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Punishment, Proportionality, and the Economic Analysis of Crime

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Since Gary Becker's ground-breaking intervention in 1968 economists have come to regard crime and punishment not only as a legitimate area of interest for economic analysis, but also an especially important one.¹ As Becker himself acknowledged, much contemporary economic analysis of these broad social issues draws on the foundational work undertaken by the consequentialist political theorists of the eighteenth century, and on the ideas of Jeremy Bentham and Cesare Beccaria in particular.² Becker saw his role as updating the thinking of these theorists, and of re-emphasising the relevance of their analysis for twentieth-century economic theory. The analysis pursued here seeks to underline Becker's observations on the validity of these earlier enquiries and aims to offer further details on the development of those eighteenth-century lines of enquiry which are proving so useful in more recent considerations of the economic perspectives on crime and punishment.

The emphasis here will be on Bentham's discussion of punishment as optimal policy in response to offending behaviour. Four key themes will be explored. First, the range of Bentham's conception of an 'economic' approach to punishment will be explored, and the relationship of his penal theory to his broader understanding of political economy will be examined. Second, the cost-benefit approach to punishment

¹ G. S. Becker, 'Crime and Punishment: An Economic Approach', *Journal of Political Economy*, lxxvi. (1968), pp. 169-217.

² Of Bentham's works, texts derived from Dumont's *Traité de législation civile et pénale*, ed. É. Dumont, 3 vols., Paris, 1802, have usually been the source for Bentham's views on crime and punishment. This discussion draws primarily on Bentham's *An Introduction to the Principles of Morals and Legislation*, London, 1789; the version used being *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart, London, 1970, and published as part of *The Collected Works of Jeremy Bentham*, hereafter *IPML (CW)*. Other valuable works dealing with Bentham's penal theory included: *Théorie des peines et des récompenses*, ed. É. Dumont, 2 vols., London, 1811; *The Rationale of Punishment*, ed. R. Smith, London, 1830; 'Principles of Penal Law', in *The Works of Jeremy Bentham*, ed. J. Bowring, 11 vols., Edinburgh, 1838-43., i. pp. 336-580 (hereafter 'Bowring').

Cesare Beccaria was a young Lombardian aristocrat who rose to prominence with the publication of *Dei delitti e delle pene*, Leghorn, false imprint Haarlem, 1764. Hereafter, references are to *On Crimes and Punishments*, trans. D. Young, Indianapolis, 1986. A rearranged French translation was produced by Morellet in 1766, and an English edition published in 1767.

grew clearly from an established tradition of consequentialist thinking and the context and influences on Bentham's own utilitarian brand of economic analysis will be identified. Third, the question of leniency in punishment is intrinsically connected to Bentham's analysis of the nature of offences and this focus for his theory will be examined, and significant distinctions illustrated between the consequentialist theories of Bentham and Beccaria. Finally, Bentham's analysis involved a sophisticated notion of 'economy' that allowed his calculative model to accommodate an account of the 'disposition' of an offender in the assigning of pain of punishment. This previously undiscussed element of his theory will be explored in some detail, and will be used to answer some significant criticisms of Bentham's 'economic' approach to punishment.³

These four themes combine to form a consistent focus on Bentham's primary concern, that a reduction in the levels of pain applied was not only required, but was essential, if improved efficiency in the deterrent force of punishment, and hence an advance in political economy, was to be achieved by judicial practice.⁴

1. Political Economy and the 'Economic' Conception of Punishment

Consequentialist logic lies at the heart of Bentham's economic analysis of crime and punishment. Such methodology presents any act, and any legislative act in particular, as being 'right' in so far as it provides, or promises to provide, a surfeit of happiness. Such 'happiness' can be understood either in conventional 'economic' terms as a monetary value, and this is appropriate for Bentham in many of his writings which considered specific financial issues. But, in relation to punishment, Bentham's discussion interprets 'economic' much more widely in his discussions of 'quantities' of pain and pleasure. For example, Bentham used very broad terms, such as 'mischief' for negatives in the cost-benefit equation – which covered everything from financial loss to fear and danger offered by the threat of offending. These general expressions allowed him to extend and apply his calculative analysis across a strikingly

³ These criticisms can be found in É. Halévy, *La formation du Radicalisme Philosophique*, 3 vols., Paris 1901-4, trans. M. Morris as *The Growth of Philosophic Radicalism*, London, 1928; rept. 1972, pp. 69-72; and L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, 5 vols., London, 1948-86, pp. 381-5, and pp. 391-3, 'Emphasis on Severity'.

⁴ Evidence from the Bentham archive at University College London will be of importance here. For Bentham's interest in leniency see UC xxvii. 48; for a discussion on precise calculation as an aid to deterrence see UC xxvii. 24a; and on the need for judicial interpretation see UC cxl. 61.

broad range of economic, social and political issues. So, whilst monetary value was frequently the explicit concern of his thinking, it is constantly apparent that via his reductionist principles the ultimate measure underpinning his 'economic' perspective of social and political questions always remained pain and pleasure in the broadest sense.

For Bentham, social, political and economic perspectives were inextricably linked, and the symbiotic inevitability of subject approaches is clearly identified in his conception of the close relationship between penal theory and political economy. Political economy was integrally connected to his complete code of laws⁵ and formed, for Bentham, '[...] an art exercisable by those who have government of the nation in their hands, [...] the art of directing the national industry to the purposes to which it may be directed with the greatest advantage'.⁶ Such 'greatest advantage' can clearly be understood in standard economic terms with profits, outputs and standards of living forming the bases of assessment. Taking the broader conception prevalent in Bentham's thought, however, 'greatest advantage' can also be considered in terms of happiness of the national community, which focuses on something other than conventional economic growth. Bentham is thinking here of the peace of mind brought to individuals by a sense of economic 'security'. His penal policy is wholly commensurate with this since he supposed that, 'the most powerful means of augmenting national wealth are those which maintain the security of properties [...] Such are the objects of [...] penal law'.⁷ Penal law is here linked explicitly with political economy; and whilst Bentham appreciated that political economy may be seen as '[...] a science distinct from every other' he also went on to claim that,

[...] I do not see that there can exist a code of laws concerning political economy, distinct and separate from all the other codes. The collection of laws upon this subject would only be a mass of imperfect shreds, drawn without distinction from the whole body of laws.

Political economy, for example, has reference to the penal laws,

⁵ See 'A General View of a Complete Code of Laws', in Bowring, *Works*, iii, pp. 155-210, Ch. xxvii, 'Of Political Economy', where he says: 'The distinction marked by the word economy is applicable rather to a branch of the science of legislation, than to a division in a code of laws. It is much easier to say what branch of this science should be called political economy, than to say what laws are economical.'

⁶ 'Manual of Political Economy' in *Jeremy Bentham's Economic Writings*, ed. W. Stark, 3 vols, London, 1952, i. p. 223.

⁷ 'A General View of a Complete Code of Laws', Bowring, iii. pp. 203. He also regards the civil law as assisting in terms of aiding the establishment of 'equality'. Both civil and penal aspects of his conception of political economy are important, though only the penal will be considered here.

which create the species of offences which have been called *offences against population*, and *offences against the national wealth*.⁸

This view links the pursuit of national ‘wealth’ with his discussion of offences in chapter sixteen of *IPML*, and a case is made for all issues of political economy to be regarded as dependent on the security provided by the penal system. Relying ultimately on the notion that security is the key to progress for national industry Bentham regarded the deterrent and reformative goal of punishment as essential to any co-ordination of economic growth undertaken by central authorities. Accordingly, the provision of a deterrent system of punishment was intrinsically linked, in Bentham’s view, to a calculative emphasis on the nature of both individual motivation and the central questions of political economy. Quantification was key to both his general and specific pictures of deterrence and the motivation to offend. With this economically inclined focus at the core of Bentham’s penal theory, the constant source of his interest in terms of achieving an effective penal theory centres on the role of ‘quantities’ of legal pain applied in response to the harm done and benefit gained by an offence. The question of proportionality in the amount of pain inflicted as legal punishment is, therefore, fundamental to Bentham’s penal theory and essential to his consideration of political economy.

