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Part 1: Offences

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Bentham's Project of Applied Ethics, *c.*1780: A Penal Code

Part 1: Offences

Steven Sverdlik

Abstract

Bentham's *An Introduction to the Principles of Morals and Legislation* (IPML) was originally intended to introduce a utilitarian penal code. Such a code would apply the principle of utility to the task of designing a system of criminal law. Part I, Section I of this two-part article gives an overview of IPML, in which the basic moral assumptions of utilitarianism are presented and the central concept of mischief is emphasised. The principle of utility favours the making of actions that are mischievous and profitable to punish into criminal offences. Section II discusses Chapter XVI of IPML. This chapter is a taxonomy of possible offences; the penal code would explain which acts in the taxonomy are mischievous and profitable to punish. This chapter also suggests how Bentham was beginning to see the need for other utilitarian legal codes. Section III discusses Bentham's concept of a 'catechism of reasons' to be included in the code, which would explain to the citizenry why each action in the code is mischievous. Section IV discusses two important sets of manuscripts that illustrate the reasoning that was to accompany the code. The first briefly treats the offence of cruelty to animals, expanding on the thinking in the famous footnote to Chapter XVII that argues that non-human animals can be treated wrongly; the second examines the remarkable treatment of 'paederasty', that is, consensual sex between adult males. IPML does not mention paederasty, although several passages are relevant to it. These passages suggest that paederasty is not mischievous. The manuscripts expand on these suggestions, arguing

explicitly that paederasty ought not to be an offence. Several new issues are discussed, such as the effect of paederasty on population size. In the subsequent Part II of this article, Bentham's treatment of punishment in IPML, *The Rationale of Punishment* and the penal code will be discussed.

Keywords: Jeremy Bentham; *An Introduction to the Principles of Morals and Legislation*; penal code; utilitarianism; criminal law; offences; paederasty; homosexuality; cruelty to animals; mischief

Bentham's *An Introduction to the Principles of Morals and Legislation* – hereafter IPML – was published in 1789.[1] The title page of the first edition states, however, that most of it was printed in 1780. In the preface, Bentham informs his readers that his original plan was for the work to serve 'as an introduction to a plan of a penal code' that would follow 'in the same volume'. He then explains how his plans had changed; as a result, he was not publishing the code.[2] Manuscripts of the penal code exist, but transcriptions of only a few passages of it have appeared in print.[3] Happily, the Transcribe Bentham project at UCL has now produced transcriptions of virtually all the surviving manuscripts.[4] These considerably enhance our ability to understand Bentham's thinking and ambitions *c*.1780. What he then hoped to produce, I will argue, is a work of applied ethics:[5] he would use the principle of utility, along with his psychological theories, to formulate a code of 'penal' or criminal law.[6] IPML was to have been the introduction to it.[7]

The penal code manuscripts are not the only source that we have for understanding Bentham's project of applied ethics, or legal design, at that time. IPML itself refers to some related works of his, then published or, he assumed, forthcoming; it also refers to sections of IPML that were eventually published separately – in one case, not for 150 years. These include *The Rationale of Punishment*;[8] *Of Indirect Means of Preventing Crime*;[9] *Of the Limits of the Penal Branch of Jurisprudence*;[10] *Of the Promulgation of the Laws* and *Of the Promulgation of the Reasons of the Laws*;[11] and *Place and Time*.[12] According to Bentham, *Defence of Usury* was a direct outgrowth of the classification of offences presented in Chapter XVI of IPML.[13] Finally, there is *A View of the Hard-Labour Bill*, published before IPML.[14]

In this part of my article I have three aims. First, and generally, to give the reader an overview of Bentham's philosophical or jurisprudential project of penal code design *c*.1780. I am especially interested in the connections of IPML to the penal code manuscripts. However, all the sources enhance our understanding of IPML, a canonical work in the history of philosophy. This part has two sub-themes: a) Bentham's central concept of 'mischief' and its application; and b) the ramifying nature of Bentham's project of applied ethics. To carry out his project, Bentham realised, many related codes and legal practices also needed to be designed; his conception of the code itself also changed over time. Most of the components of the ever-widening project were never completed, and only one fragment of the extensive penal code manuscripts was published (in French translation) in Bentham's lifetime.[15] I will limit my

attention in this part of my article to his treatment of possible criminal offences. In the second part, I will consider his treatment of punishment.

In the last section of this part I will discuss two sets of penal code manuscripts in detail: they treat cruelty to animals and 'paederasty'. I have chosen to discuss these two because of their great historical interest and because they show how deep philosophical questions were addressed in the penal code manuscripts. I am especially interested in how Bentham approached the question of the possible mischief produced by the behaviour in question. I hope to show how he used his great philosophical powers to carry out a pioneering and sophisticated project of applying the principle of utility.

1. IPML and Utilitarian Penal Law

In this section I will describe how IPML approaches the problem of designing a utilitarian code of penal law. I will begin with a sketch of the structure of the text.

When published in 1789, IPML contained seventeen numbered chapters, as well as a preface and a large concluding footnote to the seventeenth chapter. In the authoritative Burns and Hart edition of IPML in *The Collected Works of Jeremy Bentham*, the footnote is printed as a separate and unnumbered 'concluding note' (301–11). The preface and concluding note were written eight or nine years after the seventeen chapters. The material printed in 1780 consisted of most of these seventeen chapters.[16] These are the parts of the book that are of most interest to me, since they were originally intended to be part of an introduction to a utilitarian penal code. As he explains in the preface, by 1789 Bentham's plans had changed.

The seventeen chapters of IPML can be thought of as containing six parts.[17] The first consists of its ethical foundations (Chapters I, II and IV. For Chapter III, see the sixth part below). There is an argument for the truth of the principle of utility or, we might say, its rational power. This part also contains a compact set of criticisms of the theories that Bentham rejects, especially the 'principle of sympathy and antipathy', which he regards as a popular but non-rational alternative to the principle of utility (13–16, 21–33). There is a defence of a hedonistic theory of intrinsic value (to use contemporary philosophical terminology), which I will briefly describe below (18, 38–41, 88–9). It is followed by an analysis of how, in theory, the amount of intrinsic value of a pleasure or pain could

be measured (38–41). This material constitutes the basic step in applying the principle of utility: explaining what it means and the structure of utilitarian calculations.

Bentham's hedonistic theory of intrinsic value can be formulated as follows:[18]

1) Every pleasure is intrinsically good.
2) Every pain is intrinsically bad.
3) Only pleasure is intrinsically good.
4) Only pain is intrinsically bad.

These claims concern the value that any experience of pleasure and pain has 'in itself', that is, independently of any effects it produces. They form the basis of Bentham's account of mischief, which I will discuss shortly.

The second and third parts of the book – Chapters V–XII, and part of Chapter XIV – largely consist of material that might be characterised as psychological, in a broad sense. It includes a philosophical account of human action and decision-making. The second part discusses the nature of pleasure and pain, the kinds of simple pleasures and pains, and the factors that explain which sorts of experiences give a specific person pleasure or pain (Chapters V and VI). The third part is the remarkable, extended treatment of human action: its nature, causes and consequences (Chapters VII–XII; part of Chapter XIV). Although Bentham's concern is actions that may be criminal offences, much of his treatment analyses human action in general. These two parts of IPML present the parts of human psychology that Bentham needs to explain human actions and predict their effects, especially their 'material' effects on human happiness. His moral theory cannot be applied without the non-moral material that plays this role.

Bentham's important treatment of mischief occurs in Chapter XII.[19] The rough, basic idea is that mischievous acts decrease the amount of intrinsic value in the world, either by increasing the amount of pain or decreasing the amount of pleasure (49). In Chapter XII Bentham elaborates on this idea, partly by introducing two distinctions.

First, he divides the mischief caused by such an act into 'primary' and 'secondary'. These can be thought of as the more immediate and narrow versus the longer-term and wider, mischievous natural consequences of an action. The primary mischief of an act such as robbery includes pain and loss of pleasure for the victim, and her immediate social connections, such as her family. The secondary mischief involves further such effects

on 'unassignable' people in the wider community (143–4). An individual is unassignable if she cannot be named or characterised by a description that applies only to her (188, n. c).

Secondary mischief is subdivided into 'alarm' and 'danger' (144). Alarm is the painful fear that community members often have when they learn of a mischievous act; a concern that they, or people they care about, will be victimised by such an act in the future. Danger differs from alarm, though they are related. Bentham gives this strikingly distinct definition: 'danger is nothing but the chance of pain, or … the loss of pleasure' (144). Hence danger is the concept that Bentham uses to describe the actual or real probability that a person or persons will experience pain or a loss of pleasure. In fact, he grants that in some cases danger is the only sort of mischief an act creates.[20] Alarm, in contrast, is a psychological response to 'apparent danger' – that is, to a person's beliefs about the danger he, or people he cares about, are exposed to in certain circumstances. One gap in Bentham's account of mischief is that he does not explain how danger or risk is to be represented in utilitarian calculations.[21]

Two subtle aspects of Bentham's conception of mischief should be mentioned. First, he sometimes uses 'mischief' in a *pro tanto* sense, typically to refer to any pain or loss of pleasure caused by an action, but sometimes also to the danger that it might pose. He also uses it in an 'all things considered' sense that includes all the 'material' effects that an action has on the existence of pleasure and pain in the world, including all the dangers it may pose. The difference is brought out by his famous claim that 'all punishment is mischief' (158). A more precise way to put his thinking is this: the pain that punishment produces for an offender is *pro tanto* an instance of mischief. It is also intrinsically bad. But Bentham insists that acts of punishment that accord with the principle of utility have long-term beneficial effects that greatly outweigh their primary mischief (147; 158). Inflicting such punishments is not mischievous, all things considered.

The notion of an act that *is* mischievous, all things considered, is related to Bentham's conception of the principle of utility. It must be recognised that, throughout IPML, he is not entirely clear about which types of action violate the principle and which conform to it. Bentham is reasonably clear that acts required by the principle are morally right, while acts that violate it are morally wrong. However, in the 1780 material his formulations of the principle vary significantly.[22] On occasion he seems to be saying that the principle requires that all acts produce more pleasure than pain; and it prohibits acts that fail to produce more

pleasure than pain (12–13). Given what he says about happiness, this is to state that right acts increase the amount of happiness and wrong acts diminish it (cp. 74). Yet Bentham also implies that acts which produce 'the greatest possible quantity of happiness' are right, all things considered (282). The latter formulation requires maximising happiness, so failing to maximise it is wrong. These are two different standards of moral rightness. Consider the table below, which compares all the long-term effects of Acts 1 and 2, where these are an agent's only options. If the principle of utility requires increasing the amount of happiness, then both Act 1 and Act 2 are right. If the principle requires producing the most happiness, then only Act 2 is right.

