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BENTHAM'S UTILITARIAN CRITIQUE OF THE DEATH PENALTY

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I. INTRODUCTION

During a long and productive life, Jeremy Bentham (1748-1832) twice undertook to apply his general utilitarian principles of punishment to a critique of the death penalty.¹ The earlier and by far the more thorough effort was in 1775, when at the age of twenty-seven he provided an extensive discussion of capital punishment in two chapters of Book II of his *Rationale of Punishment*.² This 1775 essay (as I shall henceforth refer to these chapters) contains about eight thousand words and is

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¹ For a general survey of Bentham's theory of punishment, see L. RADZINOWICZ, 1 A HISTORY OF ENGLISH CRIMINAL LAW: THE MOVEMENT FOR REFORM 1750-1833, at 355-96 (1948). Only two pages are devoted to Bentham's critique of the death penalty. *Id.* at 389-91.

² Etienne Dumont, the editor of Bentham's works in French, is quoted as having said that "the manuscripts from which I have extracted *La Théorie des Peines*, were written in 1775." J. BENTHAM, THE RATIONALE OF PUNISHMENT 4 (1830). Professor H.L.A. Hart, however, implies that Bentham was still working on this text in 1777. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION xxxviii (J. Burns & H. Hart eds. 1970) [hereinafter cited as INTRODUCTION].

Not published until 1811, and then only in French, this book did not appear in English until 1830. This English text was edited and translated from the French of Dumont's by Richard Smith. INTRODUCTION, *supra* note 2, at 158 n.1. The French and English texts are not identical; Smith observed that "I have freely used the rights of an Editor— . . . I have translated, commented, abridged, or supplied . . . [text in order to] present . . . as faithfully as the nature of things will permit, the work of Mr. Bentham." J. BENTHAM, *supra*, at 5.

Today, it is most readily available in the Bowring edition of Bentham's works, published in 1838, in which the *Rationale* is reprinted in its entirety. 1 THE WORKS OF JEREMY BENTHAM 388-525 (J. Bowring ed. 1843) [hereinafter cited as WORKS]. In this edition, the definite article was dropped from the title of *The Rationale*, a practice I shall follow. Future page references in the text and notes to the *Rationale of Punishment* (hereinafter cited as *Rationale*) are to this version of the text. Bowring reprinted the *Rationale* not as a separate book but as though it were merely a part, viz, Part II, of a larger work of Bentham's titled PRINCIPLES OF PENAL LAW. 1 WORKS, *supra*, at 365-580.

Unfortunately, the *Rationale* has not so far been published in the definitive Athlone Press edition of Bentham's *Collected Works*, and so we still lack a critical text of this treatise. THE COLLECTED WORKS OF JEREMY BENTHAM (J. Burns ed. 1968). After publication of the first five volumes out of over three dozen announced, the project has been indefinitely suspended for want of funds.

divided into two parts of unequal length and importance.³ The first and briefer of the two (Chapter XI, "Capital Punishment") is devoted largely to explaining the distinction between "simple" and "afflictive" death penalties, and to a severe criticism of the latter.⁴ The second and more important part (Chapter XII, "Capital Punishment Examined") is about two-thirds of the whole; here Bentham argues his case against the death penalty on utilitarian grounds. I propose to concentrate on his remarks in this chapter in what follows.

Bentham's second, and distinctly less instructive, discussion of the same subject, was written in the last year or so of his life. Entitled "On Death Punishment" and styled as an essay by "Jeremy Bentham to His Fellow Citizens of France,"⁵ it was published in mid-1831.⁶ First pub-

³ 1 WORKS, *supra* note 2, at 441-50. For all quotations in my text and notes from this source, I henceforth indicate page and column numbers, respectively, by three digits to the left and one to the right of the decimal.

⁴ By "afflictive" death penalties, Bentham means a death preceded by aggravations and tortures, as for instance was provided by law in England for the punishment of "high treason." Here is how he described the "afflictive" punishment of death for "high treason:"

1. Dragging at a horse's tail along the streets from the prison to the place of execution;
2. Hanging by the neck, yet not so as entirely to destroy life;
3. Plucking out and burning of the entrails while the patient is yet alive;
4. Beheading;
5. Quartering; and
6. Exposure of the head and quarters in such places as the king directs."

1 WORKS, *supra* note 2, at 443.2.

He adds, "This mode of punishment is not now in use." *Id.* His strongest criticism, however, is directed at the "afflictive" death penalty then in use in the British West Indies, "by far the most severe punishment ever yet devised by the ingenuity of man." *Id.* Here is his description:

The delinquent is suspended from a post by means of a hook inserted under his shoulder, or under his breast bone. In this manner, the sufferer is prevented from doing anything to assist himself, and all persons are prohibited, under severe penalties, from relieving him. He remains in this situation, exposed to the scorching heat of the day, where the sun is almost vertical, and the atmosphere almost without a cloud, and to the chilling dews of the night; his lacerated flesh attracts a multitude of insects, which increase his torments, and under the fever produced by these complicated sufferings, joined to hunger and thirst, all raging in the most intense degree, he gradually expires.

Id. Bentham adds that this punishment is reserved for "negro slaves" guilty of "rebellion." *Id.*

Those who think of Bentham as a rationalistic eccentric and of utilitarian ethics as coldly calculating should read the next two paragraphs in which Bentham excoriates his fellow countrymen for tolerating such "atrocious" penalties. *Id.* at 444.1. He ends with this challenge: "Let the colonists reflect upon this: if such a [penal] code be necessary, the colonies are a disgrace and an outrage on humanity: if not necessary, these laws are a disgrace to the colonists themselves." *Id.* at 444.1-44.2.