Bentham’s analysis of proportionality is comprehensive and seeks to identify not only when it is right to punish offending behaviour, but also at what level any penal intervention should take. His detailed analysis of the notional link between the harms and benefits of crime, the harms and benefits of punishment, and an explanation of how this ‘economic analysis’ was to operate when applied to questions of social policy embodies the foundational critique that so inspired Becker. By examining Bentham’s discussion of proportionality as presented in *IPML* it is clear that Bentham was even more radical than Becker supposed. Bentham was perfectly able to understand how crime⁹ could be effectively subjected to economic analysis, and he developed a radical vision of the choices made by offenders, or ‘criminals’, as being valid from their own perspective, and necessarily accounted for, even justified, by their own unique set of circumstances and sensibilities.

⁸ *Ibid.*

⁹ ‘Crime’ meaning all offending behaviour prescribed by law.

Bentham’s account identified, more clearly than ever before, that crime is beneficial as well as harmful, and that legal punishment is harmful as well as beneficial. The core conceptions of costs and benefits expressed within his economic conception of crime and punishment can be represented, in simplified form, as follows:

Crime and Punishment Cost-Benefit Table			
	Cost		Benefit
	In respect of individuals:		
1a	‘Danger’ and ‘alarm’ of punishment threatened for potential offenders	Versus	Potential illegal gains to be received by the offender
1b	Restraint from illegal acts and absence of benefits of offending for non-offender	Versus	Guaranteed avoidance of legal punishments for non-offenders
	In respect of society as a whole:		
2a	General secondary pain of punishment – ‘alarm’ and ‘danger’	Versus	General deterrence, reformation, producing prevention of future offending
2b	General primary pain of punishment to offender, offender’s dependents, relatives and acquaintances	Versus	Particular deterrence, reformation and incapacitation from future offending

From Bentham’s description of political economy and his economic approach to punishment it can be seen that benefit 2a, that of general deterrence, must take precedence from the policy perspective since this promises greatest advantage for society at large. Yet the impact of policy on the individual is essential to Bentham’s approach, and could never be over-ridden by his interest in, and requirement for, general deterrence. In this sense benefit 1 b, that of protecting ‘non-offenders’ from

the danger of suffering punishment, was a key requirement, for this benefit adds materially to the sense of security required for progress in political economy, and it must act alongside any relief of 1a, the threat of becoming a victim of crime. Benefit 1a, shows how far Bentham went with his reductive consequentialism, since here illegal gains are identified as benefits – they may act against good political economy, but they are still goods for the individuals receiving them and will continue to occur so long as the future benefits of offending ‘appear’ to outweigh the threat of future pain. Delicate balancing is therefore required in the assignment of pain of punishment, which is an evil, as a response to offending behaviour. Punishment is, then, a cost operating as a political tool, assisting in the process of selective restraint (it is simply not economically ‘worth’ trying to prevent all crime – this is clearly understood by Bentham’s ends of punishment.¹⁰

The problem for Bentham is how to secure the promotion of benefits 2a, 1 a and 2b without the harms imposed by the penal threat becoming excessive in terms of the implications for individuals? This concern for excess illustrates the emphasis placed on restraint in the application of legal pain, and provides a foundation for ‘lenience’ in punishment on an economic model. Lenience is a term frequently discussed by penal theorists of the late eighteenth century, but the term ‘leniency’ carried the wrong connotations for Bentham, since if the correct proportions are applied then the pain of punishment will be neither too lenient nor too severe, but ‘just’. Proportionality is the key notion.

Proportionality had always been, of course, a core component of European penal theory and the idea that punishment embodied a ‘just’ desert for a crime committed had long been linked to the conception of a controlled and fair response to offending. Throughout the eighteenth and nineteenth centuries this notion of an optimal balance in the public response to crime took centre stage for the consequentialist theories of Beccaria and Bentham, as well as for the revival in retributivist theory displayed most prominently in the works of Immanuel Kant and Georg Hegel. But retributivist thinking re-emerged, in many ways, in response to the strength of the consequentialist critique and a primary question must be – from where did Bentham and Beccaria derive their consequentialist interest in proportionality? To answer this it is necessary to look in greater detail at the intellectual context out of

¹⁰ See *IPML (CW)*, p. 158.

which their ideas developed.

2. The Background to Bentham on Proportion

Bentham's development of the idea of proportion between crimes and punishments shows considerable reliance and interaction with the work of earlier thinkers. In some respects he can be described as imposing an order on concepts previously introduced by Montesquieu and Beccaria - and also, to a degree, by Hobbes. Bentham provided thirteen 'rules or canons' for penal proportion.¹¹ He did so with the intention of ensuring, as John Rawls has said, that 'the absolute level of penalties will be as low as possible'.¹² The result of Bentham's analysis was an intricate model calculating social pains against social pleasures, and aiming to provide graduations from mild to more severe punishment for the purpose of deterrence. In other words, his theory presents his penal sanction as an extension of, and in complete accord with, a system of political economy envisaged as efficient in that it would only ever deliver the minimum pain of punishment necessary to achieve reductions in offending behaviour.

a) Precursors to a Consequentialist Theory of Proportion

Though Bentham judged his own work to be original in the provision of a coherent structure for the assessment of quantities of pain as punishment he freely admitted debts to a number of thinkers, with key figures as far as punishment is concerned being Montesquieu,¹³ Beccaria and William Eden.¹⁴ Clearly aware of the novelty of his own model, Bentham stated:

my fear is, that in the ensuing model, I may be thought to have carried my endeavours at proportionality too far. Hitherto scarce any attention has been paid to it. Montesquieu seems to have been almost the first who has had the least idea of any such thing. In such a matter

¹¹ *Ibid.*, pp. 166-71.

¹² J. Rawls, 'Two Concepts of Rules', *The Philosophical Review*, lxiv. (1955), 13 n.

¹³ Charles de Secondat, Baron de Montesquieu, *Les lettres persanes*, Holland, 1721; and *De l'esprit des lois*, in *Oeuvres complètes*, Paris, 1964. The translation used hereafter is A. Cohler, B. Miller, H. Stone, *The Spirit of the Laws*, Cambridge, 1989.

¹⁴ William Eden, 1st Baron Auckland (1744-1814). He published *Principles of Penal Law*, London, 1771, held office as Under-Secretary of State for the Northern Department, 1772-8, and was MP for New Woodstock 1774-84. Eden was raised to the peerage in 1793.

therefore, excess seemed more eligible than defect. The difficulty is to invent; that done, if any thing seems superfluous, it is easy to retrench.¹⁵

Of course, examples of the advocacy of proportion in punishment can be found prior to the eighteenth century. Even amongst classical thinkers, with Cicero for instance, the notion of punishment being measured according to the extent of the offence is considered.¹⁶ But of special interest to Bentham's discussion is the emphasis on consequential detail and here some valuable connections can be made with the work of Thomas Hobbes.

In *Leviathan* there can be found principles of punishment not dissimilar to those provided by Bentham's later system. Hobbes suggested, for example, that 'hurt inflicted, if less than the benefit of transgressing, is not punishment'. The clear sense being that the weight of punishment must overcome any 'benefit' provided to the offender by the offending act.¹⁷ Here was a concept closely corresponding with Bentham's core expression of the need to proportion the pain of punishment so that it would 'outweigh the profit' of the offence. Also suggested in Hobbes was the idea that any pain of punishment which did not reach this required 'weight' could not then be called a punishment. In such a case, he said, the punishment rendered became only a 'hurt inflicted'. Similarly, for Bentham, this would be described as pain 'wasted', since it was incorrectly proportioned to the profit of the offence.¹⁸

Therefore, although we have Bentham's statement indicating his belief that Montesquieu was the originator of the emphasis on proportion, it is certain that

¹⁵ *IPML* (CW), p. 172 n. For Bentham's mention of Montesquieu and Beccaria as precursors to his own proportion theory, a paragraph from Bowring, i. p. 399, is generally offered. See Radzinowicz, *English Criminal Law*, pp. 384-5; H. L. A. Hart, 'Bentham's Principle of Utility and Theory of Penal Law, an interpretative essay', *IPML* (CW), p. cv. Since Bowring took his text from Smith's recension of Dumont's *Théorie des peines*, and it has yet to be established whether these are Bentham's words, it seems better to rely on Bentham's own reference in *IPML*.