	Pleasure	**Pain**
Act 1	5	4
Act 2	6	3

I have argued that the somewhat mixed textual evidence supports the conclusion that in IPML Bentham accepts the maximising standard of rightness; this entails that wrong actions are those that fail to produce the most happiness (or most intrinsic value).[23] I have also argued that, in addressing the issue of which acts to make into offences later in IPML, Bentham identifies acts that fail to maximise happiness and acts that are mischievous, all things considered. (In fact he tends to describe them simply as 'mischievous'.)[24] In what follows, 'mischief' and 'mischievous' will be used in the 'all things considered' sense, unless I indicate otherwise.

The fourth part of IPML draws on all the previous moral and psychological material and discusses the rules to be used in designing the punishments in a system of utilitarian penal law. The central psychological idea is that punishment can deter potential offenders by altering their calculation of the most desirable possible action. The central moral idea is, roughly, that punishments should be severe enough to deter potential offenders, but no more severe than is necessary to achieve such deterrence (Chapters XIII–XV).

Chapter XIII contains the well-known treatment of cases where punishment is 'unmeet' or inappropriate. The three main subdivisions of this category are situations in which punishment is 'groundless', 'inefficacious' or 'unprofitable'. Punishment is groundless, Bentham states, when an act such as injuring a person, which is usually mischievous, is

not mischievous in this case (159–60). The legal term now often used for this type of situation is 'justification': an agent performing a mischievous act, such as injuring another person, is said to have a justification if the law permits her to do so. Bentham himself uses this terminology (e.g. 159, n. b; 160, n. d). One type of case that he mentions is where a person freely and fairly consents to be treated in a certain way (159).

Punishment 'must be inefficacious', in contrast, when an agent performs an act that is mischievous, but should not be punished for doing so. Two examples that Bentham gives are an action performed by an insane agent and one performed to avoid 'threatened mischief', that is, a situation where a person accedes to a threat and commits an offence (161–2). Bentham argues that in situations such as these, the threat of punishment would not deter potential offenders, so the infliction of punishment causes pain with no offsetting benefit (160–2. Cp. 166–8). Following H.L.A. Hart, it is usual to say that the legal category Bentham has in mind picks out the legal 'excuses' that the principle of utility favours incorporating into penal law.[25] But in IPML Bentham does not use the word 'excuse'; he rather speaks of 'extenuations' and 'exemptions' (161, starred note).[26] I will discuss unprofitability below.

Chapter XIV is also well known. It applies the principle of utility to the issue of the right level of severity of punishments, given that the main way they benefit society is by deterring potential offenders.[27] Some final clarifications are made in Bentham's account of how potential offenders decide whether to offend (166–70, rules 1, 7, 8 and 9).[28] While Bentham's treatment of punishment lies outside the scope of this part of my article, it is worth briefly mentioning one feature of the chapter that embodies a further refinement in Bentham's project of applied ethics: he does not directly apply the principle of utility. Instead, he introduces thirteen more specific rules to determine the severity of punishment. One rule states, for example, that if a certain kind of offence is unlikely to be detected, its 'magnitude' or severity must be increased, other things being equal (170). I take it that Bentham thinks that these rules are easier for legislators and judges to apply. Given that there are several rules, however, Bentham also tries to explain the logical relationships among some of the rules, so that their joint application leads to a utilitarian conclusion (169–70).

Chapter XV discusses eleven desirable properties that different kinds of punishment can have. One example is 'variability', or the possibility of varying the quantity or amount of that kind of punishment. Presumably fines and corporal punishments have great variability, capital punishment

much less. While Bentham claims that some kinds of punishment have many desirable properties, he does not address the question of what kind or kinds of punishment should be imposed on people who commit each type of offence. That question was to be addressed in the code.

The fifth part of IPML is the enormous Chapter XVI.[29] As David Lieberman observed, 'woefully little attention' has been paid to it.[30] The best way to characterise it, I believe, is as a schematic classification or taxonomy of possible offences (271), although some other topics are also considered.[31] Bentham describes the classification as a 'natural arrangement' (274), by which he means that the categories represent different kinds of possible mischief and the different ways that they can come about (270–1. Cp. 147–8).[32] However, many possible offences (such as 'wrongful homicide' (224)) are only named; the mischief they might cause is not described. Nor are the cases described where an unusual token of the relevant type of act might not cause mischief, and should therefore be excluded from a formal definition of the offence.

Bentham states that a thorough utilitarian analysis might show that, contrary to popular opinion, some of the types of action listed are not mischievous, and therefore ought not to be made into offences. He is especially sceptical about 'self-regarding' offences. In these offences a person allegedly causes mischief to herself. Bentham suggests that in many cases the acts do not produce mischief (195–6; 277–8. Cp. 159).[33] We will consider Chapter XVI more fully below.

Although it is not mentioned in Chapter XVI, IPML entails that utilitarianism requires a second level of analysis. This is because the legal punishment of a type of action might be unprofitable (163–4; 287–9) or 'too expensive' (159). Bentham seems to think of this category as concerned with acts by citizens that are mischievous, all things considered, and with offenders who have no 'exemption' such as insanity, but where any punishment of the act would produce more *pro tanto* mischief than it would prevent. In such cases the act of punishment would itself be mischievous, all things considered (159. Cp. 287).[34] Bentham subdivides the cases of unprofitability; in some cases, the *pro tanto* mischief of punishment always exceeds the mischief of the act (163). This subdivision is relevant to Chapter XVI, since if it is always unprofitable to punish a certain kind of act, it ought not to be made into an offence.

Bentham later gives two examples of the kinds of act where the unprofitability of punishment favours excluding them from the penal code. He states that legal punishment of drunkenness and fornication

would generally be unprofitable, because obtaining evidence of their occurrence would 'spread […] dismay through every family' and 'tear […] the bonds of sympathy asunder' (290). (He is presumably thinking of drunkenness or fornication occurring at home.) The difficulty is that, to obtain convictions, the state would need to compel some family members to incriminate other members. IPML does not contain a general discussion of how an analysis of unprofitability should be structured, nor of what sorts of considerations should be recognised in one. There are a few scattered remarks about unprofitability in IPML, but nothing comparable to the careful analyses of mischief in Chapter XII.

The sixth part of IPML consists of most of Chapter XVII and all of Chapter III. Here Bentham steps back from penal design and considers two conceptual questions. First, how would a utilitarian penal code be related to the forces of the 'physical', 'moral' and 'religious' 'sanctions' and to the requirements of utilitarian morality or 'private ethics' (34–7; 281–93)? Second, what are the various branches of jurisprudence (293–300)?

There are a few passages in Chapter XVII that directly concern penal law, including the famous footnote about cruelty to animals – where Bentham argues that this should be an offence (282–3, n. b. Also 289–90; 292–3) – but most of the material in the chapter is conceptual. Bentham mentions three further sections, but these were not printed in 1789 (300). The manuscripts for them largely concern philosophical questions about the general structure of entire legal systems. These manuscripts, published as *Of the Limits of the Penal Branch of Jurisprudence*, are now recognised as some of Bentham's most brilliant work.

To summarise then: the seventeen numbered chapters in IPML printed in 1780 are, largely, directly relevant to the penal code that was to follow them – although they also contain some material about collateral issues. These chapters contain the basics of Bentham's moral theory, his account of decision-making and action, and the general rules to be followed for determining the proper severity of punishments. He also presents an elaborate classification of acts that might be treated as legal offences in the penal code, given his moral and psychological theories.

This overview suggests that IPML envisioned a penal code, or material related to it, that would do at least the following things:[35]

i) Establish whether each of the possible offences mentioned in Chapter XVI is mischievous.
ii) If so, also establish whether it is profitable to punish that type of mischievous act.[36]

iii) Give a formal definition of each type of offence that passes these two utilitarian tests, thus excluding those cases where performing the act should be treated as legally permissible or justified.
iv) Give a more complete account of legal excuses.
v) Announce the punishment for people convicted of each type of offence when that is appropriate.

2. Chapter XVI and its Implications

Although this chapter only contains a schematic classification of possible offences, it does make some important claims about different 'classes' of offence. These claims raise two important further issues for Bentham's project of applied ethics. I will begin by describing the main features of the classification it presents.

Chapter XVI first divides possible offences into five classes. They are characterised as follows. Class 1 consists of 'private offences', that is, offences causing mischief to 'assignable' individuals other than the offender (188–9; 191–4; 222–70; 275–6). This class is subdivided into offences against the person, violations of her property rights, her reputation, her 'condition'[37] and some mixed offences. It includes familiar criminal offences such as homicide and theft, as well as many unfamiliar offences like the 'elopement of servants', that is, the illegal departure of employees from their employers. This is an offence 'touching the condition of master' (239–41). Bentham states of acts in the entire class that 'the mischief they produce is obvious' (275).

Class 2 consists of 'semi-public' offences, where danger is created for a subset of a state's population but the affected individuals are not assignable (189; 194–5; 224–5, n. z2; 276–7). One of Bentham's examples is distributing threatening handbills against Jews or Catholics (225, n. z2). When such acts lead to primary mischief for assignable persons, as when one leads someone to attack a Jew, the distribution becomes a Class 1 offence (276). Bentham states that the mischief of Class 2 acts is 'in general pretty obvious', but not as much as private offences (276).

Class 3 consists of self-regarding acts (189; 195–6; 277–8). Acts in this class that might be made into offences include suicide and drunkenness (225, n. z2). As I said, Bentham expresses doubts about whether many acts in this class do cause mischief (195–6; 277–8. Cp. 159).

Class 4 is public offences. These, like semi-public offences, are danger-creating offences; they threaten to cause mischief to an unassignable

number of people in the entire state (189–90; 196–203; 260–3, n. r4; 278–9).[38] Among the many possible public offences that Bentham mentions are tax evasion and treason (260–3, n. r4). Suicide appears again as a possible 'offence against population', along with emigration and 'unprolific coition' (263). Bentham states that the mischief of such acts is often 'unobvious', when compared to offences in Class 1 (278. Cp. 151–2). By this he means that their mischief often involves risks of subtle, long-term consequences that are not obvious to the average person.

Class 5 consists of 'multiform' offences (190–1; 203–22; 279–80).[39] These might cause risk or mischief in any of the ways that acts in the first four classes can. This class is first subdivided into offences by falsehoods and offences against trust.[40] Falsehoods could cause bodily injuries, for example, or facilitate the evasion of a tax.

2.1. *Variations Due to* Place and Time

Bentham subdivides the offences in Class 1 more fully: the classification of offences in Classes 2, 3, 4 and 5 does not proceed to the same level of specificity. His aim with them, he says, is 'only to draw outlines' (222) or to present a 'general analytical sketch' (246). This difference is related to some deep issues about the nature of Bentham's projected penal code (222; 246–7; 271–2 and n. w4; 276, n. h5; 295; 298, n. a2).[41] Some were developed in *Place and Time*.