⁵ *Jeremy Bentham To His Fellow-Citizens of France, On Death Punishment* (London 1831), in 1 WORKS, *supra* note 2, at 525-32. Radzinowicz gives 1830 as the date and composition of first publication. L. RADZINOWICZ, *supra* note 1, at 390 nn.33 & 39.

⁶ Bentham mentions December 17, 1830, in an opening footnote to his essay, *see* 1 WORKS, *supra* note 2, at 525, but the context suggests that this date is probably prior to the date of composition. At the end of the essay he appends a reprint of an article on the death penalty from a London newspaper, *The Spectator*, dated May 28, 1831; the article appeared,

lished as a pamphlet of a dozen pages, the essay would quite probably be unavailable today had it not been conveniently reprinted by Bowring in his edition of Bentham's works as an appendix to Book II of the *Rationale of Punishment*.⁷ It is about as long as the second and larger part of the 1775 essay. The style, however, is distinctly inferior, marked with frequent use of the somewhat telegraphic and elliptical nonsentences in which Bentham increasingly wrote toward the end of his life. The 1775 discussion is written in a manner suitable to what it is, a special application of the general principles argued in the earlier chapters of the *Rationale*; the 1831 essay (as I shall henceforth call it) reads almost like an extended piece of correspondence,⁸ with an informality and relative lack of structure that sharply contrasts with the style of Bentham's major treatises. Moreover, as we shall see, the argument against the death penalty itself is unbalanced, even warped, by a peculiar emphasis on what must be judged to be a quite ancillary consideration.⁹

Despite these shortcomings, the 1831 essay does mark a development in Bentham's settled thoughts on the subject in at least one important respect. In his 1775 essay, a few paragraphs from the end, Bentham verges on making a concession to those who favor the death penalty. He writes that if a society or its legislature is "determined to preserve the punishment of death, in consideration of the effects it produces in *terrorum* [sic],"¹⁰ then it should use this penalty only for those "offenses which in the highest degree shock the public feeling—for murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers"¹¹ Although one

he says, "[w]hile these pages [were] under revision." *Id.* at 532.1. This article is probably identical with the item from *The Spectator* on the death penalty he also cited in his memorandum book, *Dicenda*, entry for June 21, 1831; see 11 WORKS, *supra* note 2, at 69. I infer, therefore, that this essay could not have been published before mid-1831 at the earliest.

⁷ 1 WORKS, *supra* note 2, at 525-32. Henceforth, I shall cite to the text of Bentham's essay in this version, with page and column references as for citations to his 1775 essay. See *supra* note 3. Except in punctuation style, I detect no differences between this reprint and the text of the original.

⁸ Bowring, in his posthumous biography of Bentham, reports that in late 1830, Bentham undertook to address a series of letters to the French people, but "[o]nly one, however, was written." 11 WORKS, *supra* note 2, at 56. He quite overlooked that the pamphlet, *On Death Punishment* see *supra* note 5 and accompanying text, in effect is another of these "letters"; it even opens with the words, "Hear me speak a second time!" 1 WORKS, *supra* note 2, at 525.1. Bentham styled himself in these communications to the French as a "fellow citizen" because he had in fact been made a French citizen in 1792. C. ATKINSON, JEREMY BENTHAM: HIS LIFE AND WORK 100 (1905).

⁹ See *infra* text accompanying note 130.

¹⁰ 1 WORKS, *supra* note 2, at 450.2. For explanations of this and future such citations, see *supra* note 3. By contemporary standards, Bentham uses italics for emphasis to excess. Accordingly, I have not generally followed him in this stylistic habit and, instead, have converted most such passages to roman.

¹¹ 1 WORKS, *supra* note 2, at 450.2.

cannot read this passage in context and view it as more than a concession made with some reluctance, it is also true that Bentham's overall argument in 1775 against the death penalty (whatever he may have believed about it) failed to provide adequate utilitarian grounds for complete abolition. At the end of his life, however, he seems to have thought that he had at last constructed an argument so strong and comprehensive that it no longer required him to have any reservations. In his 1831 essay, written over half a century later when English criminal law had begun to move in the direction Bentham had long advocated,¹² he confronted the policy issue at the very outset and answered categorically: "The punishment of death—shall it be abolished? I answer—*Yes*. Shall there be any exception to this rule? I answer, so far as regards *subsequential* offenses, *No*"¹³

Taken together, Bentham's 1775 and 1831 essays constitute a critique of the death penalty¹⁴ unique among leading philosophers. Since Socrates (who, as is well known, died a convict's death at his own hand from a cup of hemlock),¹⁵ philosophers have examined the morality and policy of the death penalty; but Bentham devoted more space to the topic than any of his predecessors. Hobbes, Locke, Montesquieu, and Rousseau, for example, all find reason to mention the topic in one way or another; but they do so without ever using it as a set-piece for the application of general theory. Beccaria, to whom Bentham elsewhere readily acknowledges his indebtedness,¹⁶ comes nearest to devoting comparable space and emphasis to the topic in his enormously influential little treatise, *Dei Delitti e delle Pene*,¹⁷ published in 1764, a decade before Bentham began work on his own *Rationale of Punishment*. But Beccaria had no clear and uniform theory of punishment; his arguments combine appeals both to utilitarian principles and to natural rights contractari-

¹² See L. RADZINOWICZ, *supra* note 1, at 497-607.

¹³ 1 WORKS, *supra* note 2, at 525.2-26.1 (emphasis in original). This change of opinion in Bentham's attitude toward abolition seems to have gone unnoticed by L. RADZINOWICZ, *supra* note 1, at 389-91.

¹⁴ Bentham mentions the death penalty in passing in many of his other (published and unpublished) writings. See, e.g., L. RADZINOWICZ, *supra* note 1, at 367 n.31.