¹⁶ 'Noxiae poena par esto' (let the punishment be equal with the offence), Cicero, *De Legibus*, BK. III, Ch. 20.

¹⁷ For this and following references to Hobbes, see *Leviathan*, ed. M. Oakeshott, Oxford, 1955, ch. 28, 'Of Punishments and Rewards'. Hobbes maintained here that the purpose of punishment was to deter future offences.

¹⁸ Hobbes stressed the need to inflict only the punishment determined by law, and any 'greater hurt' was deemed to be 'not punishment, but an act of hostility', *Leviathan*, p. 204. Thus, not only did he imply a type of proportion, but he also provided a clear consequentialist justification for the infliction of punishment, by saying that 'no pain [ought to be] inflicted without respect to the future good', *Leviathan*, p. 203. An intention to make the delinquent and others obey the law in future was therefore a crucial condition for Hobbes's definition of punishment.

‘proportion’ in punishment, in some sense, had a longer and more prominent English lineage than is perhaps indicated by Bentham’s own references.¹⁹ The nascent mechanistic view found in Hobbes suggested a use of penal proportion which can easily be followed into Bentham’s work.²⁰ And whilst Bentham never mentioned Hobbes in his punishment writings,²¹ in the depiction of legal action as a force of potential pain working against the opposite impelling forces of potential pleasure, the same conclusion was reached by both thinkers - that a certain *quantity* of punishment could be defined as both necessary and correct. The parallels with Bentham’s theory are strong in that the idea of proportion is crucial to both justifications of calibrated pain as ‘punishment’, and the argument was accordingly directed towards an ‘economic’ discussion of quantities of pain rather than concentrating on the more traditional debate regarding the appropriateness of specific *forms* of punishment.²²

Other thinkers also showed that proportionality was a subject discussed in England before the works of Montesquieu or Beccaria rose to prominence. In a little known work by Sollom Emlyn, for instance, the early advocacy of proportionality in punishment is found.²³ Yet Emlyn continued to make considerable use of religious justifications, particularly for his ardent defence of the death penalty, and his maintenance of connections between crime and sin revealed a continuing relationship with contemporaries who stressed elements other than proportion. With this connection with sin in mind (and Bentham’s desire to avoid the connection) it may be supposed that the fact that Hobbes was similarly blunt in his conviction that ‘[...] every crime is a sin’ may go some way towards explaining Bentham’s avoidance of any reference to Hobbes despite their obvious connections.²⁴

In comparison, Bentham’s discussion was sharply distinguished in its wholly secular

¹⁹ Beccaria also noted the pre-eminence of Montesquieu in this field, ‘The immortal President de Montesquieu touched hastily on this matter. Indivisible truth has compelled me to follow the shining footsteps of this great man’. See *On Crimes and Punishments*, p. 4.

²⁰ See also *Leviathan*, p. 94, where Hobbes said, ‘Therefore before the names of just, and unjust can have place, there must be some coercive power, to compel men equally to the performance of their covenants, by the terror of some punishment, greater than the benefit they expect by the breach of their covenant.’

²¹ Hobbes is occasionally mentioned in Bentham’s letters. See, for example, *The Correspondence of Jeremy Bentham*, vol. vii., ed. J.R. Dinwiddy, Oxford, 1998 (CW), pp. 25 and 136.

²² Bentham went even further by preferring the word ‘value’ to ‘quantity’ since, ‘the word *quantity* will not properly include the circumstances either of certainty or proximity’. *IPML* (CW), p. 169.

²³ Sollom Emlyn, *State Trials*, ‘Preface to the Second Edition of State Trials’, vol. i, (London, 1730). For further discussion see J. Beattie, *Crime and the Courts*, Oxford, 1989, p. 453.

²⁴ *Leviathan*, p. 190. Mandeville appears to be the first English advocate of a clear separation between crime and sin.

approach, already common amongst the progenitors of utilitarian thought. Men such as Hutcheson and Helvétius provided a considerable impetus for penal thinking which avoided any association with religious justification, and there can be little doubt that they paved the way for Bentham's extension of rational calculation and an 'economic' conceptualisation of offending behaviour.²⁵

3. The Thirteen Rules of Proportion and the Production of Milder Punishment

The development of specific rules for the purpose of proportioning punishments to offences is clearly Bentham's most obvious contribution to proportion theory and the devising of optimal policy in the response to crime. With nine of his rules he established the foundations for increases in amounts of pain provided as punishment.²⁶ Three others protected against excesses, with rules five and six limiting increases in pain, whilst rule twelve provided for a positive diminution. Finally, a thirteenth rule was offered which stressed that precise calculation was not required and small disproportions might be ignored. With this plan Bentham sought the formation of a mechanism for a calibrated assessment and application of pain that was simply unknown to earlier analyses.

The crux of the theory was an overwhelming emphasis placed on quantities of pain: [...] the four first, we may perceive, serve to mark out the limits on the side of diminution: the limits *below* which a punishment ought not to be *diminished*: the fifth, the limits on the side of increase: the limits *above* which it ought not to be *increased*.²⁷

Not only was this fifth rule, which limited the increase, of profound importance in Bentham's scheme for the reduction of punishments as observed in contemporary legal practice, but each of the first four rules added quantities of pain in such a way as constantly to preserve their increase relative to the perceived increase in the

²⁵ Francis Hutcheson maintained that 'right' action depended solely on material consequences, saying, 'That action is best, which procures the greatest happiness for the greatest numbers: and that worst, which in like manner, occasions misery'. See *Inquiry Concerning Moral Good and Evil*, 1726, pp. 177-7. Helvétius asserted that all men are driven only by self-interest, and their despotic tendencies must be checked by tangible motives: see *De l'esprit*, pp. 284-9.

²⁶ See *IPML (CW)*, Ch. 14, rules 1-4 and rules 7-11, pp. 166-171.

²⁷ *Ibid.*, p. 169.

severity of the offence.²⁸ Seeking such control in the infliction of pain revealed Bentham to be on common ground with a prominent strain of contemporary English reform thinking which can be seen represented in the use of Beccaria's work by men such as William Eden. Such writers were concerned with reducing the severity of punishments as applied under contemporary practice. For Bentham, following his economic model, more lenient punishment could only ever be expressed as a reduction in the quantity of pain linked proportionately to a new, lower assessment of the pain spread by the offence.²⁹ Less pain could only be justified once his theory of the distribution of pains had discovered the degree of harm done to be, in fact, lower than that conventionally assumed.

There were thus several theorists at this period writing in favour of more lenient systems of punishment and such thinkers were using a variety of theoretical approaches. Beccaria's and Eden's pro-leniency theories may be seen as precursors to Bentham, but only in terms of the attack on the destructive consequences of contemporary severities and in locating Bentham's relationship within the English debate where common support could be found for proportioning.³⁰ Bentham paid considerable attention to Beccaria's demands for milder punishments, although the simple concept of proportionality presented in Beccaria's vision of a fixed scale of punishments to offences was not reflected in Bentham's more variable embodiment of proportionality within his thirteen rules. With Beccaria, as with Eden, the basis for proportion was frequently sentimentalism - for Bentham this was an example of the erroneous establishment of political argument on principles of sympathy and antipathy.³¹ In some respects, therefore, Bentham's 'economic'

²⁸ One of the biggest criticisms of punishment was that the law provided no reasonable limits to its infliction, beyond the protection provided by Article 10 of the 1689 Declaration of Rights against excessive fines and cruel and unusual punishments. See L.G. Schworer, *The Declaration of Rights, 1689*, Baltimore, 1981, p. 86. Ignatieff has noted, however, that proportionality was exercised by victims, jurors and judges regardless of the law: 'obviously, a complex calculus ordered a prosecutor's, judge's, or juryman's conception of the proportionality of punishment to crime. We do not know enough about this calculus to explain why it changed during the eighteenth century'. *A Just Measure of Pain*, New York, 1978, pp. 19-20. Bentham's approach was closely connected with this popular desire for proportion.

²⁹ Spread in primary and secondary degrees – see Cost-Benefit Table above.