In IPML, Bentham assumes that the principle of utility, its hedonistic theory of intrinsic value and the basic principles of human psychology apply to, or are true of, all human beings.[42] But he believes that the application of these principles always requires supplementation with more specific information. To design a utilitarian penal code for a given country at a given time, he says, we would need to know facts about its climate, geography and political structure. For example, we would need to know what kinds of physical 'calamities' such as flooding are possible or likely. In *Place and Time* Bentham gives an example: firing a gun into the air. In a mountainous Swiss region this could cause an avalanche;[43] it presumably would not do anything comparably mischievous on a Pacific island. Hence, the Swiss should probably have an offence that the islanders do not need to have. Acts creating the danger of such calamities would be offences in Class 2 (225, n. z2). Different types of government, such as kingships and democracies, should have somewhat different public offences (Class 4), since the various offices and their duties will vary.

Finally, *Place and Time* contends that facts about moral and religious customs and beliefs are relevant in the design of utilitarian penal codes.[44] Bentham gives this example: in some parts of France in his day corpses were carried to a cemetery without a coffin, a practice that would shock people in England.[45] This could support the conclusion that it ought to be made an offence in England but not in France. Thus, when any of these types of specific information is considered, it is possible that a kind of action should be made into an offence in one country at one time, yet not be made into an offence in another country at the same time. It is also possible that a kind of action should be made into an offence in one country at one time and not be made into an offence in that country at another time.

Consequently, Bentham seems to have conceived of the application process by which offences are established for various jurisdictions as having three stages. First, the most abstract part, treated in IPML: moral theory, psychological theory, a natural arrangement of possible offences; the concept of the profitability of punishment. Second, a 'universal'[46] penal code, applicable everywhere. This would not be a complete code, but it would contain some defined offences, as well as material establishing that these types of acts are mischievous and profitable to punish. Third, complete specific codes for individual jurisdictions. These would include the universal code and draw on specific information about the jurisdiction to establish other, more localised offences.

The penal code that was to follow IPML would be universal and applicable everywhere and always. Some of the offences in it would be fully defined. Bentham suggests that many Class 1 offences would be treated this way (275–6, and n. h5. Cp. 271–2),[47] but many other offences in the code would be characterised only generically. Consider Classes 2 and 4. Bentham states that information about local circumstances is relevant in the utilitarian calculations that determine whether specific types of act in these classes are mischievous and possibly qualify as offences (222, 272). This explains why Bentham would not descend to the same level of specificity in the code in characterising offences in these classes. They would be fully, but variously, defined in the specific codes of each jurisdiction. This means that the penal code following IPML would not have constituted a specific utilitarian penal code for any country, including England. Bentham was convinced that English criminal law – then largely in common law form – was deeply flawed[48] and in need of a codified utilitarian replacement, but his penal code would not have been such a replacement.

2.2. Other Branches of a Legal System

Chapter XVI introduces a related issue. This is the fact that any system of penal law presupposes the existence of various other branches of law.[49]

Bentham's discussion of the offences involving the legal concepts of property, trust and condition is carried out at a conceptual or generic level. For the conditions of husband and wife, for example, he describes at a general level the kinds of legal rights and duties each of them can have; offences will violate those rights or fail to carry out those duties (254–7). However, we are not told which specific form of those rights is in force in the legal system whose penal law we are considering. For example, we are not told whether a husband can have only one wife at a time or whether a wife can have only one husband at a time (255–6). Bentham tells us that these sorts of questions are dealt with in the 'civil branch of legislation' (256). We might take him to be making a purely logical point – namely, that a generic penal statute prohibiting adultery, for instance, must be supplemented by some form of matrimonial law if its prohibition is to have specific content. But by 1789 Bentham clearly understood a further point: that a generic utilitarian penal statute prohibiting adultery must be supplemented by utilitarian matrimonial law if the penal law is to produce the most happiness.

To illustrate this point further, consider the rules of property law. Unless they have been designed by applying the principle of utility, it cannot be assumed that a theft of someone's legal property violates that moral principle. Mark Twain's novel *The Adventures of Huckleberry Finn* can be used to show this. In the novel, Huck helps the slave Jim to escape from his owner. Huck was committing a property crime in their state's legal system, one that might fall into the category of 'wrongful disturbance of proprietary rights' (232). It does not follow that Huck's doing this violated the principle of utility. The principle might even require doing it.

The material added to IPML in 1789 strongly suggests that, by then, Bentham had realised the need for utilitarian legal codes to supplement the penal code, although he does not present an argument like the one I just did.[50] The preface describes a set of legal codes to parallel and supplement the penal. They would form 'a complete body' of utilitarian law, a 'pannomion' (5–7, Cp. 305). The eight other works would each have introductions like IPML's, setting out secondary utilitarian principles governing one major branch of law. Each would also have a code, comparable to the penal code (5–7).

The utilitarian codes for these other branches of law presumably would also be universal and partly generic. The corresponding specific utilitarian codes for any jurisdiction would vary with differences in factors such as local climate and customs, and be 'calculated for the meridian' (6; cp. 272; 295). This picture has a significant implication. Bentham suggests that many Class 1 offences could be fully defined in the universal penal code and hence appear in every utilitarian penal code; however, this misses the point that these definitions would be generic. The property crimes defined in Class 1 would always have to be supplemented by a utilitarian code of property law designed for a specific jurisdiction, so that an act of theft there, for example, would violate the principle of utility.[51]

To summarise: Chapter XVI introduces two important and related complications for Bentham's project of applying the principle of utility to the design of a penal code. Information about various non-legal features of a given jurisdiction is required before the offences in all five classes could be properly defined. Even these definitions would be generic, however, and their content would require supplementation with material from other utilitarian legal codes designed for that jurisdiction. These points enormously expand the scope of Bentham's initial project of applied ethics. While he probably did not fully draw out these implications in 1780, the material in Chapter XVI discussed here suggests the directions in which his thinking was moving.

3. A Commentary or Catechism of Reasons

One of the most important philosophical features of Bentham's eventual plan for the penal code has not been mentioned. I am referring to his goal of stating the reasons for incorporating each offence and for the various forms of punishment allotted to it. This idea occurs in a different form in Chapter XVI, but it is expounded in a powerful new way in related material and carried out in some of the penal code manuscripts. This is still another aspect of Bentham's evolving thinking about the application of the principle of utility to legal design.

As we have seen, IPML clearly envisions a penal code that defines offences carefully and announces the punishments for committing them. At the end of Chapter XVI Bentham observes that the place that any offence has in the 'natural arrangement', or taxonomy of offences that he has just presented 'suggests the reason of its being there' – namely,

its nature and 'obnoxious' tendency (273–4). We naturally take him to be referring to the mischievousness of each offence in the arrangement. This implication is difficult to accept: Chapter XVI is in fact a taxonomy of possible offences. That is, it is an open question whether the acts in the classification are mischievous or are profitable to punish. So, as I said, Bentham intended the code itself to incorporate material that established that the offences in it are mischievous and profitable to punish.

While working on IPML and the code, Bentham changed his conception of how to present both the reasons for establishing acts as offences and the reasons for their punishment. His thinking about this was published in English after his death in two short pieces: *Of the Promulgation of the Reasons of the Laws* and *Specimen of a Penal Code*. *Of the Promulgation* presents his conception of a 'commentary of reasons' to accompany utilitarian legal codes, while *Specimen* is a sample entry of the penal code. The latter contains a definition of the offence of 'simple personal injuries', explanations of the elements or components of the definition; possible punishments; 'aggravating' and 'extenuating' circumstances; and a commentary of reasons on the preceding material.[52] The commentary is in question-and-answer form; Bentham in fact sometimes refers to it as a 'catechism'.[53] It is designed to put the reasons into a form that the average citizen can understand.[54]

There is interesting theoretical material about reasons in *Of the Promulgation*. Bentham argues that reasons for laws are most persuasive when they are shown to be part of 'a reasonable system of morality'.[55] The most reasonable such system is based on the principle of utility: it 'directs all [moral] reasons to a single centre'.[56] Hence '[t]o give a reason for a law is to show that it is conformable to the principle of utility'.[57] This claim is restating the idea implicit in IPML (e.g. 273–4) – namely, that to give reasons for including an offence in the code is to show why such acts are mischievous.[58] Likewise, to give reasons for a law imposing a certain punishment on an offender is to show that doing so is right and will produce the most happiness.

Of the Promulgation transposes the claim that Bentham makes in Chapter XVI of IMPL about the taxonomy of offences to the commentary of reasons. It is no longer a bare taxonomy that suggests the reasons for making acts into offences; the penal code was to have a commentary that states explicitly and simply what these reasons are.[59] *Specimen* also contains several questions directed to issues of punishment. Such issues are not mentioned in Chapter XVI (273–4), which considers only reasons for making acts into offences.

Of the Promulgation argues that a commentary of reasons is useful in several ways: for example, it makes it easier to understand and remember the law, and it would guide judicial interpretation of it.[60] The uses that Bentham discusses expand significantly on the four that he attributed to the taxonomy (272–4). 'The greatest advantage' of the commentary, he says, is that it will elicit 'the approbation of all minds, by satisfying the public judgement, and obtaining obedience to the laws; not from a passive principle of blind fear *alone*, but with the concurrence of the will also'.[61] In other words, a clear and convincing statement of why various acts are prohibited and punished will call forth agreement from all rational citizens (cp. 28, n. d). They will therefore be more inclined to obey the law because they believe that doing so is socially beneficial. Bentham does not assert that fear of punishment will play no role in securing their obedience, but he is suggesting that this will be less important. This is a departure from the marked emphasis on deterrence in IPML. We can add, on Bentham's behalf, that in general it is advantageous in utilitarianism to have obedience to reasonable laws motivated by benevolence rather than fear.[62] This is because creating fear will sometimes require inflicting painful punishments, as well as because a person motivated by benevolence might obey a law even if she thinks that she will not be apprehended if she does not obey it (118).

Bentham is here approaching the problem of application in a different way. He is considering how the form of the penal code can itself affect the behaviour of citizens. In *Of the Limits* Bentham asserts that all laws creating offences are the commands or prohibitions of a sovereign, who simultaneously commands or permits some of her subordinates to punish people found to have disobeyed the first commands. However, around the same time, *Of the Promulgation* states, in effect, that if the commands of a utilitarian sovereign are accompanied by a utilitarian commentary of reasons, she can elicit 'obedience […] hardly distinguishable from the feelings of liberty'.[63]

4. Two Exemplary Penal Code Manuscripts

With respect to the universal penal code that was to follow IPML, Chapter XVI hardly carries Bentham's plan forward: the mischievousness and profitability analyses that were needed for each offence were to be presented in the code itself – eventually, Bentham thought, in the form of a catechism of reasons. We will now look more closely at two sets of

penal code manuscripts; they discuss cruelty to animals and 'paederasty'. Here we encounter material that would have constituted one of the direct applications of the theoretical material in IPML and was to have been presented in the volume that it was to introduce or in some related public document.[64] By employing the principle of utility and his psychological and philosophical ideas about action, Bentham would establish conclusions about what sort of actions should be criminalised. The other direct application in the code was to be the treatment of punishment.