¹⁵ Plato, Phaedo 57b. As one recent commentator has noted, "Poisoning by means of hemlock juice (conium) seems to have been a common method of execution in Athens. Death was apparently painless but rather slow." PLATO, THE LAST DAYS OF SOCRATES 196 (H. Tredennick trans. 1954).

¹⁶ J. BENTHAM, THEORY OF LEGISLATION 353-54 (2d ed. 1874), cited in H. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 41 (1982).

¹⁷ C. BECCARIA, ON CRIMES AND PUNISHMENTS 45-52 (H. Paolucci trans. 1963). How much Bentham's argument in his 1775 essay can be said to have relied upon, or been anticipated by, Beccaria's in this treatise I have not attempted to ascertain. For a general discussion of Beccaria's influence on Bentham, see HART, *Bentham and Beccaria*, in ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY *supra* note 16, at 40-52. On the influence of other thinkers on Bentham, see L. RADZINOWICZ, *supra* note 1, at 301-54.

anism. Nor is Beccaria a philosopher of Bentham's stature. Kant, who certainly is, and whose antiutilitarian views on the death penalty were published in 1797,¹⁸ wrote only briefly on the subject, although like Bentham, he too used this topic as a convenient application of general theory.

Bentham's great utilitarian successor, John Stuart Mill, who might have been expected to carry on Bentham's attack on the death penalty, apparently wrote nothing on the subject. When he did finally address it, it was not until late in his life (1868), in a speech during debate in Parliament on a bill to abolish public hangings.¹⁹ Speaking against an amendment to abolish the death penalty outright, Mill defended this punishment for murder.²⁰ He employed that mix of reasons characteristic of his later semipopular writings that made his professed utilitarianism somewhat doubtfully the genuine article. Whether Bentham, who by that time had been dead for over three decades, would have been convinced by Mill's argument, we will of course never know.

In any case, Bentham's critique is unswerving and shows him as one, perhaps the only, leading philosopher who, throughout his adult life, steadily and soberly opposed "Death Punishment"²¹ and expressed that opposition in writings that are still instructive. Accordingly, in my examination of Bentham's argument, I shall emphasize roughly equally exposition and internal critique on the one hand, and evaluation of the argument's strengths and weaknesses from a modern vantage point in the United States on the other. The risk of irrelevance in criticizing his views anachronistically is, I think, outweighed by the benefit of showing what we should think about his views in light of current knowledge.

II. THE UTILITARIAN CONCEPTION OF PUNISHMENT

In order to appreciate Bentham's critique, we need to place it within his general "rationale of punishment." As commentators on utilitarianism have made clear,²² any possible utilitarianism is some combination of (i) a doctrine of the end-state to be realized, that is, a condition or state of affairs deemed to have intrinsic value, and (ii) a theory of the consequences of possible actions open to the agent (person, legislature, society), whose value is purely instrumental because choice among these

¹⁸ I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102-07 (J. Ladd trans. 1965).

¹⁹ Mill, *Parliamentary Debate on Capital Punishment Within Prisons Bill*, Hansard's Parliamentary Debates, 3rd Series (April 21, 1868), reprinted in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 271-78 (G. Ezorsky ed. 1972).

²⁰ Thus, Mill's actual position on abolition, as distinct from his reasons, is very close to Bentham's of 1775. See *supra* text accompanying notes 10-13.

²¹ Bentham used the term "Death Punishment," as in the title of his 1831 essay, *supra* note 5.

²² See, e.g., J. SMART & B. WILLIAMS, *UTILITARIANISM FOR AND AGAINST* 4, 9, 79 (1973).

alternative actions is determined by how efficiently each leads (or would lead) to the end-state. According to Bentham, a punishment, like any other legal practice, must be morally justified in terms of its conduciveness to the appropriate end. That end can be variously stated, and Bentham's own account of it varies depending on whether he has a proximate or the ultimate end in mind. "The immediate principle end of punishment," he writes, is to "control action,"²³ *i.e.*, the conduct of those who are liable to a punishment if they violate the law as well as the conduct of those who are undergoing punishment after having been sentenced for a violation. He also says that "the chief end of punishment" ought to be "general prevention,"²⁴ an end that will be achieved if and only if adequate "control" is attained. But both these ends are penultimate. The ultimate end of penal laws is one shared with all legislation, and Bentham describes it as follows: "The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community. . . ." ²⁵ Precisely how this end-state is to be measured and in what it really consists are notorious problems, and we will return to this point later.²⁶ Suffice it to say here that Bentham believed alternative social policies could be evaluated by reference to their efficiency in reaching various ends, but the only end-state that ultimately mattered is that of the greatest happiness. Thus, in his theory, the only rational or justifiable punishments for a society to adopt are punishments that most efficiently produce the greatest happiness.

Since a utilitarian necessarily views any punishment as an "evil,"²⁷ that harm can be justified only by being the necessary condition of some greater good, benefit, or happiness that exceeds the evil of punishment. The ideal punishment, therefore, achieves the maximum in social benefit at the cost of the minimum social harm. Bentham believed that the capacity of any mode of punishment to approach this ideal could be evaluated in terms of a fairly small number of (not altogether independent) factors. These factors are relevant not solely because of their effect on reducing the crime rate through prevention and deterrence; what ultimately matters is the overall effect of punishment on the general happiness. Such happiness includes not only a lower crime rate but many other factors, including the well-being of the persons being pun-

²³ INTRODUCTION, *supra* note 2, at 158 n.1.

²⁴ 1 WORKS, *supra* note 2, at 396.2.