³⁰ For the English debate Francis Bacon was of great and continuing influence, not only for reform in terms of a Digest, but also as a precursor to eighteenth-century attacks on severity. 'For roughness, it is a needless cause of discontent: severity breedeth fear, but roughness breedeth hate.' See Francis Bacon, Essay XI, 'Of Great Place', *The Essays or Counsels Civil and Moral of Francis Bacon*, ed. A. S. Gaye, Oxford, 1911, p. 46. He was also popular across Europe. Indeed, Beccaria honoured him by placing a line from his essay 'Of Negotiating' on the title page of *On Crimes and Punishments*.

³¹ See UC xvii. 48, 'Antipathy on the side of lenity'. See also the first paragraph of UC xxvii. 60. Beccaria also used utilitarian arguments which unquestionably redeemed his analysis in Bentham's opinion.

response can be seen as a direct reply to the inadequacy of existing theory provided by prominent advocates of proportioned leniency.

Bentham was well aware of the potential charges against his system from such supporters of sentimentalism. He might be accused, he suggested, of offering a system fatally flawed on the grounds that the ignorant, or those roused by passion, did not calculate. To this he provided an emphatic response:

When matters of such importance as pain and pleasure are at stake[...] who is there that does not calculate? Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate. Passion calculates, more or less, in every man: in different men, according to the warmth or coolness of their dispositions: according to the firmness or irritability of their minds: according to the nature of the motives by which they are acted upon.³²

And although in an early manuscript Bentham outlined a distinction which suggested that poor men might be driven by ‘the physical appetite of hunger’ rather than by ‘the appetite for riches’, he still regarded such poor men as selecting courses of action on the blunt basis of profit and loss, though he emphasised that they may be ‘less qualified for the task’.³³ With such an understanding of the intrinsic nature of calculative, rational motivation, a system which itself emphasised calculation was not only suitable but, indeed, necessary. Consequently, Bentham formed a system in which more moderate punishments were deemed necessary on the basis of an application of logic rather than upon any sentimental or religious grounds. Appropriate quantities of pain, delivered by various punishments, were sought via an empirical assessment of the effectiveness of past punishments. The consequences of existing punishments were searched for their proven deterrent value, and a sense of mathematical precision was stressed throughout.³⁴

³² *IPML (CW)*, pp. 173-4. He added, as proof of the calculation of madmen, that, ‘There are few madmen but what are observed to be afraid of the strait waistcoat’. *Ibid.*, p. 174n.

³³ UC xxvii. 63. See also the fuller extract given at p. 24 below. Bentham stressed that all men do not calculate equally. The poorer men are, the more they are naturally driven by their physical appetites of lust and hunger and the less effective they are at calculating.

³⁴ See also UC xxvii. 24a, on calculation.

a) Leniency as Bentham 's Fourth Objective of Punishment

At every point during his discussion of proportion Bentham kept his attention on the prime goal of deterrence, as expressed in his objects of punishment, but here too we find an important and insufficiently analysed element.³⁵ The first three of his objects have often been discussed in previous commentaries, and of greatest importance for Bentham was the attempted prevention of all crimes - the first object of punishment. He also made it clear, as his second object, that if an offence was to be committed then the penal code must seek to prevent the worst; and thirdly, such a code ought to dispose the offender to keep the mischief caused down to a minimum. But of particular interest here is the fourth object of punishment, which stated that mischief must be prevented 'at the least expence', and the influence of Beccaria is profound, as Becker rightly noted.

Whilst it is possible to view this object in monetary terms, and this view is certainly encouraged by Bentham's use of the term 'cheap', it also provides a clear reference to his broader economic model for crime prevention. In this respect 'cheapness' meant nothing more than the 'least quantity of pain' possible, or in other words, as mild a punishment as possible. Thus, whilst the first three objects of punishment concentrated on prevention, his fourth object of punishment was leniency, assessed as minimum pain or indisposition to severity. Leniency was, therefore, one of four key goals for Bentham. And these four goals governed, collectively, the application of his rules of proportion:

Subservient to these four objects, or purposes, must be the rules or canons by which the proportion of punishments to offences is to be governed.³⁶

In accord with his objects, Bentham's first four rules established additions in pain to outweigh the profit of the offence, to move against the greatest offences, to encourage preferment of the lesser of two competing offences, and to assign additions of punishment for each particle of mischief found to have been spread. Much can be related to Beccaria here, and Bentham specifically referred to Beccaria

³⁵ *IPML (CW)*, p. 165.

³⁶ *Ibid.*

when he stated his first rule of proportion.³⁷ Although the equivalent expression of punishment ‘outweighing’ the profit of the offence is not to be found in Beccaria’s text, what is found is a justification of proportion expressed such that,

the obstacles that restrain men from committing crimes should be stronger according to the degree that such misdeeds are contrary to the public good and according to the motives which lead people to crimes.³⁸

Beccaria went on to offer a critique of notions of honour, vice and virtue as foundations for punishment which changed through the ages, and he called for the establishment of a ‘universal scale of punishments and crimes’. As Montesquieu had done earlier, Beccaria suggested that the same punishment for crimes causing differing degrees of harm was counter-productive.³⁹

Bentham incorporated Beccaria’s notion of proportion succinctly in his first rule that, ‘*the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence*’.⁴⁰ ‘Profit’, of course, suggested more than pecuniary gain, but referred once more to an encompassing conception of pleasure, or advantage, derived by the offender from the offence. Similarly, Bentham incorporated, in his second and third rules, the distinction between greater and lesser crimes as first discussed by Montesquieu.

Where Bentham made substantial developments in the understanding of proportion as a provider of leniency was with the fifth and sixth rules which, for the first time, established a limit to increases in pain. Whilst it was vital, as the fourth rule said, to ‘punish for each particle of the mischief’, the novel restraint on Bentham’s infliction of pain was given by the emphasis in his fifth rule, that prevention be secured with minimum pain. Thus, stressing the importance of his objective of leniency, Bentham said:

³⁷ See *ibid.*, p. 166. Bentham referred to section six of Morellet’s 1766 French translation, *Traité des délits et des peines*.

³⁸ Beccaria, *On Crimes and Punishments*, pp. 14-16. For Beccaria punishments were seen as ‘political obstacles’.

³⁹ *Ibid.*, p. 16, ‘If an equal punishment is meted out to two crimes that offend society unequally, then men find no stronger obstacle standing in the way of committing the more serious crime if it holds a greater advantage for them’. Compare Montesquieu, *The Spirit of the Laws*, bk. 6 ch. 16, pp. 91-2.

⁴⁰ *IPML (CW)*, p. 166.

The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*⁴¹

With this fifth rule of proportion the justification for *any* excess or severity in punishment was rejected.

Yet it was not only on rule five that the assessment of leniency within Bentham's theory depended. With the need to incorporate the essence of the more sentimental, or 'humanitarian', approaches of Beccaria and also, to some extent, that of Eden, Bentham provided for the protection of individual sensibility and circumstance within his rules of proportion. Thus, rule six stated:

*That the quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into account.*⁴²

The centrality of circumstances and sensibility were vital to Bentham's theory if he was to achieve the same end as Beccaria of protecting the individual within a logical system involving the assignment of pain. In practice Bentham indicated that this must involve delegating a considerable sphere of action to the judge. For, whilst his first five rules were intended to guide the legislator alone, with the sixth rule he attempted, quite specifically, to guide the judge, 'in his endeavours to conform, on both sides, to the intentions of the legislator'.⁴³ And the intentions of the legislator, as prescribed within the first five rules, were to inflict the mildest possible punishments which prevented mischief. Such concessions in favour of judicial interpretation stood in stark contrast to Beccaria's desire to avoid any leeway for

⁴¹ *Ibid.*, p. 169. He emphasised the importance of the fifth rule later when discussing the properties to be given to punishment, 'the punishment ought in no case to be more than what is required by the several other rules: since, if it be, all that is above that quantity is *needless*'. *Ibid.*, p. 175.

⁴² *Ibid.*, p. 169.