These two sets of manuscripts are not complete; but none of the other manuscripts on specific offences that I know of is complete either. The two sets differ significantly in how worked-out they are. However, they give us a nice sense of how Bentham applied the material in IPML to specific issues. They also contrast in an interesting way. In one Bentham was advocating adding an offence to English criminal law; in the other he was arguing for removing an offence from English (and European) criminal law. Yet in both he was swimming against the tide of contemporary English opinion.

Finally, it is important to state that while Bentham's thinking in both sets of manuscripts is remarkably 'forward-looking', to use an apt phrase of Peter Singer, this cannot be said of all the manuscripts.[65] One example is adultery. This is listed as a possible Class 1 offence against the condition of a husband in Chapter XVI (256–7), and Bentham goes on to state that the corresponding possible offences against the condition of a wife include it (257). There are extensive manuscripts on this offence;[66] Bentham clearly intended to include it in the code. Adultery was not a criminal offence in England in 1780, although the misleadingly named civil action of 'criminal conversation' could be brought by a husband against the seducer of his wife.[67] Adultery was a crime in Scotland and most European countries at that time, but it was never subsequently made into a criminal offence in England.[68]

A second example is his defence of the judicial use of torture to extract evidence in certain cases.[69] Torture designed to extract evidence of crimes was condemned by leading figures such as Beccaria and declared by William Blackstone to be properly prohibited by English law.[70] To say that Bentham's thinking was not forward-looking is not to say that it is unworthy of consideration. Both sets of manuscripts and related material contain important arguments. A manuscript of 1804, for example, defends the use of torture with an early version of what is now called a 'ticking time bomb' case. As Bentham formulates it, it goes as follows: suppose strong evidence is available to legal authorities that

100 innocent people are about to undergo torture, and that a criminal in custody knows where this will occur. Bentham asserts that if torturing him as severely or more so is the only way to prevent the torture of the others, it would be right to torture him.[71] This sort of case calls for a serious response.

4.1. Cruelty to Animals

In a famous footnote in Chapter XVII Bentham argues that cruelty to animals should be made into an offence and refers to an entry in the penal code (282, n. b). The first modern law penalising cruelty to certain animals was enacted forty years later in England,[72] and such laws now exist in many countries. There is a three-and-a-half page manuscript in Bentham's hand that discusses this offence.[73] Although quite incomplete, it touches on deep questions.

In IPML Bentham offers some theoretical ideas about what sorts of treatment of animals are mischievous. (I use 'mischief' and 'mischievous' although, interestingly, they do not occur in this passage or in the manuscripts, but they would be appropriate.) In fact, the note contains the most complete account of the *pro tanto* mischievousness of death in IPML, and thus indirectly helps to explain why Bentham thinks that killing a person is usually mischievous, all things considered. He can be taken to claim that some animals feel 'pains of the senses' from, say, being whipped or starved; such pain is *pro tanto* mischief. But these animals do not feel any 'pains of expectation' (46, 48–9). Therefore they are not pained by the thought that they will or could die, as adult humans are. Bentham takes this to support the conclusion that if, for example, someone kills an animal quickly or painlessly for certain purposes, this is not mischievous, all things considered. He mentions killing it for food or to prevent it from 'molesting' or attacking people. Humans will benefit from these acts, but the animal would not suffer, or suffer much, from them in dying, when compared to dying in nature. Furthermore, animals 'are never the worse for being dead'. On the other hand, 'tormenting' an animal by inflicting on it a pain of sense is often mischievous (282, n. b).

The penal code manuscripts give a definition of the offence, prohibiting 'wantonly' hurting or 'worrying' any animal. The 'exposition' of the definition clarifies 'wantonly' and defines 'animal' as any being susceptible to pain. Bentham mentions 'birds, beasts, fish and insects'. Animals are permissibly used i) when 'chastised' moderately; ii) for human necessity or convenience, such as for food, 'physic' or to do

work; iii) to defend any person from being hurt or 'annoyed'; and iv) for experiments to acquire medical or other knowledge.[74] We can take these limitations to amount to a statement about which sorts of treatment of certain animals are mischievous, all things considered, and which are not.

The manuscripts state three reasons for making cruelty to animals an offence – that is, they state the types of mischief that such acts cause. First, Bentham says, such a law would benefit the offender, by preventing him from becoming crueler and committing comparable crimes against people.[75] Presumably, his point is that there is danger that he would be subject to greater punishments for these more serious offences, if he were not punished for this sort of action. Second, it would benefit other people who can be annoyed or hurt by animals that have been 'worried' or vexed by someone. He mentions the cruelty of drovers, which can cause cattle being driven through towns to panic and cause damage.[76] Finally, such laws benefit the animals themselves. Echoing IPML, he says that the pain of any creature concerns a benevolent mind: whether that creature has black skin or white, or four legs or two, is irrelevant.[77] He goes on again to compare the killing of an animal and the killing of a human, adding more detail of his thinking:

> Killing of a man is the worst crime that can be committed against man […] *because of the terror which such an act strikes into other men*. To this horror other animals are not liable. To make amends for their inferiority in other respects, other animals have the privilege of not knowing that they are to die. Killing other animals therefore is nothing: the only harm is in tormenting them while they live.[78]

Bentham argues that the killing of a person should be treated as the worst sort of crime because it causes terror and thus pain in other people. This is not the strongest reason he could mention, given his hedonistic theory of intrinsic value. Given this theory, and the principle of utility, an act of killing a person could be mischievous and wrong even if it caused no pain to other people. This is possible because the victim would have had a pleasant life with little pain if she had lived. This consideration – that a person's death often deprives her of much possible (earthly) pleasure – seems to be the most important one, according to Bentham's moral theory.[79] However, if this is the main reason that killing a person is wrong, it would apply as well to animals – even if they do not fear their own deaths. A cow, say, might have a pleasant life extending years into

the future if it is not killed today. Bentham thus misunderstood what the main component of the *pro tanto* mischief of killing a sentient animal would often be, given his hedonistic theory of intrinsic value.

It is interesting that Bentham did not adopt this way of thinking about the killing of sentient beings, because he does recognise analogous points in his treatment of offences against trusts, property and condition in IPML. He recognises that preventing a person from coming into the possession of property, say, or being invested with a trust of benefit to her, might pass both utilitarian tests, and so should be made into an offence.[80] Preventing a person's future experience of pleasure in these ways can thus be wrong and qualify for being an offence, given Bentham's basic assumptions.

If the hedonistic theory of intrinsic value entails that the death of an animal can be mischievous, all things considered, and wrong because death deprives it of future pleasures, Bentham's definition of the offence of cruelty to animals might well need revision. This is because some acts of killing animals painlessly that Bentham regards as not mischievous will be mischievous, and thus eligible for legal prohibition.

4.2. 'Paederasty'

Bentham's remarkable and brilliant manuscripts on 'paederasty', probably written *c*.1785, were only published in 1978.[81] Louis Crompton, the editor, states that they constitute 'the earliest scholarly essay on homosexuality known to exist in the English language'.[82] Bentham can be taken to conclude that consenting sexual relations between two adults of the same sex should not be an offence. Here I will discuss the manuscripts, as well as the material in IPML that is relevant to it.

To begin with Bentham's foil, Blackstone: in his *Commentaries* he treats 'the infamous crime against nature'[83] as falling into the category of 'offences against the persons of individuals'. Other crimes in this category are homicide, rape and 'mayhem' – mayhem being the act of causing of severe bodily injury.[84] 'Buggery' was then the English legal term for the offence that we will consider, although Blackstone does not use it in his *Commentaries*.[85] In the eighteenth century, English courts often sentenced men convicted of the offence to hanging. Even later, between 1805 and 1832, fifty men were hanged for it;[86] the last hangings for this offence occurred in 1835. It ceased being a crime in 1967.

The manuscripts mention various sexual practices such as bestiality, lesbianism, anal and oral sex and masturbation,[87] but they focus on consenting sexual relations in private between rational adult

men of the same sex because this 'makes the most figure in the world'.[88] This topic was treated by the earlier Enlightenment writers Montesquieu, Voltaire and Beccaria.[89] I will also focus on consenting sexual relations in private between rational adult men. For brevity, I will use Bentham's term 'paederasty', despite its misleading etymological suggestion that one partner is a boy.

With the benefit of hindsight and the penal code manuscripts, we can see that IPML contains philosophical claims suggesting that paederasty was not to be included in the penal code, although this is nowhere so stated. We also know that Bentham was reluctant to state his views openly. A letter of his, written in March 1779 to Franz Ludwig Tribolet, strongly suggests that, while working on IPML and the code, he chose to refrain from explicitly discussing his own developed views about paederasty. Tribolet was secretary of the Berne Economical Society, which had offered a prize in 1777 for the best plan of a penal code.[90] Bentham originally intended to submit his code to this competition. He asked Tribolet if the Society wanted contestants to state openly and fully their opinions about 'crimes of impurity'. He added that he had done this for his own satisfaction, but he was unsure if he should share them with anyone else.[91] Crompton quotes notes of Bentham connected to the paederasty manuscripts that reveal his anxieties about even discussing the question openly; he knew that doing so would leave him open to damaging accusations that he was a homosexual.[92] And of course Bentham never published the paederasty manuscripts. Nonetheless, as we will see, his reasoning in the manuscripts is deeply rooted in the philosophical material in IPML.

The manuscripts begin the discussion of 'irregularities of the venereal appetite which are stiled unnatural' thus: 'I have been tormenting myself for years to find if possible a sufficient ground for treating them with the severity with which they are treated at this time of day by all European nations: but upon the principle of utility I can find none'.[93]

4.2.1. Categorisation

There is no mention in IPML of 'paederasty' or 'buggery' (or of 'sodomy'). As I have said, Chapter XVI is a classification of possible offences and Bentham seems to assert that it is 'exhaustive', at least as far as its specification process goes.[94] He makes clear that some of the types of action in the scheme would not pass both utilitarian tests and be included in the code. One example of this is usury, which, as we saw, Bentham does mention, only to suggest that it probably should not be

in the code.[95] However, he expresses scepticism about Class 3 offences in general, that is, acts in which an agent allegedly causes mischief to herself (195–6; 277–8). Paederasty might be thought to fall in to that class, but it is not mentioned as a possible Class 3 offence – unlike, for instance, self-mutilation and suicide (225, n. z2), or idleness and gaming (232, n. m3). So it is tempting to say that IPML does not treat paederasty as even a possible offence. But Bentham apparently decided to exclude even mentioning it, while leaving conceptual space for it when he suggests that some Class 3 acts might be better categorised as Class 4 offences 'against population' and 'against national wealth' – on the 'faint probability' that they fail to increase population and thus, presumably, the national wealth (278. Cp. 277).