²⁵ INTRODUCTION, *supra* note 2, at 158; *cf.* 1 WORKS, *supra* note 2, at 396. For a discussion of Bentham's interpretation of the principle of utility ("the greatest good of the greatest number"), see M. MACK, JEREMY BENTHAM: AN ODYSSEY OF IDEAS 219-29 (1963).

²⁶ See *infra* text accompanying notes 146-50.

²⁷ 1 WORKS, *supra* note 2, at 390.2.

ished, as Bentham makes abundantly clear.²⁸ He calls these factors the several "properties" of punishment;²⁹ by name they are "Variability," "Equability," "Commensurability," "Characteristicalness," "Exemplarity," "Frugality," "Subserviency to Reformation," "Efficacy with respect to Disablement," "Subserviency to Compensation," "Popularity," and "Remissibility." This list is common both to the *Rationale* and to his better-known treatise, *An Introduction to the Principles of Morals and Legislation*, published in 1789.³⁰ As I shall explain below, the chief difference between his two critiques of the death penalty arises from his shift in judgment about the relevance and relative weights of these factors.

Since variations in the quality and severity of a punishment are easily under the control of the rational legislator, Bentham's general theory of punishment proposes multiple criteria for the proper apportionment of punishments to crimes. He formulates these criteria in terms of a baker's dozen of "Rules,"³¹ each of which is asserted with all the imperative force Bentham can muster. His language thus somewhat disguises the fact that the sole warrant for these rules is that compliance with them in the long run maximizes the general happiness. Thus, Rule 7 states: "To enable that the value of the punishment may outweigh the profit of the offence, it must be increased in point of magnitude, in proportion as it falls short in point of certainty."³² The reason such rules must be followed, Bentham implies, is that they enable the rational legislator to attach just the right quantum of pain in terms of punishment to discourage the commission of the offense through deterrence and prevention, calibrated so that any increase in the severity of the penalty would in fact cause society distress greater than the good that would be achieved by any further reduction in crime.

Oddly enough, however, Bentham's two discussions of the death penalty make no explicit reference to these "Rules," even though it might seem that they would provide the most direct way to evaluate the merits of the death penalty. This may be the one *prima facie* shortcoming in Bentham's utilitarian critique of the death penalty. Yet there is a reason for this omission, which Bentham (though he never mentions it) may well have had in mind. His discussions of the death penalty are intended to be completely general. That is, he undertakes to evaluate

²⁸ It ought not to be forgotten . . . that the delinquent is a member of the community, as well as any other individual— . . . and that there is just as much reason for consulting his interest as that of any other. His welfare is proportionably the welfare of the community—his suffering the suffering of the community.

1 WORKS, *supra* note 2, at 398.2.

²⁹ 1 WORKS, *supra* note 3, at 402-06; cf. INTRODUCTION, *supra* note 1, at 175-86.

³⁰ In *Rationale* he added another property, "Simplicity of Description," omitted from the INTRODUCTION. 1 WORKS, *supra* note 2, at 405-06.

³¹ *Id.* at 399-402.

³² *Id.* at 401.2.

the death penalty as such, as a mode of punishment whose suitability for *any* crime is in question. Consequently, it would be virtually impossible for him to try to evaluate its relative suitability by means of his "Rules" for each of the many capital crimes in the penal code of his day. This gain in scope and brevity for his discussions is not without a price, however. Where the punishment of murder is concerned—the one crime whose punishment by death is likely to arouse the most controversy, at least in the United States³³—Bentham's discussion is incomplete because he fails to concentrate on showing that the death penalty for murder, when compared to the alternative punishments, is second best overall under the relevant "Rules" for apportioning punishment to crime.

This defect points to a consideration of general importance in Bentham's discussions of the death penalty. A utilitarian critique of any law or social policy cannot proceed except by reference to alternatives. What alternatives to the death penalty does Bentham consider? In both of his death penalty essays he considers only one. In 1831, he describes it tersely as "prison discipline,"³⁴ thereby leaving open to speculation whether he meant natural life imprisonment, imprisonment for a fixed term or under an indeterminate sentence, imprisonment in solitary confinement, imprisonment during which labor would be exacted from the convict, or some combination of these. In 1775, he was more precise: "[P]erpetual imprisonment, accompanied with hard labour and occasional solitary confinement"³⁵ Whether the vagueness of Bentham's language on the point in 1831 indicated some softening of his views on the preferred alternative is doubtful. Apparently, Bentham never gave serious thought to less rigorous forms of incarceration for capital felons than what he recommended in 1775.³⁶

The evaluation of a mode of punishment on utilitarian grounds, then, proceeds as follows. First, one must pick out the several factors in

³³ Except for certain federal criminal statutes, which provide the death penalty for some crimes other than murder, the only capital crime in the United States today is murder, variously defined. U.S. DEPT. JUSTICE, CAPITAL PUNISHMENT 1980, at 10 (1981). For current federal death penalties, see 18 U.S.C. None, however, of the death penalty provisions of these statutes is currently enforceable. *United States v. Weddell*, 567 F.2d 767 (8th Cir. 1977), *cert. denied*, 436 U.S. 919 (1978).

³⁴ 1 WORKS, *supra* note 2, at 531.2.

³⁵ *Id.* at 450.1.