⁴³ *Ibid.*

judicial discretion.⁴⁴ Yet Bentham's inclusion of such discretion was essential to achieve the necessary scope to establish an economic, 'minimum' punishment as the standard.

b) The Calculation of Milder Punishment as an Aid to Deterrence

So far emphasis has been placed on the fourth object of delivering punishment at as cheap a rate as possible. In this sense minimum punishment was a key goal. However, this fourth object did not detract from, but supported, the first three objects which together aimed for prevention.⁴⁵ Once again, debts were incurred here to both Beccaria and Eden. Beccaria, in particular, relied principally on arguments concerning certainty to support his position, and to remove the need for pardons or exemptions. So he wrote, '[...] one of the greatest checks on crime is not the cruelty of punishments, but their inevitability'.⁴⁶ Importance was clearly placed on the sureness of the infliction of punishment on the guilty. William Eden argued similarly, but added that mildness in punishing protected the public virtue of all - victims, witnesses, juries and judges.⁴⁷ This emphasis on mildness was a development from the notion prominent in Montesquieu and Beccaria that harsh punishments corrupted the citizenry, and that once a citizen body was accustomed to severe punishments such severity no longer shocked them into obedience of the law.⁴⁸ The most damaging criticism of the deterrent power of severe punishment was provided by Beccaria when he noted how extremely difficult it was to maintain 'the essential proportion' between offences and punishments when severity was high, and that impunity arose from the very savagery of severe punishments.⁴⁹

Thus, 'economical' or mild punishments aided deterrence via their conduciveness to proportioning, and by their ease and certainty of application. The scope for graduated proportionality within Bentham's theory has been shown above to have

⁴⁴ See Beccaria, *Crimes and Punishment*, chapter 4, 'Interpretation Of The Law', where he reacted vehemently against the extreme judicial discretion characteristic of the Europe of his day. Such discretion was the product of the simultaneous operation of Roman law, local custom, royal decrees and judicial practice.

⁴⁵ It supported them only in the sense of emphasising the minimum necessary deterrent.

⁴⁶ Beccaria, *On Crimes and Punishments*, p. 46.

⁴⁷ In that under severe regimes 'jurors are taught to trifle with their oaths', and to lie by 'a kind of pious perjury', in order to protect minor offenders from grossly disproportionate penalties. Such behaviour was due, Eden said, to impulses of benevolence. With mild punishments there was no need for deceit, hence no-one was corrupted by the judicial process. *Principles of Penal Law*, pp. 268-70.

⁴⁸ Beccaria, *On Crimes and Punishments*, pp. 46-7.

⁴⁹ *Ibid.*, p. 46.

been considerable through his emphasis on calculative quantification; and although Bentham did not demand the removal of judicial freedoms, he clearly expected punishment always to be applied.⁵⁰ Judges were not free to recommend pardons. With Bentham, they simply had discretion to adjust the quantities of pain applied; yet this discretion was intended to allow better proportioning of punishment to offence, and hence improve the quality of the punishment as a deterrent for others. His objective of graduated, minimum pain therefore allowed, first, no reason for the restraint of prosecution on the part of both victim and jury, and second, the certain application of punishment, on the part of the judge.

The superiority of Bentham's system in its deterrent effectiveness relied completely on the accuracy of its calculative analysis of the quantity of punishment relative to the offence. As a standard rule Bentham held with the general dictum that 'the quantum of the punishment must rise with the profit of the offence'.⁵¹ However, determining the profit of the offence was by no means straightforward although, 'the profit of the offence *is* commonly more *certain* than the punishment'.⁵² To compensate for this accepted, but awkward fact, Bentham introduced three further rules within his theory of proportion which enabled additions to be made to the quantity of punishment:⁵³

[Rule 7] *To enable the value of punishment to outweigh that of the profit of the offence, it must be increased, in point of magnitude, in proportion as it falls short in point of certainty.*

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

[Rule 9] *Where the act is conclusively indicative of a habit, such an increase must be given to the punishment as may enable it to outweigh the profit not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.*

⁵⁰ To be applied, that is, where justification existed, i.e. not where the conditions for 'Cases unmeet for punishment' applied.

⁵¹ *IPML (CW)*, p. 167.

⁵² *Ibid.*, p. 169.

⁵³ Rules 7, 8 & 9. *Ibid.*, p. 170.

With these supplements to his first rule of proportion we find Bentham developing precise guidelines for an improved correlation between the values of both punishment and offence. In attempting to account for any mischief caused, and profit provided, by other likely offences of the same type, and in assessing whether an offence was indicative of a habit, Bentham substantially modified consequentialist proportion theory by extending his assessment beyond any single offence.

Yet these three further rules look as if they could easily tend towards gratuitous harshness; indeed, Bentham himself suggested that it may well be a ‘severe’ and ‘random’ way of calculating.⁵⁴ And although Bentham emphasised that the rules might only be used in certain cases, such as frauds of coin, where similar offences were almost guaranteed to have occurred without detection, one is still left with the sense that the allowance of a greater quantity of pain, than was *known* for certain to be justified, did provide grounds for excessively severe pain. This sense is only increased by rules ten and eleven which stated that if a quality, or mode, of punishment is especially appropriate, and particularly if this is well calculated to provide a ‘moral lesson’, then quantity could again be increased.⁵⁵ Accordingly, his closely calculative theory of proportion seems undermined, and with it any pursuit of leniency. However, in the manuscripts, Bentham can be found to suggest that:

If the rules of evidence be clear from over-scrupulous subtleties, if the system of procedure be simple, and the administration of Justice pure, a small quantity of punishment is enough to make up that deficiency of force which results from the uncertainty of execution.⁵⁶

The point to note is that only a small quantity of additional pain was envisaged within the supplements to punishment provided by rules seven, eight and nine above. The implication is, that the additions from these rules, for unknown elements in the calculation of punishment, are to be substantially less than the quantities of pain justified by the first and most important rule.

Yet, though the manuscript in question gives some clarification on this issue of supplementary pains, it raises new problems not treated in *IPML*. Whilst it seems to

⁵⁴ *Ibid.* This suggestion provided material for those who suggested that Bentham continued to favour severe punishments: see Radzinowicz, *English Criminal Law*, p. 391.

⁵⁵ Here Bentham seems to revert to giving undue weight to the manner of the offence, rather than the manner of the motives.

⁵⁶ UC xxvii. 63. Sheet headed ‘Common Measure’, uncertainly dated, but probably 1777.

be the case, in theory, that Bentham argued for only small quantities of punishment to be needed to achieve a deterrent effect, in practice it was shown to be more complicated. An important distinction is introduced with the claim that there is a significant difference in deterrent effect of a given lot of punishment when faced with various motives to offend.

It is clear that in Bentham's early penal theory a particular amount, or mode, of punishment had a better chance of deterring when it operated against what he described as the appetitive motive of 'amour' or 'affection', rather than when confronted with, say, a motive of physical desire or ill-will. Thus he remarks:

There are some appetites which are circumspect and reflective; such are the appetites for riches for power, and for honour. There are others which are precipitate and blind, such are the physical appetites (of lust and hunger) and the appetite of revenge. The former can be combated with much more advantage than the latter: with much greater probability of success [...]

The poorer a man is, the nearer is the appetite for riches to the physical appetite of hunger: it is the more precipitate: it is the less qualified for the task of calculation. On this account it is necessary to be severer against crimes of indigence than against crimes of avarice although the nominal profit to the criminal and the mischief to the party injured be to the same amount in the one case as in the other.⁵⁷

The implications of this passage appear far-reaching. What is of interest here is the considerable emphasis placed on the principle that quantities of punishment restrain motives, rather than prevent specific offences. The countering of various motivating forces, on the economic model, was given new importance in this calculation of punishment.⁵⁸ But recognition was also given, for the first time, to the entirely inconsistent deterrent ability of a given quantity of punishment when faced with a

⁵⁷ UC xxvii. 63.

⁵⁸ This was a considerable distance from Beccaria's understanding, which suggested a fixed scale of punishment to offence and appeared unable substantially to accord with motivating circumstances in particular instances. Eden, on the other hand, did appreciate something of the variety of forms of motivation, since he called for the legislator to put himself in the situation of the offender, and to take account of the offender's circumstances before assigning punishment. Yet he could only offer vague, incalculable sympathy in response.

variety of motivating ‘appetites’.