The manuscripts address the issue of categorising the possible offence. Bentham argues that if paederasty were to be an offence, it would be an 'offence against oneself', as he calls it; that is, it would fall into IPML's Class 3.[96] Blackstone in effect put it in Class 1. Bentham objects by saying that since paederasty is consensual, Blackstone's classification is comparable to conflating concubinage and rape.[97] Bentham also discusses the idea suggested in IPML that paederasty 'hurts population',[98] which might call for categorising it as a Class 4 offence; see below.

4.2.2. Consent and Mischief

Paederasty is carried out by rational adults who are well informed and freely consent to participate. This immediately calls to mind the principle in IPML that consensual acts cause no mischief to the parties, so that punishment of them is 'groundless' (159; 277, n. i5). Bentham briefly endorses this claim regarding usury when a loan contract is consensual (231 n. l3).

In the manuscripts, Bentham begins by addressing the question of whether paederasty is mischievous directly. He argues that there is virtually no reason to think that it is. He proceeds as follows, utilising the categories of mischief in IPML. Consenting sexual relations between adults cause pleasure, not pain, so there is no primary (*pro tanto*) mischief caused to the participants themselves, nor to people closely connected to them, such as their family (Cp. 143–4).[99] Nor do they cause the secondary (*pro tanto*) mischief of 'alarm' – that is, fear in community members that they will be unwillingly subjected to such behaviour (Cp. 144).[100] Finally, they present no danger or objective risk to community members that they will be unwillingly subjected to such behaviour (Cp. 144).[101]

This straightforward analysis must be supplemented with an examination of any subtle long-term *pro tanto* mischief that the activity is alleged to have. This is a point made in IPML's treatment of tax evasion, where Bentham notes that there are subtle forms of mischief visible only to 'the eyes of statesmen' (152). The manuscripts treat these issues at some length, making them into a proto-treatise comparable to *Defence of Usury*. The three main arguments Bentham considers are that paederasty i) weakens or 'enervates' the participants, especially the passive partner;[102] ii) 'robs women', by reducing the number of potential husbands;[103] and iii) 'hurts population', by reducing procreative activity.[104] I will not summarise Bentham's often brilliant and erudite treatments of all three. I will just look at the third issue, as it was raised in IPML about some Class 3 acts, and paederasty would presumably be a prime example.

Bentham cites Voltaire's claim that paederasty is an 'outrage against nature' that 'would destroy mankind if it were general'.[105] His basic response is that there is clearly enough desire for procreative sex in human nature to ensure that population will generally be at an acceptable level, so wise rulers will not feel the need to take measures such as punishing paederasty to increase it. He supports this conclusion in several ways.[106] First, he says that men who engage in it sometimes also engage in procreative sex; in any case, there is a very strong inclination in the general population to engage in procreative sex. Secondly, the main constraint on the growth of population is not the strength of the desire to engage in procreative sex, but the supply of food.[107] Bentham also argues that history shows that in the country where paederasty was most widely practised (meaning ancient Greece), there was no dearth of population; in fact, Greek city states often had to accommodate a growing population by establishing colonies abroad. He directs a gibe at Catholic clerics who condemn paederasty by observing that if any general practice would destroy mankind, it is celibacy.[108] Lastly, he considers one segment of the female population that he thinks is unfortunately but typically infertile, namely prostitutes.[109] He says that the cause of their infertility is excessive sexual activity, and that some of the demand for their services comes from paederasts unwilling to risk severe punishment for engaging in their preferred form of sexual activity. (See below for more on Bentham's thinking about their sexual preferences.) His conclusion is that if paederasty were legalised, these patrons of prostitutes would often find male sex partners, thus promoting the prostitutes' fertility and, indirectly, increasing the population.

4.2.3. Legislators and Individuals

There is an argument made in Chapter XVII of IPML that raises the mischief issue in a different way. Bentham asserts that 'of individuals the legislator can know nothing' (290). His subject here is the extent to which utilitarian penal legislation will coincide with utilitarian moral duties of prudence. These are moral duties to promote one's own happiness. Bentham argues that very little legislation compelling prudence is needed.[110] Elsewhere he argues that people generally pursue their own happiness; again, they presumably need little legal prodding to do so (155; 284).[111] In Chapter XVII he grants that people may fail to promote their happiness because they act carelessly or are misinformed, but he then questions whether a lawgiver or legislator has more information about various individuals' circumstances and sensibilities than they do.

> It is only with respect to those broad lines of conduct in which all persons, or very large and permanent descriptions of persons, may be in a way to engage, that he can have any pretence of interfering; and even here the propriety of his interference will, in most instances, lie very open to dispute. (290)

Bentham does not give examples of legislation erring because of this misapprehension, but he adds the following observation about legislators, suggesting again that they tend to be ruled by antipathy.

> The great difficulty here is, to persuade them to confine themselves within bounds. A thousand little passions and prejudices have led them to narrow the liberty of the subject in this line, in cases in which the punishment is either attended with no profit at all, or with none that will make up for the expense. (291. Cp. 29–30, and n. e)

Bentham deploys the claim that legislators know nothing of individuals' circumstances and sensibilities in the manuscripts. Discussing sexual acts involving men and women that 'apply' so-called 'wrong parts' of the woman, he writes:

> If there be one idea more ridiculous than another, it is that of a legislator who, when a man and a woman are agreed about a business of this sort, thrusts himself in between them, examining situations, regulating times and prescribing modes and postures.[112]

This passage is noteworthy because of its similarity to one in *Defence of Usury*. There Bentham argues in the same way against anti-usury laws that purport to protect the interests of poor borrowers by setting maximum rates of interest on loans.

> It is not often that one man is a better judge for another, than that other is for himself, even in cases where the advisor will take the trouble to make himself master of as many of the materials for judging as are within the reach of the person being advised. But the legislator is not, can not be, in possession of any one of these materials.[113]

Bentham elsewhere made an audacious and challenging comparison of consensual loan agreements and consensual sex acts between adults. In 1786 he wrote a letter that stated: 'You know it is an old maxim of mine, that interest [i.e. rates in loan contracts], as love and religion, and so many other pretty things, should be free.'[114] Almost 200 years later Robert Nozick made a similar comparison, which constituted a gibe directed at socialists (and liberals): 'the socialist society would have to forbid capitalist acts between consenting adults.'[115] Bentham does not compare consensual loan agreements and consensual sexual relations in IPML, although the passage on groundless punishment (159) is suggestive. However, it now seems that he had made such a comparison, and taken it in a libertarian direction for both kinds of behaviour, by about 1780. That is, he not only compared them; he regarded them both as non-mischievous.

4.2.4. Unnatural Acts

Blackstone and many others condemned paederasty as 'against nature'. Bentham was interested in this sort of claim in the 1770s.[116] The idea that unnatural acts are morally wrong is discussed in IPML II. There Bentham states that to condemn acts simply because they are 'unnatural' is an example of an appeal to the popular, but non-rational, 'principle of sympathy and antipathy' (21–31, esp. 27, n. d; 29–30, and n. e; sometimes abbreviated as 'the principle of antipathy' (27, n. d; 278)). The rational content of asserting that a kind of act is 'unnatural', Bentham states, is simply that it rarely occurs[117] – but, he adds, some acts that are condemned as unnatural, such exposing newborns in ancient Rome, were said to be all too frequent. While it is possible, he says, that acts condemned as unnatural are mischievous, often they are not (27, n. d).

Mischievousness, of course, is the basic concept used in IPML's approach to criminalisation. Bentham does not give an example in IPML of an allegedly unnatural act that is not mischievous. However, we can now see that IPML provides a philosophical basis for arguing that the common and summary condemnation of paederasty on the grounds that it is unnatural lacks rational power. In IPML Bentham also criticises the philosophical-theological theory that there is a moral 'law of nature' that establishes in general which acts are right and wrong as another instance of the principle of sympathy and antipathy (27, n. d. Cp. 276, n. h5; 298, n. a2).[118] The manuscripts briefly consider the claim that paederasty is unnatural. Bentham doubts that many men would want to have sex with other men if they could have sex with women (see below); but he asserts that if many men did prefer to have sex with other men, doing so would be natural, not unnatural.[119]

4.2.5. Antipathetic Pain

To his great credit, Bentham addresses a serious difficulty that his position seems to face. It is not explicitly raised in IPML. That work states that a person who feels antipathy towards someone who is experiencing pleasure will experience a distinctive kind of pain (48).[120] This position suggests that even if paederasty causes no other kind of *pro tanto* mischief, as Bentham concluded, the antipathetic pain of people who believe that such activity is occurring somewhere in their country would constitute a *pro tanto* mischievous consequence of it. Extending this point further, we could then ask: if there is enough of this kind of pain, would it not follow that this *pro tanto* mischief could outweigh in intrinsic value whatever pleasure the participants feel, so that their sexual activity is mischievous, all things considered, and hence a candidate for criminalisation?[121]

Bentham does not quite formulate the difficulty this way, but it appears that he has some sense of it, as we will now see. He considers at several points in IPML the role of popular, non-utilitarian modes of thought and feeling in designing utilitarian penal law.[122] There is, first, his general criticism of the popular but mistaken principle of sympathy and antipathy, which often gives incorrect answers about which acts to criminalise and how severely to punish them (21–31). He also discusses the related idea of the 'moral sanction'. This is, roughly, social activity meant to reward behaviour that people morally approve of and to discourage behaviour they morally disapprove of (35–6; 44; 47).[123] Bentham often mentions it. He allows that moral sanctions meant to discourage behaviours often have the same targets as utilitarian penal

law. However, the two types of sanction would not always coincide in their targets (37; 130–1; 172). Furthermore, the moral sanction cannot be measured and inflicted in exact amounts, unlike legal punishments. Bentham therefore asserts that a utilitarian legislator ought to ignore the operation of the moral sanction and impose the punishments that would be appropriate if it were inoperative (172).[124] Lastly, he discusses the significance of the 'popularity' of the various kinds of punishment (182–4). He says that if a punishment favoured by the principle of utility is unpopular, it is 'the business of the legislator' to try to correct the error (184).[125] Bentham's catechism of reasons could carry out this function.