³⁶ No general study of Bentham's views on punishment is available; the very topic is a neglected part of most scholarly discussions of his life and his works, despite the obvious importance he attached to his labors in this area. *But see supra* note 1. The general continuity and relative severity of Bentham's views about the appropriate punitive alternatives to the death penalty may be seen in M. IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750-1850 (1978), an account in which Bentham's views and influence figure prominently.

terms of which any punishment may be said to yield effects upon the general happiness. Second, one must compare alternative punitive policies with respect to each of these factors. The identification and comparison may both be said to be part of what, following Bentham and his younger admirer, John Austin, has come to be called "analytical jurisprudence."³⁷ By themselves, however, these two steps cannot suffice. One must also couple each factor in each alternative punishment with some empirical observations, evidence, or data based on the study of these punishments in society, so that the rational legislator can truly calculate the relative impact of the alternatives upon the general happiness. Without such evidence, not even an ordinal ranking of the two alternatives is possible, except on wholly armchair or conjectural grounds. However, basing the choice between alternatives involving life and death on such grounds can hardly be called rational. Nevertheless, as we shall see, he adduces *no* evidence for most of the many empirical claims on which his objections to the death penalty rest. To be sure, arguments over penal policies based on empirical evidence were hardly an established practice in 1775 or even in 1830.³⁸ Still, Bentham nowhere shows the slightest concern that he offers virtually no evidence drawn from actual human experience relevant to the choice of punishments. He may have deceived himself into thinking that his conjectures were as good as genuine data. Perhaps he collapsed unawares the analytic exercise of isolating relevant factors into the empirical enterprise of gathering data to show how different punishments actually function. Possibly the task of gathering relevant empirical evidence simply struck him as too boring to undertake, as it has most philosophers. In any case, a utilitarian defender of the death penalty, confronted with Bentham's critique, need not back down before the onslaught of Bentham's evidence; during the course of his argument Bentham offers virtually none.

III. FOR THE DEATH PENALTY

The structure of Bentham's 1775 critique of the death penalty could hardly be simpler: In favor of capital punishment there are four factors; against it there are also four; but taken all together, the latter outweigh the former. Thus, given a choice between the death penalty and the alternative of "prison discipline," a utilitarian must favor the alternative. Let us look closely at each of the three steps in Bentham's argument.

The four relevant considerations that favor the death penalty, according to Bentham, are these: it is "analogous" to the crime, it is "pop-

³⁷ J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1861).

³⁸ See M. IGNATIEFF, *supra* note 36.

ular," it is "exemplary"—that is, "an execution makes a deep and lasting impression"³⁹ on all who witness it—and above all, it is wholly incapacitative, or, as Bentham puts it, "It is efficacious in the highest degree in preventing further mischief from the same source."⁴⁰ To the exposition and support of the first two considerations, Bentham devotes only a few lines; the latter two, he treats more amply. Even so, a reader not inclined in advance to agree with Bentham might well complain that he underestimates the force of several factors, even on utilitarian assumptions, and that in any case he disposes of the argument for the death penalty far too briskly.

A. ANALOGY

The factor of "analogy" does not appear as such in Bentham's general catalogue of the dozen "properties" of any punishment. It is, however, identical with the property that does appear on that list under the heading of "Characteristicalness."⁴¹ As he rightly points out, this factor favors the death penalty, but only for the crime of murder. Since in 1775 English law authorized the death penalty for dozens of nonhomicidal crimes against the person, property, public order, and the state,⁴² Bentham could as well have cited this factor to argue *against* the death penalty, except for the punishment of murder. Whatever the reason, he did not choose to adopt this tactic. As a factor favoring the death penalty even for murder, Bentham regards it as singularly weak and disposes of it with no more than an epigram: "Analogy is a very good recommendation, but not a good justification."⁴³

As a utilitarian, surely he is right. That a punishment is analogous to the crime for which it is meted out is at best an intervening, not a final, consideration in its favor. Analogies of this sort, by themselves, have little if any impact on the general happiness. The possibility that underlying the factor of analogy is a principle of reciprocity—it will be done to you as you have done to others—and thus of rough justice, seems not to have occurred to Bentham. Or, rather, while it clearly does occur to him earlier in the *Rationale* in his general discussion of "Characteristicalness,"⁴⁴ this awareness deserts him when he shifts to the particular case of the death penalty. No doubt, as he implies, it is possi-

³⁹ 1 WORKS, *supra* note 2, at 444.2.

⁴⁰ *Id.* at 449.2.

⁴¹ He explicitly links the two concepts in INTRODUCTION, *supra* note 2, at 178 and in 1 WORKS, *supra* note 2, at 404.1. In the latter work he discusses the "Analogy Between Crimes and Punishments" in some detail. *Id.* at 407-09.

⁴² L. RADZINOWICZ, *supra* note 1, at 3-79, 611-59.

⁴³ 1 WORKS, *supra* note 2, at 449.2.

⁴⁴ *Id.* at 403-04.

ble on utilitarian grounds to argue against *lex talionis* in general.⁴⁵ But it is a regrettable oversight that Bentham fails even to comment on this powerfully attractive perennial source of defense of the death penalty for murder.

B. POPULARITY

Bentham dismisses the factor of "popularity" virtually out of hand, because he believed the then current attitudes in favor of the death penalty were all based on ignorance and misinformation.⁴⁶ Once it is understood that the death penalty is not the deterrent or preventive that it is reputed to be, Bentham thinks, its popularity will wane. Today, we must regard this optimism as somewhat naive. Survey research and its scientific analysis strongly suggest that by no means all of the popular support for the death penalty can be traced to the (perhaps misguided) belief that it is a uniquely effective deterrent and preventive of crime.⁴⁷ Rather, a considerable fraction of the support for this punishment seems to rest on other grounds, retributive or even vindictive.