This appreciation of the varied effects of a given lot of punishment on distinct motives produced a number of difficulties for Bentham. By linking economic weakness, i.e. poverty, with essentially ‘precipitate’ motives to offend, Bentham assumed that the poor must be driven by stronger motives, and hence would require a greater threat of punishment to prevent them from offending. So he envisaged a situation where the same offence might be committed simultaneously by an indigent poor man and by a middle-class man, and where they might both receive the same quantity of profit of pleasure. However, not only would they require different quantities of punishment, but, as the quote above emphasised, the indigent man ought generally always to receive the more severe. As the quantity of punishment had to rise with the profit of the offence, so it must also apparently rise with the involvement of ‘precipitative’ physical appetites.

This concept holds damaging implications for the presentation of Bentham’s theory as one which supports leniency. Since the most prosecuted group of individuals, the poor, are hereby prescribed greater quantities of pain than their better-off compatriots, it appears that the continued concentration of severity upon the most disadvantaged sections of society is not only countenanced but justified. And although Bentham’s twelfth rule of proportion operates to reduce quantities of pain, by allowing for circumstances to prove punishment for any crime to be unprofitable, the weight given to the physical, ‘precipitate’ motives of hunger and lust apparently removes all hope of any general leniency for the poor within his penal model.

However, Bentham spent much time considering motivation, both in psychological and economic terms, and it is clear from the structure of his theory, as presented in *IPML*, that many ideas and positions were well established before he came to consider the application of his rules of proportion. Of particular importance was the chapter on dispositions, for it was on the basis of this element only, that motives otherwise requiring severe pain for their restraint might be said to be deterred by a lesser.⁵⁹

Thus, when considering in what proportion an offence was to be punished, Bentham took the following three aspects into account, and apparently in the following order:

⁵⁹ See Ch. 11 in *IPML* (CW).

1. the quantity of pain inflicted on society by the offence
2. the quantity of profit received by the offender
3. the disposition of the offender

It can be seen that his thirteen formal rules of proportion dealt essentially with the second aspect in that their prime object was to outweigh the profit of the offence at minimum expense; they also dealt with the first aspect by emphasising that every particle of mischief must receive a quantity of punishment. These thirteen rules did not, however, bear any relation to the third aspect, that of the disposition of the offender. Yet, his theory of proportion had also to incorporate increments of pain relative to the nature of the offender's disposition if this was found to be 'bad'. Here we find a conceptual separation between motivation, intention, disposition and the rules of proportion, with 'disposition', in particular, referring to a manner of reaction to motives. The notion of disposition thus becomes closely linked to the idea of individual 'character' and its goodness or badness as reflected in, and identified by, the response to the force of motives and their restraining sanctions. If 'disposition' was found to be other than positively 'bad' then this aspect would provide grounds for restraint in punishment. It is suggested therefore, that it was emphasis on this element which prevented Bentham's logical addition of quantities of punishment from uncontrollably undermining his interest in greater leniency, especially for the indigent poor.

4. The Role of 'Disposition' in the Reduction of Legal Punishment

As an integral part of Bentham's discussion of human dispositions he confronted the problem of how to assess the depravity of an offender, and how to account for this 'anti-social' aspect of character within his economic model. In the late eighteenth-century debate this question of depravity revolved around, and was inextricably linked with, the question of how temptation should be dealt with in any theory of proportioned punishment.⁶⁰

The problem of a reduction in blame when accompanied by an increase in temptation was a peculiarly English development. It was not prominent in Beccaria's discussion, yet William Blackstone, an important disciple of Beccaria in

⁶⁰ Blackstone sought increases in punishment for increases in temptation. Eden, on the other hand, sought proportionate reductions in punishment in relation to increases in temptation.

some respects, spent much time considering the question. And William Eden, once again, is seen to confront the problem of temptation in suggesting that the ‘malignity’ of an offence should be established before assigning punishment.⁶¹ Eden’s analysis has further been contrasted with the approaches of Blackstone and William Paley, both of whom sought in varying ways to justify severe punishments, as they too drew conclusions of depravity from the susceptibility to temptation.⁶² However, both Blackstone and Paley argued that the category of offence took precedence over the motives of the offender, and over the consequences of his actions. Hence the most tempting offences, that is to say, those which were most easily committed and most difficult to detect, ought to be assigned the severest punishments. Eden’s analysis was, conversely, exceptional in its valuation of the particular circumstances of individual offenders, and in its demand for a clear reduction in punishment in proportion to any increases in temptation, and there are clear connections to Bentham’s thinking here.⁶³

Bentham unmistakably engaged with this debate when he assumed ‘disposition’ to be associated with the question of temptation.⁶⁴ Incorporating this into his model he regarded a disposition to be either beneficent or depraved, and his position of the late 1770s was summed up in *IPML* as follows:

So far then as the absence of any aggravation, arising from extraordinary depravity of disposition, may operate, or at the utmost, so far as the presence of a ground of extenuation, resulting from the innocence or beneficence of the offender’s disposition, can operate, the strength of the temptation may operate in abatement of the demand for punishment. But it can never operate so far as to indicate the propriety of making the punishment ineffectual, which it is sure to be when

⁶¹ Eden, *Principles of Penal Law*, p. 10.

⁶² Radzinowicz is one amongst many to have noted the variety of views on punishment in relation to an increased temptation to offend. *English Criminal Law*, p. 250 and p. 385.

⁶³ Eden’s argument was that tempting crimes showed less depravity, and consequently deserved less punishment. It was Eden’s view - against the accepted understanding of the law as expressed by William Blackstone - that the application of Beccaria’s theory of proportion in punishment could provide for no other conclusion. It was inherently unjust to punish more severely those who committed the simplest and most tempting crimes.

⁶⁴ This can be seen in a number of texts. See *IPML (CW)*, Ch. 11, and p. 138 in particular, where Bentham discussed, ‘what is to be understood by the *strength of the temptation*, and what indication it may give of the degree of mischievousness in a man’s disposition in the case of any offence’.

brought below the level of the apparent profit of the offence.⁶⁵

Here, Bentham clearly stated his rejection of Blackstone's and Paley's calls for automatic increases in punishment with increases in temptation; and in this sense Bentham can be said to follow Eden's line of thinking, though with an economic justification attached to any reduction of punishment in relation to temptation. Nevertheless, Bentham placed a strict limit on the extent to which temptation could be used to reduce punishment - it ought never to fall 'below the level of the apparent profit of the offence'. Here we see that although disposition must be taken into account, it was not of prime importance; it must follow a calculation of mischief spread, and a valuation of the profit of the offence. Nonetheless, a basis was provided for the reduction in punishment.

However, paradoxically, the above text, which supported the strength of temptation as a ground of abatement, apparently contradicted the analysis given just one sentence earlier:

The strength of the temptation, *cæteris paribus*, is as the profit of the offence: the quantum of the punishment must rise with the profit of the offence: *cæteris paribus*, it must therefore rise with the strength of the temptation. This there is no disputing.⁶⁶

Clearly there is ample room for confusion. Bentham's position in regard to this issue has been closely discussed by both Elie Halévy and Leon Radzinowicz; but although they ultimately conclude that Bentham's theory does allow for some, limited extenuation of punishment upon certain occasions of increased temptation, they remain unconvinced that Bentham sought any substantial reduction on these grounds.⁶⁷ Radzinowicz, for instance, has taken Bentham's position to mean that:

penalties should be adjusted to every degree of temptation, but the courts should have the power to mitigate them in cases where the presence of temptation indicates the absence of a confirmed depravity,

⁶⁵ *IPML (CW)*, p. 167.