The passage in IPML that most closely bears on the problem of the significance of antipathetic pain elicited by paederasty occurs in Chapter XIV. This considers the moral significance of the antipathetic pleasure that victims and community members can derive from the pain that an offender experiences from legal punishment (44). This pleasure could be relevant in determining the severity level, and even the profitability, of the punishments imposed on offenders. Bentham grants that punishments designed for other purposes, such as 'example' (that is, deterrence), may have this as a 'collateral end'. He argues against excessive severity, as follows:

> But no punishment ought to be allotted merely to this purpose, because […] no such pleasure is ever produced by punishment as can be equivalent to the pain. The punishment, however, which is allotted to the other purpose, ought, as far as it can be done without expense, to be accommodated to this. (159 n. a)

Now, if no punishment should be imposed on an offender if the only benefit that it produces is antipathetic pleasure in others, it seems to follow that no form of behaviour should be criminalised in the first place if the only pain it produces is experienced by third parties who merely know or believe it is occurring.

This is a plausible inference. However, the problem with it is that the reason Bentham gives for not punishing when the only benefit is antipathetic pleasure is weak. As Michael Quinn observes, it is plausible to say that if one person experiences pleasure when she believes that another person is in pain, then the amount of pleasure is less than the amount of pain (Cp. 3, n. a). But it is not plausible to say that if many people experience pleasure when one person experiences pain, then it would never produce the most happiness (or intrinsic value) to inflict the

pain.[126] And it is noteworthy that Bentham does not make this claim in the paederasty manuscripts.

We can now consider what he does say about this problem there.[127] Bentham begins by forthrightly granting that antipathetic pain 'is unquestionably to be placed to the account of the [*pro tanto*] mischief of the offence' of paederasty.[128] Although this specific claim is not made in IPML, it is entailed by Bentham's account of mischief there: any pain is *pro tanto* mischief. Having granted this claim, Bentham makes four arguments for the proposition that paederasty still should not be criminalised. I will discuss the two most important.

First, the antipathy to it is not 'warranted by the essential mischievousness' of the activity. This was assessed in the analyses that Bentham previously carried out. They consisted of the brief review of the possible primary and secondary *pro tanto* mischief of paederasty, and the subsequent discussion of possible subtle, long-term effects of it. That showed that it produces no mischief *pro tanto*. Any antipathetic pain produced by paederasty is thus 'accidental' and 'grounded only in prejudice'. Such prejudice can be 'assuaged and reduced' by 'bringing to view' the utilitarian analyses. This will reduce or eliminate the painful antipathy to paederasty and the desire to prevent it.[129] Here we would see the operation of 'reason and reflection'.[130]

Second, Bentham makes a point about antipathy and punishment. He says that the widespread and intense antipathy to which paederasts are subjected is itself a sort of punishment.[131] Since this is 'beyond what is enough', the antipathy cannot be a reason to have more punishment imposed by legal officials.[132] This argument can be taken to address the profitability of punishing paederasty. It might be reformulated thus: even if paederasty is mischievous, all things considered, there is still no need to punish it. This is because whatever discouragement is needed to reduce its incidence is already imposed by the 'moral sanction' of informal popular antipathy.

The first argument reveals how Bentham's project of promulgating the utilitarian reasons for criminalising or legally permitting various activities was under intense strain in the case of paederasty. The strategy he endorses there is to persuade non-utilitarians of their moral errors, perhaps with some sort of catechism of reasons based on the paederasty manuscripts. Yet Bentham was reluctant to disclose his thinking about paederasty, even to a relatively liberal Swiss scholarly society whose competition was endorsed, and whose prize was augmented, by Voltaire.[133] And Bentham never saw fit to publish it.

Now, in the material in IMPL printed in 1780, Bentham expresses a rather high opinion of the European morality in his own day. He states that the dictates of the moral sanction in Europe were approaching 'nearer and nearer to a coincidence with those of utility every day', as were the dictates of the religious sanction (121. Cp. 131–2).[134] And he briefly commends the ability of sovereigns and interested parties to combat moral errors with the pen rather than the sword (164). Yet Bentham then feared the antipathy that he undoubtedly would have faced had he published his thinking about paederasty.[135] This could well have been because he thought that his programme of legal reform would be seriously set back by such ill-will towards him. If so, we might put his predicament thus: Bentham probably thought that it would not promote the most happiness to publicise a utilitarian penal code, even one that presented the reasoning behind its own provisions. Or, in Sidgwick's terms, he thought that some features of a utilitarian penal code ought to be esoteric during his lifetime.[136]

The second argument represents an important change from the position Bentham defends in IPML. We saw that he states there that the legislator should ignore whatever pain the moral sanction inflicts on offenders and should impose the punishments that would be appropriate if it were inoperative (172). In the manuscripts, however, he argues that paederasts suffer from informal 'punishments' that are more than enough, so there is no justification for imposing additional legal punishments. As a general claim in a utilitarian approach to punishment, the latter position is, I think, more defensible. If informal sanctions for some behaviours are common and produce the optimal moral result, it would be wrong for a utilitarian legislator to ignore them and impose more pain on the wrongdoers. In other words, legal punishment would here be unprofitable, and conflict with Bentham's rule of 'frugality' or cost-effectiveness (169, rule 5; 179–80).[137] But this point does not fully capture what Bentham's utilitarian analysis seems to call for. He concludes that paederasty causes no *pro tanto* mischief at all, except for some non-rational antipathetic pain. Given that conclusion, it seems to follow that a utilitarian legislator should not only refrain from punishing paederasts; she should also try to diminish the informal antipathetic sanctions imposed on them. Here again we see Bentham's predicament. His second argument, too, seems to show that a thinker devising and defending a utilitarian penal code should publicly argue that paederasty is not 'essentially' morally wrong, which could and properly should

diminish popular antipathy to it. Yet this was a step that he was not prepared to take.

5. Conclusion

Bentham's discussion of paederasty, unknown for some 200 years, is one of his most brilliant and powerful treatments of a topic in applied ethics. Its philosophical incisiveness is comparable to the finest parts of IPML. In fact, as we saw, the discussion revises an important claim in Chapter XIV, bearing on the question of the profitability of punishment. This is what a careful application of a theoretical framework can do: bring out some implications of the framework that seem unacceptable and which may call for revising the framework itself. Bentham seems to be describing an intellectual process of this nature in the preface (7).

In closing, it is important to note that the paederasty manuscripts also contain some strikingly premodern ideas. Bentham believed, as did Montesquieu and others, that a preference of males for sex with other males was largely the result of the sexual segregation of schoolboys, and that it tended to disappear when men could associate with women.[138] He also condemns masturbation as 'the most incontestably pernicious' of the sexual irregularities he considers, mentioning 'physicians' who think that it has serious consequences for the health and happiness of those who engage in it.[139] Bentham, like some other prominent contemporary philosophers, was probably relying on respected medical writers, such as S.A.D. Tissot.[140] (He nonetheless rejects the idea of criminalising masturbation done in private on the grounds that such a law would have no effect on its occurrence.)[141] Finally, Bentham speaks of the sexual relations of men with men as an 'abomination',[142] the product of a 'miserable taste'[143] and a 'vice'.[144] If these remarks truly expressed Bentham's own feelings,[145] his 'reflection' on their philosophical significance is all the more impressive.

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Declarations and conflicts of interest

Research ethics statement

Not applicable to this article.

Consent for publication statement

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Conflicts of interest statement

The author declares no conflicts of interest with this article.

Notes

1 Bentham, *An Introduction*. In this article, Arabic numerals in parentheses refer to pages in this printing; upper case Roman numerals refer to chapters.

2 IPML retains indications of the close connection that Bentham originally had in mind between the 1780 material and the penal code. It repeatedly refers to the penal code as 'the body of the work' (82; 222; 223 n. w2; 224–5 n. z2; 271; 293; 295 ('this work')). There are also, as Bentham states (7), more than thirty footnote references to specific parts of the code (e.g. 74, n. c; 160). Finally, the pagination of the 1789 edition is in Roman numerals, appropriate for introductory material. The penal code itself would have been paginated in Arabic numerals.

3 Bentham, *Specimen of a Penal Code*; Crompton, 'Offences', Part 1; Crompton, 'Offences', Part 2. See also Crompton's 'Introduction'. W.L. and P.E. Twining, 'Bentham on Torture', 514–27.

4 The general webpage for the penal code transcriptions is: http://transcribe-bentham.ucl.ac.uk/td/Penal_Code. The manuscripts of the code that was to follow IPML are mainly in boxes 71 and 72. My references to the manuscripts follow the standard format. For example, 'UC lxxi. 145r2' refers to the third page (that is, the second recto) in the 145th folio (that is, a folded piece of paper having four sides or pages) in box 71 of the Bentham Papers in the UCL Library.

5 Bentham presumably thought of it as a work of 'censorial jurisprudence' – that is, a work establishing what penal law ought to be (293–4; 298 n. a2). The distinction of censorial and 'expository' jurisprudence was introduced in Bentham, *Fragment*, 397–8; 403, n. g; 417. But note Bentham's suggestion that the most rational arrangement of the substance of penal law – a 'natural arrangement' – would fall under the heading of ethics rather than jurisprudence: Bentham, *Fragment*, 418. For the concept of a natural arrangement, see the end of Section I below.

6 H.L.A. Hart asserted that Bentham's topic in IPML is not only criminal law, but also much of civil law as we use that term, such as the law of contracts and torts. Hart, 'Bentham's Principle', lxxxi; cvii–viii.

For a brief defence of the claim that Bentham's term 'penal' is equivalent to our 'criminal', see Sverdlik, *A Guide*, 65–9. I argue that the evidence in the material printed in 1780 supports the conclusion that Bentham's topic was only criminal law.

Bentham originally wrote IPML and the penal code manuscripts to compete for a prize offered by the Berne Economical Society. See Section IV below. The English notice of the competition described the

topic of the works to be submitted as 'the imperfections of the Criminal Laws'. Afterwards Bentham himself often used the phrase 'criminal law' to describe what he was writing about: Bentham, *Correspondence*, vol. 2, 68–9; 100; 173; 248 (in French); 498.

7 A brief history of the writing of IPML is in the introduction to the first printing of Burns and Hart's edition of it (1970), xxxvii–xxxix. Unfortunately the current printing of 1996 does not include it, even though there are references to it in the text. See, for example, IPML, 16; 55. For an important recent account see de Champs, *Enlightenment and Utility*, 61–6.

8 Reprinted in *Works*, ed. Bowring, vol. 1, 388–525. Bentham refers to this work at IPML, 158, n. a, as *The Theory of Punishment*. It did not appear in English, as *The Rationale of Punishment*, until 1830. There is a modern edition of Bentham, *Rationale*, ed. James McHugh. Below I refer to pages in the more readily available Bowring edition. While some parts of *Rationale* were clearly written after 1780, much of it was written between 1775–7.

9 This was once going to be a chapter in IPML. See the references to it at IPML, 124, nn. k2 and 1; 220, n. q2. Parts of IPML prefigure it (e.g. 198, and notes 't' and 'u'). A version of it eventually appeared in *Works*, ed. Bowring. vol. 1, 533–80. For earlier works on 'preventive police', see L.J. Hume, *Bentham and Bureaucracy*, pp. 33–4; 42–4. See also Quinn, *Bentham*, 64–82.