C. EXEMPLARITY

Bentham's discussion of the deterrent effect of the death penalty is diffuse and indirect. True, he devotes as much space to this one theme as he does to the other three factors favoring the death penalty combined. But he does so in such an oblique, incomplete, and disconnected manner that his exposition and criticism are distinctly inferior to what we would have expected him to provide. After all, it is he who states early in the *Rationale*, just as we would expect of a good utilitarian, that "[g]eneral prevention ought to be the chief end of punishment, as it is its real justification,"⁴⁸ and "general prevention" is a synonym for "deterrence." I diagnose the unsatisfactory character of his discussion as the result of an attempt to bring most of the considerations affecting deterrence under his rubric of "Exemplarity." Unfortunately, it cannot be done. On the one hand, deterrence involves several considerations that do not conveniently fit here, as his discussion of the death penalty for

⁴⁵ *Id.*

⁴⁶ The same explanation has been advanced in our own time from the Supreme Court by Justice Marshall, who argued that if the general public were better acquainted with the actual facts surrounding crime and the death penalty in contemporary society, support for executions would wither away. *Furman v. Georgia*, 408 U.S. 238, 362-63 (1972) (Marshall, J., concurring).

⁴⁷ For discussion of "the Marshall hypothesis," see H. BEDAU, *THE DEATH PENALTY IN AMERICA* 66 (3d ed. 1982), and works cited therein.

⁴⁸ 1 WORKS, *supra* note 2, at 396.2; *cf.* INTRODUCTION, *supra* note 2, at 158, where Bentham adds in a note: "The immediate principal end of punishment is to control action . . . , that of the offender, or of others"

"rebellion" under the heading of "Efficacy"⁴⁹ makes abundantly clear. On the other hand, exemplarity provokes Bentham into speculations about the psychology of the would-be criminal and the effects of witnessing executions that only obscure the more central issues. Accordingly, in my account of his views here I shall make no attempt to convey the exact pattern of his discussion but instead will reshape it in the interests of clarity and brevity.

First, Bentham argues that Beccaria⁵⁰ was wrong in thinking that "the impression made by any particular punishment was in proportion to its duration, and not to its intensity."⁵¹ "[F]or the generality of men," he observes, "among those who are attached to life by the ties of reputation, affection, enjoyment, hope, capital punishment appears to be more exemplary than any other."⁵² Not, mind you, that it *is* more severe; here Bentham quite agrees with Beccaria, who believed that life imprisonment is by far the more severe of the two punishments.⁵³ But the death penalty *seems* more severe, and that is what matters to its "exemplary" role. As Bentham observes earlier in the *Rationale*: "The apparent value [*i.e.*, severity of a punishment] influences the conduct of individuals. It is the real punishment that is the expense—the apparent punishment that gives the profit."⁵⁴ Not surprisingly, therefore, he says that of the four reasons for the death penalty, this one "is the strongest."⁵⁵ Still, it is not strong enough.

Bentham's central counterargument is this: Perpetual imprisonment, with suitable aggravations of labor and solitary confinement, can be made to have a more terrifying impact on prospective criminals than it currently does and more than does the threat of death. After all, the criminally inclined classes are by temperament "brutal," "independent," and "wandering,"⁵⁶ all traits that render them "hostile to steady [confinement] and laborious industry"⁵⁷ Make it clear that this, not a quick and relatively painless death, is what awaits them, and they will shrink from it the more. The law-abiding members of the middle class, who have long ago learned to chain themselves to factories, desks, and careers, overrate the finality of death and underrate the dreadful prospect of a lifetime confined behind bars. If, in short, prospective criminals were as rational as legislators ought to be, they would see that

⁴⁹ See *infra* text accompanying notes 62-68.

⁵⁰ See C. BECCARIA, *supra* note 17, at 46-47.

⁵¹ 1 WORKS, *supra* note 2, at 444.2.

⁵² *Id.* at 445.1.

⁵³ C. BECCARIA, *supra* note 17, at 46-47.

⁵⁴ 1 WORKS, *supra* note 2, at 398.2.

⁵⁵ *Id.* at 450.1.

⁵⁶ *Id.*

⁵⁷ *Id.*

the prospect of life imprisonment ought to have a greater deterrent effect on their behavior than the death penalty.

How does this argument strike us today? I cannot attempt here to review the full range of evidence and argument over the deterrent efficacy of the death penalty; besides, it is not really relevant to Bentham's argument as it is stated above.⁵⁸ Of primary relevance to his argument as he actually states it is that, today, very few opponents of the death penalty favor natural life imprisonment at hard labor as the alternative.⁵⁹ It is not an attractive alternative, least of all to the rational legislator once he understands what it will cost the community in taxes for prison construction, custodial services, etc. Even more to the point is the counterproductiveness, on utilitarian grounds, of making prisons so dreadful as to inspire the terror Bentham's argument requires. If virtually everyone in prison today is eventually going to be released (excepting only a few Charles Mansons or Richard Specks), then what is the point of ruining prisoners' lives behind bars, thereby adding injury to harm, with the result that the convict emerges in due course worse than when he went in? In sum, I doubt whether there really are utilitarian grounds for defending the alternative of prison over that of execution if this requires society to increase the horrors of imprisonment in order to make the threat of prison an even better deterrent than the death penalty.

D. EFFICACY

Although Bentham opens the case for the death penalty by citing what he elsewhere calls "Efficacy with respect to disablement"⁶⁰ as the first of the four factors, it is doubtful whether he thinks it favors the death penalty more strongly than does "exemplarity" or deterrence. In any case, he confines his criticism to two points. The first and major criticism is that society already uses "confinement" as a sufficient mode of incapacitation for the criminally insane.⁶¹ If such "confinement" suffices to prevent these dangerous offenders from recidivism, there is no reason why it cannot do the same for convicts who are not criminally insane. His second point is an arguable concession to those who favor the death penalty. He admits that in "the case of rebellion" or as we

⁵⁸ Much of it is to his argument in 1831, however, as we shall see.

⁵⁹ It is true that bills before American legislatures that would abolish the death penalty for murder frequently specify no parole eligibility. However, among those who oppose the death penalty it is generally (but not universally) argued that this is only a concession to political expediency and is neither necessary for public safety nor desirable on other grounds. See H. BEDAU, *THE DEATH PENALTY IN AMERICA* 228-31 (1st ed. 1964) for a more detailed discussion of alternatives to the death penalty.