⁶⁶ *Ibid.*

⁶⁷ They also remain uncertain as to how to specify exactly which occasions may qualify for mitigated punishment.

or where the offence has been committed under the influence of a benevolent stimulus.⁶⁸

In other words he sees Bentham's argument as being in favour of reducing punishments. Elie Halévy, however, reflecting the quote from *IPML* above, begins his analysis by saying that Bentham thought, 'punishment must increase with the profit from the crime; therefore, other things being equal, it should increase, [...] with the strength of the temptation.'⁶⁹ Halévy acknowledges the fact that Bentham knew this appeared harsh and he sees that Bentham made an allowance for the element of temptation, 'so as to lessen the punishment in so far as the stronger influence of a slight temptation indicates a worse disposition in the agent.'⁷⁰ But Halévy emphasises that this is to be seen as an exception, and must not be 'confused with the rule'. He continues:

To say that the proof of a depraved disposition is less conclusive is not to say that the depravity is less. For in spite of contrary indications it is always possible that the crime would have been committed even if the temptation had been less strong. The attenuating circumstance is only a matter of presumption; the crime is a matter of certainty.⁷¹

It seems Halévy is suggesting that it will be a rare occasion when an increase in temptation will actually lead to any attenuation of punishment. It does sometimes appear possible to doubt whether Bentham's theory will actually lead to any mitigation at all. In summing up the use of his chapter on human disposition, for instance, Bentham said:

The depravity of disposition, indicated by an act, is a material consideration in several respects. Any mark of extraordinary depravity, by adding to the terror already inspired by the crime, and by holding up the offender as a person from whom there may be more mischief to be

⁶⁸ Radzinowicz, *English Criminal Law*, p. 385.

⁶⁹ Halévy, *Philosophic Radicalism*, p. 69. Compare *IPML (CW)*, p. 167.

⁷⁰ Halévy, *Philosophic Radicalism*, p. 69.

⁷¹ *Ibid.*

apprehended in future, adds in that way to the demand for punishment.⁷²

This implies that any indications of extra depravity should produce an *addition* to the quantity of punishment, which is something very different from looking for ways of reducing punishment. It does not seem difficult to extend this calculation of depravity, especially if deemed to be an ‘extraordinary depravity’ as above, to conclude that the least likely effect of assessing disposition in Bentham’s terms would be any reduction in punishment applied.

Similarly, Radzinowicz has also argued, despite his earlier comments given above, that Bentham was in accord with Blackstone in supporting the punishing of the most tempting crimes more severely so that the principal goal of deterrence be achieved. He says, that Bentham, ‘suggests that punishment should be increased in proportion to the temptation, irrespective of the gravity of the offence’.⁷³ Clearly there has been great uncertainty amongst commentators regarding Bentham’s precise meaning.⁷⁴ Radzinowicz tried to clear the confusion by sharply stating that what it all indicates is that Bentham was, ‘by no means in favour of lenient penalties’.⁷⁵ Both commentators agree that there is a theoretical basis for the mitigation of punishment on the basis of increased temptation, but it is reckoned, in practice, to be more an exception rather than a rule, and an exception to be governed only by judicial discretion.

It is certain, at least, that it would be claiming too much to say that Bentham was against lenient sentences. He clearly states that deliberately mild punishments were

⁷² *IPML (CW)*, p. 141.

⁷³ Radzinowicz, *English Criminal Law*, p. 391. Radzinowicz had also earlier said, ‘When, owing to a combination of circumstances, the temptation to commit a certain crime is particularly great, the punishment should be correspondingly more severe’: *ibid.*, p. 384. And, likewise, he notes Bentham’s comment in *IPML* that, ‘To say, then, as authors of great merit and great name [Beccaria and Eden] have said, that the punishment ought not to increase with the strength of the temptation, is as much as to say in mechanics, that the moving force or *momentum* of the *power* need not increase in proportion to the momentum of the *burthen*’: see *IPML (CW)*, p. 166n. Radzinowicz continues, ‘Paley and Blackstone both considered increased temptation a reason for enhancing the severity of the punishment. Eden objected both to an increase and a mitigation’. See *English Criminal Law*, p. 384. This, however, seems wrong since Eden objected only to an increase.

⁷⁴ Hart also finds Bentham’s views on temptation to be apparently contradictory: ‘For Bentham a strong temptation points in two opposite directions: on the one hand it shows that the offence manifests a less generally maleficent disposition needing less to correct it than the same offence committed for some trivial gain. So punishment may in principle be abated on this account. But it must never be lowered to the point at which it fails to outweigh the apparent profit; if it does the offender will be punished to no purpose and his punishment will be so much useless cruelty[...]’. See H. L. A. Hart, ‘Bentham’s Principle of Utility and Theory of Penal Law’, an interpretative essay, *IPML*, (1996), pp. cv-cvi.

⁷⁵ Radzinowicz, *English Criminal law*, p. 391.

cruel to both offender and the public at large:⁷⁶

The partial benevolence which should prevail for the reduction of it below this level, would counteract as well those purposes which such a motive would actually have in view, as those more extensive purposes which benevolence ought to have in view; it would be cruelty not only to the public, but to the very persons in whose behalf it pleads [...] Cruelty to the public [...] by suffering them, for want of adequate protection, to lie exposed to the mischief of the offence: cruelty even to the offender himself, by punishing him to no purpose.⁷⁷

However, believing it cruel to be positively mild is not at all the same thing as being outrightly opposed to milder punishments. From his economic perspective his only prerequisite was that the minimum pain of the punishment must outweigh the profit of the offence. And he defended this position against those who regarded this a harsh tenet, saying, ‘the above rule has been often objected to, on account of its seeming harshness: but this can only have happened for want of its being properly understood’.⁷⁸ On the question of quantities of pain in general he said quite simply in the *Traités*:

The question is not whether a penal code is more or less severe; this is a bad way of looking at the subject. The whole question can be reduced to judging whether or not the severity of the code is necessary.⁷⁹

It is more appropriate to say, then, that Bentham did not agree with Eden in supporting lenient sentences simply because they were lenient, but that he did agree with Eden in regarding existing systems of punishments to be inhumane in their lack of proportion; consequently he sought to establish a far closer proportioning of punishment to

⁷⁶ In his discussion of human dispositions Bentham concluded that: ‘[...] the aversion we find so frequently expressed against the maxim, that the punishment must rise with the strength of the temptation; a maxim, the contrary of which, as we shall see, would be as cruel to offenders themselves, as it would be subversive of the purposes of punishment’. *IPML (CW)*, p. 142.

⁷⁷ *Ibid.*, pp. 167-8.

⁷⁸ *Ibid.*, p. 167.

⁷⁹ ‘Rationale’, Bowring, i. p. 398.

offence.⁸⁰

Ultimately then, Radzinowicz is mistaken in grouping Bentham together with Blackstone simply because they both mention that punishment ought to be greater for more tempting crimes. Bentham did not argue, as Blackstone and others did, that tempting crimes demanded greater punishments because they were easy to commit. Neither did he say that the most tempting crimes should be severely punished because they were more difficult to prevent. His argument for all crimes was the same. They will only be prevented once the pain of punishment outweighed the profit of the offence. He took the view that neither too great nor too small a punishment was required, but only one correctly measured.

To move the debate beyond the analysis of Halévy and Radzinowicz it is necessary to return to the manuscripts.⁸¹ Here Bentham expressed the desire that those of good disposition ought not to be punished more severely solely because they were exposed to temptation. In the sense that ‘beneficence’ might be seen as a characteristic of individual disposition, Bentham’s use of the concept of ‘good’ disposition here appears very close to the conventional notion of individual virtue.⁸² Indeed, where Eden spoke of virtue, Bentham suggested beneficial conduct.⁸³ Disposition is thus linked closely to intentionality. Yet still this was pursued in economic terms: if an individual’s actions had no intention of harming society, or if they positively meant to benefit society, then, although harm might be unwittingly produced, the disposition had to be good or ‘beneficent’. Although such actions could not be encouraged, at the very least they could be taken to show the absence of any future threat from the offender.

The Nature of Disposition as an Indicator of Future Mischief

This future threat was of key importance for Bentham’s theory. To make sense of his analysis we must examine the model of the ‘shapes of mischief’ discussed in the chapter on the ‘Consequences of a Mischievous Act’ in *IPML*.⁸⁴ Using his

⁸⁰ As Halévy rightly says, ‘It is true that Bentham happens to find himself in agreement[...] with the sentimentalists when he denounces the excessive severity of punishments. But an agreement about principles must not be inferred from a partial agreement about conclusions’. *Philosophic Radicalism*, p. 74.

⁸¹ And to UC xxvii. 60-3 in particular.

⁸² On the connection between good disposition and beneficence see Bentham’s quote at page 29 above.