10 This was to constitute the final three sections of Chapter XVII (cp. 298–300).

11 IPML, 160, nn. f and 1; Bentham, *Of the Promulgation*, 157–63. Some material is later than IPML.

12 This is the title of the authoritative text in *Jeremy Bentham: Selected Writings*. It is closely connected to IPML and may have originally been intended by Bentham to be a chapter. An earlier version of it appeared as *Essay on the Influence*.

13 In *Writings on Political Economy*, Quinn. See IPML, 4–5 and 231, n. l3.

14 This was published in 1778 and is referred to at IPML, 177, n. b.

15 'Code Pénal … Des Injures Personelles Simples'. Translated and edited by 'R. S.' [Richard Smith] as Bentham, *Specimen*. The corresponding manuscripts are UC lxxi. 18–26v.

16 Some notes and additions to the seventeen chapters written after 1780 were printed at the end of the 1789 volume. In the Burns and Hart edition of IPML, these are inserted at the appropriate pages of those chapters. See, for example, 21, n. c; 35, n. b; 191, n. g (and the editors' note, 190 n. 1). When IPML was reprinted in 1838 after Bentham's death, it included two other chapters. *Works of Bentham*, ed. Bowring, vol. 1, 76–83. Burns and Hart regarded them as spurious and did not include them in their edition. Introduction to IPML, 1970, xl–xli.

17 For more on the structure of the book, and the main arguments, see Sverdlik, *Guide*.

18 Sverdlik, *Guide*, 21–7.

19 Sverdlik, *Guide*, 178–96.

20 IPML, 149; Sverdlik, *Guide*, 183–6.

21 Wesley Mitchell asserted that in IPML 'Bentham relies upon classification, and not upon calculation'. 'Bentham's Felicific Calculus', 173. While I think that Bentham briefly explains in Chapter IV some of the concepts to be used in utilitarian calculations, he does not explain in Chapter XII how the concept of danger is to be represented mathematically. So the problem is not exactly that he does not perform calculations; it is rather that he does not explain the mathematical idea that would allow calculations to be done. Sverdlik, *Guide*, 186–90.

22 Some material added in 1822 complicates matters (11, n. a; 14, n. d). Sverdlik, *Guide*, 6–7.

23 Sverdlik, *Guide*, 1–11; 75–82.

24 Sverdlik, *Guide*, 179–80.

25 H.L.A. Hart, 'Prolegomenon', 17f. However, Bentham mentions three types of circumstance that cannot be thought of as excuses. Sverdlik, *Guide*, 205.

26 The terms 'exemption' and 'extenuation' are not fully explained in IPML. Two notes suggest that 'exemptions' are based on persistent mental conditions such as insanity and infancy that rule out the legitimacy of punishing offenders (72, n. r; 161, n. g). Both concepts will be discussed in the second part of my article.

27 But see Sverdlik, *Guide*, 255–6.

28 Sverdlik, *Guide*, 220–30.

29 It was this chapter, in Dumont's French translation, that J.S. Mill later recalled as having had a profound impact on him when he was about fifteen. John Stuart Mill, *Autobiography*, 67, 69.

30 Lieberman, '*Of the Limits*', 294.

31 Notably, the material about legal concepts such as powers, rights, trusts, property and 'conditions' (205–14). In 1789 Bentham seemed to acknowledge that these 'analytical discussions' properly belong in a treatise on legal terminology and method (4). Sverdlik, *Guide*, 260–2. As Bentham notes, the idea of such a classification was sketched earlier in *Fragment*. IPML, pp. 5; 272, n. x4; *Fragment*, pp. 414–9.

32 Montesquieu and Beccaria sketched, but only sketched, classifications similar in spirit to Bentham's. Montesquieu, *Spirit*, 189–91; Beccaria, *On Crimes*, 17–9.

33 In 1830 Bentham eliminated this entire class of offences in a table summarising the plan that he then had for a penal code; however, he did acknowledge that a few listed offences would have corresponding self-regarding forms. Bentham, *Constitutional Code*, note 6 to the table following 457.

34 Sverdlik, *Guide*, 206–13. In this case punishment is both *pro tanto* mischievous and mischievous all things considered.

35 The letter to Franz Ludwig Tribolet gives us a valuable snapshot of Bentham's plans for the code (and IPML, in effect) as of 30 March 1779 (Bentham, *Correspondence*, vol. 2, 248–53). For more on Tribolet, see Section IV below. The original deadline of the essay competition Bentham intended to enter was 1 July 1779, so he was writing in the expectation that he would soon be submitting his entry. He there describes (in French) how the code was structured, as well as eight features found in the entries on each offence. I have simplified his account somewhat: Bentham also describes some titles placed before the individual entries. These were to deal with topics relevant to all the offences, such as justifications, exemptions and extenuations (see n. 26 above). There are extensive penal code manuscripts on some of them, notably 'extenuations' and 'aggravations'. While these terms do occur in IPML, Bentham gives no systematic account there of such considerations, nor of the role they play in determining punishments (83; 95; 167; 191, n. g). I will discuss them in the second part of my article.

36 If an act failed either of these tests, it would not be in the penal code. However, we might expect some discussion there as to why the code excludes any act that was then treated as an offence in England or other European countries. This is presumably the reason why Bentham wrote the 'Paederasty' manuscripts discussed below.

37 'Conditions' are relatively permanent legal statuses that entitle a person to some services by others or give them legal powers over others. They include husband and wife, and master and servant (192–3). Sverdlik, *Guide*, 275–6. Bentham's treatment of conditions in IPML is based on Blackstone's. Blackstone, *Commentaries,* vol. 1, Chapters 12 and 14–17. Bentham adopts the same set of conditions that Blackstone does (234–70).

38 Bentham says they do not produce 'any primary mischief' (278) – that is, mischief to an assignable person or people closely related to him or her (143–4). But he does seem to think that an act that produces primary mischief (and is thus a Class 1 offence) could also be a Class 4 offence in virtue of the 'secondary' mischief that it causes (278). This would consist of objective risks ('danger') posed to the state or the people at large, or the painful fear of possible mischief experienced by some people, that is, 'alarm' (144). An example might be bribery of a judge, which could produce mischief for a party in a law case, but also constitute a breach of 'judicial trust' (260).

39 In a note added in 1789 Bentham states that he thinks that this entire class could be eliminated with the possible offences in it being assigned to the other four (191, n. g). Nonetheless, the five-class scheme of 1780 remains in the body of IPML.

40 Bentham adopts a wide concept of a trust, which includes 'public trusts' (209); Bentham, *Of the Limits*, 313–15; Hume, *Bentham and Bureaucracy*, 25–7; 77–80. These are basically public offices or positions with defined powers and duties. He characterises many offences in Class 4 as being 'against' public trusts, for example, 'bribery in prejudice of judicial trust' (260).

41 IPML sometimes connects these issues with the idea of a 'law of nature', applicable to all human beings. Bentham seems to say that this idea might have gained currency because there are some offences that appear in the penal code of every country (275–6, and n. h5. Cp. 271–2).

42 Cp. Bentham, *Place and Time*, 208; Sverdlik, *Guide*, 270–3.
43 Bentham, *Place and Time*, 160.
44 Bentham, *Place and Time*, 162–4.
45 Bentham, *Place and Time*, 162.
46 UC lxxi. 2r2.
47 See n. 41 above.
48 Bentham, *Place and Time*, 182.
49 Sverdlik, *Guide*, 276–8.
50 He seems to have recognised this point around 1782. *Of the Limits*, largely written in 1780, treats Chapter XVI of IPML as having laid the groundwork of a 'complete body of the laws' (Bentham, *Of the Limits*, 221). This is not correct, as we have seen. Chapter XVI is a taxonomy of possible criminal offences, so it does not establish a classification of the offences contained in any utilitarian penal code. Furthermore, Chapter XVI states that matters such as the laws of marriage belong to another code (256). Bentham seems to have envisioned an interrelated set of utilitarian codes as he began work on the *Projet* manuscripts in 1782. See de Champs, *Enlightenment*, 66–78.
51 IPML 230 has such a generic definition. The definition in the manuscript 'Of Theft' (UC lxxi. 43), though unfinished, roughly follows IPML and is similarly generic.
52 Bentham, *Specimen*. The offence corresponds to 'simple corporal injuries' in IPML, 224. It is thus the first genus in the first subdivision of Class 1 offences, namely 'offences against the person'. So this offence would have been the first one treated in the penal code. See n. 15 above. Editor Richard Smith states that the piece is mainly intended to 'show the use of a commentary of reasons'. Bentham, *Specimen*, 164, note.
53 Bentham, *Of the Promulgation,* 163. Cp. 158.
54 The letter to Tribolet (Bentham, *Correspondence*, vol. 2, 249) states that the entries on offences in the code will provide the reasons for various legal 'dispositions' [his French word] established in the law for the offence. I take this to mean first that the entries will explain why the acts there defined are mischievous. It also means that they will state the reasons for having the specified punishments. Hobbes had advocated providing public reasons for the laws. Hobbes, *Leviathan*, 388–9 (Chap. 30). See also de Champs, *Enlightenment*, 73, n. 15 on Frederic II's proposal of 1770, along the same lines.
55 Bentham, *Of the Promulgation,* 163.
56 Bentham, *Of the Promulgation,* 162.
57 Bentham, *Of the Promulgation*, 163.
58 This idea is more clearly stated in Bentham, *Fragment*, 415–16; 418 n. a1. See also the earlier 'What a Law Is' in Bentham, *Preparatory Principles*, 449–50, n. a.
59 The 1789 preface to IPML states that the eight other utilitarian codes that Bentham intended to produce were to have commentaries of reasons (9). See also de Champs, *Enlightenment*, 73 on the *Projet* manuscripts. Bentham's *Constitutional Code* of 1830 contains 'ratiocinative' parts *passim*.
60 Bentham, *Of the Promulgation*, 160–2.
61 Bentham, *Of the Promulgation*, 161 (my emphasis).
62 See Sverdlik, *Guide*, 64–5; 156–60 on the moral role of benevolence.
63 Bentham, *Of the Promulgation*, 161.
64 The second clause is needed because reasoning to show that a type of behaviour should not be an offence might not have appeared in the penal code itself.
65 Singer, *Animal Liberation*, 7.
66 UC lxxi. 90–104r2.
67 Blackstone, *Commentaries*, vol. 3, 94. This action was abolished in 1857.
68 Stone, *Road to Divorce*, 232–3. Attempts were made in Bentham's time to criminalise adultery, but these were rejected by Parliament. Radzinowicz, *History of English Criminal Law*, 195–203.
69 Twining and Twining, 'Bentham on Torture', 514–27.
70 Beccaria, *On Crimes*, 29–33; Blackstone, *Commentaries*, vol. 4, 211–12.
71 Twining and Twining, 'Bentham on Torture', 563–4, n. 102.
72 This statute of 1822 prohibited the cruel treatment of cattle.
73 UC lxxii. 214.
74 UC lxxii. 214r1.
75 Bentham praises Hogarth's 'The Four Stages of Cruelty' as a great 'moral lesson' on this theme (UC lxxii. 214v1).
76 UC lxxii. 214v1–r2. It is thought that such situations gave rise to the phrase 'like a bull in a china shop'.
77 UC lxxii. 214r2.
78 UC lxxii. 214v2 (my emphasis).
79 See Kagan, *Death*, 205–33; Norcross, 'The Significance of Death for Animals'.
80 The possible offences against trust include 'wrongful non-investment' and 'wrongful interception (215–6); parallel to them are 'wrongful non-investment of property' and 'wrongful interception of property' (231), and, for example, 'wrongful non-

investment of mastership' and 'wrongful interception of mastership' (240).