⁶⁰ INTRODUCTION, *supra* note 2, at 181.

⁶¹ I WORKS, *supra* note 2, at 449.2.

might say today, terrorist violence in the service of a revolutionary political ideology, an exception to total abolition may be "necessary" on grounds of incapacitation.⁶² Even here, Bentham shrewdly counsels caution on the ground that executing terrorist rebels is more likely to turn them into martyrs who inspire rather than discourage their followers. In a prescient anecdote (whether genuine or fictitious, the context does not indicate), Bentham writes: "'Look,' said the executioner to an aged Irishman, showing him the bleeding head of a man just executed for rebellion—'look at the head of your son.' 'My son,' replied he, 'has more than one head.'"⁶³ As Bentham wisely advises, "It would be well for the legislator, before he appoints capital punishment, even in this case, to reflect on this instructive lesson."⁶⁴

Bentham's discussion of incapacitation prompts some skeptical observations in light of current knowledge. First, as a purely logical point, Bentham comes close to committing the fallacy of inferring that if a convicted offender has been incapacitated, then crimes will thereby have been prevented. To be able to infer that, we would have to *know* that the offender (whether executed, incarcerated, or otherwise incapacitated) was certain to commit another crime in the future. Of course, we rarely if ever know that; at most, we can construct a certain probability of such recidivism given either the convict's past criminal record or his membership in some convict class whose recidivist characteristics have been already measured. This criticism is particularly relevant where the incapacitative powers of the death penalty are concerned. It is necessarily true that the death penalty incapacitates; it is at best empirically true that this incapacitation prevents much recidivism.⁶⁵

It is also empirically true, however, that incapacitation by way of death prevents a measurably greater number of recidivist murders than does imprisonment. Evidence at our disposal today shows that recidivist murder is rare but does occur.⁶⁶ It also occurs in prisons, a possibility Bentham overlooked.⁶⁷ No doubt such recidivist murders could be prevented by execution of *all* convicted murderers. It is also true, as any latter-day Benthamite would be quick to point out, that most of these crimes could have been prevented by other means as well, *e.g.*, better parole review procedures. Nevertheless, a contemporary utilitarian who

⁶² *Id.*

⁶³ *Id.* at 450.1.

⁶⁴ *Id.*

⁶⁵ See Bedau, *Capital Punishment*, in MATTERS OF LIFE AND DEATH 148, 167-69 (T. Regan ed. 1980).

⁶⁶ See H. BEDAU, *supra* note 47, at 173-80, for recent United States data on homicide involving persons released after convictions of criminal homicide.

⁶⁷ See H. BEDAU, *supra* note 47, at 173-80 for recent United States data on homicide in prisons; see also T. SELLIN, THE PENALTY OF DEATH 103-20 (1980).

wants to evaluate the relative incapacitative effects of execution versus incarceration must realize that current policies governing imprisonment do not and probably cannot prevent *all* the crimes that full-scale use of executions could prevent. Of course, it would be folly on utilitarian grounds to try to isolate this consideration from all others and elevate it into a decisive factor in favor of the death penalty. Even so, this factor does emerge from a critique with a slight margin still in favor of the death penalty, if not in Bentham's day then in ours.

Finally, the punishment of terrorism and rebellion (an issue as relevant to deterrence as to incapacitation) has not been studied with sufficient care by empirically-minded investigators. The general logic of Bentham's argument, however, remains as valid in our day as in his. Thoughtful students of contemporary terrorism have relied up on this argument perhaps without realizing that they were anticipated by Bentham two centuries ago.⁶⁸

E. EVALUATION

Has Bentham made out the strongest possible case for the death penalty on utilitarian grounds? The issue divides into four parts because we have to distinguish between (a) the argument for the death penalty as a mode of punishment for many or all of the major felonies—Bentham's primary target, and (b) the argument for the death penalty confined to the punishment of murder. We must also scrutinize (i) the adequacy of his argument under the four rubrics he has chosen, in contrast to (ii) the adequacy of an argument for the death penalty based upon all twelve of his "properties" of punishment (as well as upon others he may have overlooked). As these two sets of distinctions fully intersect, the evaluation of the adequacy of Bentham's argument falls into four separate parts. We have, however, already disposed of half of this task, *viz*, (i)(a) and (i)(b). I think Bentham is correct in concluding that it is difficult to defend the death penalty on utilitarian grounds as the proper punishment for many felonies, if utilitarian grounds are confined to the four that Bentham identifies. I think he is also right with regard to the death penalty for murder, although here the case for the death penalty is a bit stronger, even more than Bentham himself realizes.

Could the utilitarian argument for the death penalty, whether confined to murder or extended to the punishment of other crimes, be enhanced by taking into account factors that Bentham identifies but ignores, or by appeal to factors that he is unaware of but that a truly thoroughgoing utilitarian defense of the death penalty would uncover? Answering this question may look like a much larger task than it really

⁶⁸ See H. BEDAU, *supra* note 47, at 101, 181-85.

is. As an illustration, consider the general factor Bentham identifies as "Simplicity of Description."⁶⁹ His failure to mention this as a factor favoring the death penalty seems surprising.⁷⁰ Surely, the fact that the death penalty, whether for murder or for other crimes, is easily understood "not only to the enlightened, but to the most unenlightened and ignorant,"⁷¹ must seem to be a factor in its favor. Or, upon reflection, should we say that it is a factor that counts equally for the death penalty and for the alternative of imprisonment, because each is equally easily grasped by the multitude? Perhaps on balance we should say that this deterrence-relevant factor favors the death penalty over imprisonment, but not by very much, and perhaps in the end is of no more significance than the factor of "analogy."