⁸³ See the discussion of disposition at *IPML* (CW), p. 167.

⁸⁴ For a fuller account see A. J. Draper, “‘To Exclude Some Greater Evil’: Distributions of Pain in Bentham’s Theory of Punishment”, *Contemporary Political Studies*, 1998, ed. A. Dobson and J. Stanyer, Nottingham, 1998, pp. 269-78.

understanding of the ‘danger’ of future pain, Bentham reassessed disposition, in cases of high temptation, in terms of its indication of a potential future threat to the community. Bentham established that a divided assessment of the future threat must be made when seeking grounds for a reduction in the levels of punishment. Thus we find in the manuscripts a distinction between a ‘general’ and a ‘particular’ future threat. Of the individual offender of ‘less bad’ disposition Bentham believed it could be said that:

It is certain also that as far as he alone is concerned there is the less reason, even on the principle of utility for punishing him: for there is the less reason to apprehend that in his disposition the selfish or dissocial affection will in the general tenor of his conduct maintain an undue ascendance over the social [...] Now in proportion as the temptation is strong, the less depraved is it necessary a man’s disposition should be in order to admit of his yielding to the temptation [...] in proportion therefore as the temptation is strong, the less has the community to fear from the general behaviour of the delinquent, abstracted from his behaviour in the particular sort of case in question.⁸⁵

With high temptation indicative of less depraved disposition, society had less to fear from the *general* behaviour of an individual. Hence Bentham could support the argument of theorists such as Eden who believed that high temptation demanded more lenient punishment. Thus Bentham gave the following example:

A man with a numerous family of children, on the point of starving, goes into a baker’s shop, steals a loaf, divides it all among the children, reserving none of it for himself. It will be hard to infer that that man’s disposition is a mischievous one upon the whole.⁸⁶

In general it could be said that such a man would only give in to the temptation to steal when his family was on the point of starvation, and this was done in an extra-regarding manner, i.e. he ate none of the stolen bread himself. Bentham’s model assessed this act to be of little threat to society and a reduction in punishment could

⁸⁵ See UC xxvii. 60.

⁸⁶ *IPML (CW)*, p. 128.

be justified. To emphasise the point Bentham gave a further example:

Alter the case, give him [the man with the family] but one child, and that hungry perhaps, but in no imminent danger of starving: and now let the man set fire to a house full of people, for the sake of stealing money out of it to buy the bread with. The disposition here indicated will hardly be looked upon as a good one.⁸⁷

Clearly, in this case, the temptation is in no way as extreme as the first, and the action taken is directly harmful to others in a considerable degree. The general threat from an individual prepared to take such action was considered to be high, and a correspondingly high threat of punishment was required to counter such an offence.

But it was also established that, as far as the *particular* behaviour of both offenders in the examples were concerned, they were extremely likely, perhaps even certain, to succumb to future temptations similar to the ‘particular sort of case in question’. The crucial importance of this point was carried to a logical conclusion with the suggestion that ‘as often as a temptation of the magnitude in question falls in his way, so often will he committ the offence in question’. Hence Bentham also claimed that:

If then it be seriously intended to find a stop to the offence in question it is evident that an addition must be made to the punishment; and that not in the inverse proportion to the strength of the temptation.⁸⁸

Bentham continued, saying that to do otherwise would be cruelty to both the community and to the offender, thus, apparently neutralising once again his earlier argument that temptation recommended abatement of punishment.

This divided approach to the assessment of offences of strong temptation exemplifies the way Bentham’s theory was able to tackle existing questions in a new fashion. But it also shows how the complexity introduced by such an appreciation of positive and negative social value necessarily removed the possibility of establishing any simple line of argument in respect of temptation. He could never provide a fixed

⁸⁷ *Ibid.*, pp. 128-9.

⁸⁸ UC xxvii. 60.

rule which demanded either an increase or a reduction when faced with high temptation. Commentators have clearly had difficulty in reconciling the conflicting ideas Bentham presented on this point. Yet consistency is provided in both his manuscripts and published work.

On the one hand, from the ‘general’ perspective Bentham argued that society had little to fear from the individual who succumbed to an offence of high temptation. On the other hand, from the ‘particular’ view, he was certain that society had a great deal to fear from the same offender. By dividing his analysis, and producing such a dual assessment of the future threat from offenders lured by high temptation, Bentham found grounds for supporting both a reduction and an increase in any corresponding punishment. This does not imply, however, that one cancels out the other, for the quantities involved always vary.

The problem for Bentham was that as long as there remained the chance of a similar temptation reoccurring, the political sanction had to take some action to prevent it. It was certainly not free to remit punishment altogether as he believed was the case as far as the moral sanction was concerned.⁸⁹ Again Bentham was in accord with William Eden, for even Eden never suggested that offences of high temptation ought to go unpunished altogether. With division into a ‘general’ and ‘particular’ threat, it seems plain that Bentham’s theory was able to establish a considerably reduced threat from such offences. For, since the greater threat must come from ‘general’ behaviour, once this was detached from the specific ‘particular’ threat, it was indeed possible for Bentham to argue for the imposition of a lower quantity of pain as punishment.⁹⁰ The obvious problem for Halévy and Radzinowicz, in deciding which occasions were appropriate for mitigated punishment and which were not, is resolved. In Bentham’s penal theory any mitigation on the basis of temptation depended solely on the establishment of an absence of any ‘general’ threat from the behaviour of the offender, and this rested, predominantly, on an identification of the ‘disposition’ of the offender as ‘good or beneficent’.

Thus, individual disposition was assessed by Bentham in terms of its inclination to produce future pain within society, and therefore formed the last of the three key aspects in Bentham’s theory of proportion. With his rules of proportion he provided a

⁸⁹ See UC xxvii. 60, where a sharp contrast is drawn between the moral and political sanctions in cases of high temptation.

⁹⁰ *Ibid.*

calculative model which sought restraint in punishment, and he attempted to provide a method, framed in economic language, for justifying the milder punishment of those driven to crime by circumstances where no positive indication of depravity was found. In this way Bentham established a means for valuing the popular, often sentimentally provoked, call for a reduction in severity of punishment for simple, tempting crimes, and developed a detailed analysis for the calculation of depravity.

Concluding Remarks

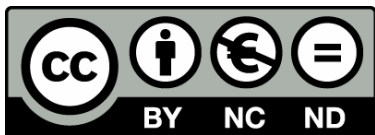
Becker was very much aware, in 1968, that an ‘economic’ approach to crime and punishment might prove distasteful to his readers, and he sought to calm any concerns provoked by the ‘apparent novelty of an “economic” framework for illegal behaviour’ by making clear that both Beccaria and Bentham had ‘explicitly applied an economic calculus’ to these subjects some two hundred years earlier.⁹¹ This essay has attempted to illustrate how the intellectual heritage for an ‘economic’ perspective on crime and punishment is far richer than even Becker supposed, and that with Bentham’s analysis it reached a new level of sophistication and development.

Economic assessments form the root of consequentialist thinking about all social policy and this discussion has sought to identify how comprehensive such thinking can be when focussed on a particular issue. Bentham developed a subtle and sophisticated method for the assessment and application of punishment in terms of benefits and burdens. He was perfectly aware that the precision demanded by such a theory could never be achieved in practice. Indeed, any theory which attempted to account for quantities of pain inflicted on a population at large, made up of ‘unassignable’, that is entirely unknown, individuals could never achieve total precision in quantification. Yet Bentham realised an assessment of such distributed pains had to be attempted if an effective system of deterrence was to be achieved by the imposition of legal punishment.

Becker’s own analysis has certainly raised an awareness of the ideas of Bentham and Beccaria amongst contemporary economists, and Becker’s mathematical

⁹¹ Becker, ‘Crime and Punishment: An Economic Approach’, p. 209.

skills and novel applications enabled him to unlock some of the conceptions grasped at by Bentham. Yet, in terms of the value of crime for criminals, and the coherence of an ‘economy’ of deterrent threat from legal punishment, more remains to be done and further exploration of Bentham’s economic model of analysis is undoubtedly necessary if the full implications of his ‘pioneering studies’ are to be recognized.⁹²



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⁹² *Ibid.*