81 Crompton, 'Offences', Parts 1 and 2. Crompton notes that the manuscripts are labelled to indicate that they relate to the penal code. 'Introduction', 386. He follows A. Taylor Milne in dating them to around 1785. Crompton, 'Introduction', 383. Milne, *Catalogue*, 22. However, Philip Schofield states that Bentham appears to have abandoned work on IPML about 1782 (to be taken up again *c*.1788). This presumably means that he also abandoned work on the penal code in 1782. 'Preface to the New Edition'. In Bentham, *Correspondence*, vol. 2, vi.

82 Crompton, 'Introduction', 383.

83 Blackstone, *Commentaries*, vol. 4, 142.

84 Blackstone, *Commentaries*, vol. 4, 116–45. Bentham states that Blackstone categorised paederasty as an offence against the peace. Crompton, 'Offences', Pt. 1, 391. Bentham must be referring to one of the editions of Blackstone's earlier *An Analysis of the Laws of England.*

85 He did use it, for instance, in *An Analysis,* 6th ed., 139.

86 Gatrell, *Hanging Tree*, 100–1.

87 Crompton, 'Offences', Pt. 1, 389–90.

88 Crompton, 'Offences', Pt. 1, 390.

89 Montesquieu, *Spirit*, 193–4; Beccaria, *Crimes*, 60; Voltaire, 'So-called Socratic Love'. On Voltaire's later *Prix de la Justice et de l'Humanité*, see n. 133 below. Bentham also mentions unnamed 'writers'. 'Offences', Pt. 2, 98. He apparently sought literature on the subject. His brother Samuel wrote from Hamburg in 1779 that he had sent Bentham a book on sodomy. Bentham, *Correspondence*, vol. 2, 324.

90 See the English version of the announcement of the competition in Bentham, *Correspondence*, vol. 2, 68–9.

91 Bentham, *Correspondence*, vol. 2, 252. The paederasty manuscripts also speak of 'offences of impurity'. Crompton, 'Offences', Pt. 1, 389.

92 Crompton, 'Introduction', 384–5.

93 Crompton, 'Offences', Pt. 1, 389.

94 See IPML, 271 ('a systematical enumeration' of offences); 274 (a natural arrangement that is also exhaustive).

95 There are offences named in IPML that are not in the classification in Chapter XVI, for example, 'defraudment touching the coin' (168, n. i), and, as I mentioned, 'cruelty to animals' (283, n. b). There are penal code manuscripts for both. Paederasty is not mentioned anywhere in IPML.

96 Crompton, 'Offences', Pt. 1, 389, referring to the title of the manuscripts.

97 Crompton, 'Offences', Pt. 1, 391. This is an interesting example of a place where Bentham's focus on classification yields philosophical insight. See n. 21 above.

Bentham made this point in *Fragment*, 419, n. e1, and in 'Critical Jurisprudence Criminal' (UC lxix. 14–15). Bentham, *Fragment* cites Blackstone's classification of buggery in his earlier *Analysis* and 'Critical' may be referring to it too.

98 Crompton, 'Offences', Pt. 1, 396–8.

99 Crompton, 'Offences', Pt. 1, 390.

100 Crompton, 'Offences', Pt. 1, 390.

101 Crompton, 'Offences', Pt. 1, 390.

102 Crompton, 'Offences', Pt. 1, 391–6.

103 Crompton, 'Offences', Pt. 1, 398–403; 'Offences', Pt. 2, 91–3.

104 Crompton, 'Offences', Pt. 1, 396–8.

105 Crompton, 'Offences', Pt.1, 396; Voltaire, 'So-called Socratic Love', 76.

106 Crompton, 'Offences', Pt. 1, 396–8.

107 Bentham here mentions Hume and Adam Smith in support, without giving the references. I believe they are: David Hume, 'Of the Populousness', 305, 309; Smith, *The Wealth of Nations*, 97–8 (Iviii); 180–2 (Ixi2). Hume and Smith's other general ideas about what influences population size evidently influenced Bentham's thinking in the manuscripts.

108 IPML lists celibacy as a possible offence against population (263). But 'Offences' argues that even in the countries where it is most prevalent, it has little effect on the size of the population, and Bentham reiterates his basic claim that in well-governed countries coercive measures to increase population are not needed. Crompton, 'Offences', Pt. 1, 398.

109 Bentham discusses prostitution in *Of Indirect Means*, 543–6.

110 Sverdlik, *Guide*, 289–90.

111 Sverdlik, *Guide*, 146–53.

112 Crompton, 'Offences', Pt. 2, 100–1. Bentham is not describing the issue quite properly: the legislator would not need to know which individuals were enjoying homosexual sex, or the postures mentioned. The issue is whether the legislator could know that some, indefinitely described, individuals are enjoying the activity, and what the consequences of their behaviour are. Bentham in effect claims to have

reasonable beliefs about these facts. Given that he does have such beliefs, he is able to make his arguments about their non-mischievousness.

113 Bentham, *Defence of Usury*, 59.

114 Bentham, *Correspondence*, vol. 3, 518. Bentham was writing to George Wilson, a confidant. Bentham, *Correspondence*, vol. 3, xxiv.

115 Nozick, *Anarchy, State and Utopia*, 163. Bentham, *Of Indirect Means*', 544, touches on an oddity of marriage contracts, in contrast to other contracts: he asks why marriage contracts are virtuous if of indefinite duration, but criminal if of limited duration?

116 In *Comment on the Commentaries* he criticises Blackstone's brief account of it. Bentham, *Comment*, 10–21; Blackstone, *Commentaries*, vol. 1, 33–6.

117 Cp. Hume, *Treatise,* 474–5 (III i 2).

118 For an overview of the main early modern versions of the theory, see Schneewind, *Invention of Autonomy*, 17–25; 58–81; 118–40. I noted that Bentham himself shows some willingness to accept a restricted version of natural law theory. Above, n. 42.

119 Crompton, 'Offences', Pt. 1, 402.

120 Cp. Crompton, 'Offences', Pt. 2, 97.

121 This sort of difficulty for the hedonistic version of utilitarianism that Bentham accepts parallels the problem of 'external preferences' that Ronald Dworkin claims beset preference utilitarianism. *Taking Rights Seriously*, 232–8.

122 Bentham does not mention the possibility that even people who accept the principle of utility might have experiences of pleasure and pain that are at odds, in a sense, with its dictates; for example, they might enjoy witnessing mischievous acts.

123 Sverdlik, *Guide*, 63–5.

124 Cp. Bentham, *Rationale*, in *Works*, ed. Bowring, vol. 1, 455.

125 Bentham's discussion of the mischief of tax evasion could be an example of this sort of instruction. Popular thinking tends to underestimate the mischief of such behaviour (149–52). Cp. Bentham's discussion of a similar popular error about smuggling. Quinn, 'Popular Prejudices', 83–4. Note that these are two errors of excessive leniency, in contrast to the issue of paederasty.

126 Quinn, 'Popular Prejudices', 68.

127 Crompton, 'Offences', Pt. 2, 97–8.

128 Crompton, 'Offences', Pt. 2, 97.

129 Crompton, 'Offences', Pt. 2, 97. The essential/accidental distinction is similar to that of 'abstract' and 'net' utility that Quinn finds in other works of Bentham. Quinn, 'Popular Prejudices', 70–8.

130 Crompton, 'Offences', Pt. 2, 106. Bentham speaks of 'reflection' in IPML (16; 28 n. d). Sverdlik, *Guide*, 49–55.

131 He makes the same point about prostitution. Bentham, *Of Indirect Means*, 545.

132 Crompton, 'Offences', Pt. 2, 98.

133 Bentham, *Correspondence*, vol. 2, 173–4. Bentham refers there to Voltaire's *Prix de la Justice et de l'Humanité*, which was a submission to the competition and meant to encourage others. Clancy, *Literary Translation.* This contains a chapter on 'Sodomy'. Clancy, *Literary Translation*, 189–94. It does not advocate legalising the activity, though it does favour moderate punishment. A note added in the posthumous Kehl edition of Voltaire's works, published in the 1780s, is more radical: it advocates decriminalising consensual same-sex sexual relations. Clancy, *Literary Translation*, 194. Bentham probably did not know of it when he wrote the paederasty manuscripts.

134 For the religious sanction see also IPML 35–7; Sverdlik, *Guide*, 62–3.

135 Crompton, 'Introduction', 384–5.

136 Sidgwick, *Methods*, 489–90.

137 Sverdlik, *Guide*, 206–13.

138 Compton, 'Offences', Pt. 2, 91–3. Montesquieu, *Spirit*, 193–4; Voltaire, 'Socratic', 76–7; Beccaria, *Crimes*, 60.

139 Crompton, 'Offences', Pt. 2, 101–2.

140 Laqueur, *Solitary Sex*, 25–61, describes the remarkable history of thinking about masturbation from 1712–97. Tissot is discussed at 37–41. He was an authority who was relied on in the influential *Encyclopédie* article on masturbation. Laqueur, *Solitary Sex*, 37–8; 212–3. Rousseau, Voltaire and Kant shared some of Bentham's concerns. For Voltaire: Laqueur, *Solitary Sex*, 41–2; Rousseau: Laqueur, *Solitary Sex*, 42–4; Kant: Laqueur, *Solitary Sex*, 57–60 and Kant, *Metaphysics of Morals*, 220–2.

141 Crompton, 'Offences', Pt. 2, 102.

142 Crompton, 'Offences', Pt. 1, 389.

143 Crompton, 'Offences', Pt. 1, 397.

144 Crompton, 'Offences', Pt. 2, 93.

145 Bentham entertained the notion of publishing the manuscripts and may therefore have thought that he needed to mouth conventional attitudes.

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