The chief reason Bentham, during his discussion of the case for the death penalty, ignores so many of the "properties" of punishment that he elsewhere readily identifies is that he thinks all the others unambiguously favor the alternative of imprisonment. Let us, therefore, turn to this part of his overall argument and see whether we should agree.

IV. AGAINST THE DEATH PENALTY

In 1775, the four characteristics of punishment that Bentham invokes against the death penalty relative to imprisonment are that it is "not convertible to profit," it lacks "frugality," as well as "equability," and it is "not remissible."⁷² If the space he devotes to developing his argument under each of these factors is any indication of his judgment of their relative weight, then clearly the third and fourth have the greater importance.

A. UNPROFITABILITY

Bentham does not linger over the obvious point that a dead convict cannot provide "compensation."⁷³ It does not matter whether the compensation is devoted to repairing the loss suffered by the victim of the

⁶⁹ 1 WORKS, *supra* note 2, at 405-06.

⁷⁰ Elsewhere, Bentham introduces a conception of "extraordinary punishment" and a general argument for it on utilitarian grounds. J. BENTHAM, *OF LAWS IN GENERAL* 212 (H. Hart ed. 1970). His argument in this passage can be seen as a forerunner of the contemporary policy in the United States to the effect that "life" imprisonment shall be the normal punishment for murder except where a court finds certain "aggravating" factors present; for example, the offender's previous conviction of murder. Bentham's reluctance to embrace total abolition in 1775 and Mill's opposition to total abolition a century later reflect the notion that there may be utilitarian grounds for an occasional exception to the policy of complete abolition of the death penalty. See *supra* text accompanying notes 12-13, 21-22.

⁷¹ *Id.* at 405.2.

⁷² *Id.* at 445.2.

⁷³ *Id.*

crime or to the loss suffered by society in bringing the offender to justice. A regimen of capital punishment prevents both sorts of compensation.

The defender of the death penalty, of course, might well reply that it is in fact economically cheaper to execute convicts than to imprison them for life, so that the loss caused by their death and resulting incapacity to compensate is more than offset by the gain produced by not having to expend public resources for their permanent custody. Bentham's failure to anticipate this objection is easily explained. In his day, prison enthusiasts shared the optimistic belief that prisons could be run as profitable "capitalistic enterprises."⁷⁴ In our time, the economic costs of long-term imprisonment have become a popular consideration in support of the death penalty.⁷⁵ In truth, however, the actual additional cost of life imprisonment for persons currently sentenced to death would add little to the total annual cost of operating a maximum security prison. If anything, the costs of a criminal justice system in which the death penalty is authorized appear to be considerably greater, given present state and federal laws, than the costs of the same system without the death penalty.⁷⁶

B. FRUGALITY

Here is an example of what Bentham would have regarded as a "frugal" punishment: Fine a very wealthy man \$10,000 and use it to distribute \$100 to each of a hundred who are destitute. Thanks to the differing marginal utility of money, such a fine would inconvenience one wealthy person only slightly but would no doubt benefit many poor a great deal. The death penalty, however, Bentham argues, is "pre-eminently [sic] defective . . . in point of frugality."⁷⁷ His reason seems to be that its infliction fails to produce a desirable quantum of pleasure coordinate with the pain produced for the person being punished, whereas imprisonment can do this much more effectively.⁷⁸ Here, his reasoning runs as follows: The only way that a convicted criminal can profit or please society is by means of the good works he can do during punishment or afterwards. Both are possible with imprisonment, neither with

⁷⁴ See M. IGNATIEFF, *supra* note 36, at 109-11.

⁷⁵ Elsewhere, I have discussed it as "the taxpayer's argument." See H. BEDAU, *supra* note 47, at 193.

⁷⁶ See NEW YORK STATE DEFENDERS ASSOCIATION, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982). This report calculates that the cost of the death penalty trial alone in New York under current law would be more than double the cost of lifetime imprisonment in the state penitentiary, *i.e.*, \$1.4 million versus \$0.6 million. *Id.* at 23.

⁷⁷ 1 WORKS, *supra* note 2, at 445.2.

⁷⁸ As one can see, his argument here rather overlaps with his previous argument concerning the impossibility of using the death penalty for the purpose of "compensation."

death. Thus, through this back door Bentham introduces the idea of the utility of reform, perhaps even including post-punitive release; he says that under the punishment of "confinement and hard labour . . . there is a chance of . . . [the convict's] being reformed, and rendered of some use to society."⁷⁹

C. INEQUABILITY

Under this heading, Bentham has two quite distinct points to make; they are best discussed separately. Their relative importance in his mind is difficult to judge, partly because he fails to keep the two points completely separate.

The first aspect of inequability is the absence of what he elsewhere calls "Variability,"⁸⁰ or that general property of punishment by means of which it admits of more or less, as with lashes of a whip or time in prison. The second property is that by virtue of which, when punishment is inflicted, everyone who undergoes it experiences the same amount of pain. Elsewhere, Bentham calls this second aspect "Equability."⁸¹ Bentham argues that the death penalty fails the first, or variability, requirement because it is an all-or-nothing matter, an act that of itself admits of no degrees or room for variation. Of course, as he has already explained,⁸² the death penalty can be preceded with tortures and followed by indignities visited upon the dead man's corpse. Bentham ignores these possibilities and, strictly, he is correct to do so: Neither torture nor desecration of a corpse is a way of varying *death*.

Bentham boldly insists that "*Variability* is a point of excellence in which the punishment of death is more deficient than in any other."⁸³ Does he mean "than in any other of its many defects," or "than in any other penalty?" It does not really matter, since on either interpretation he is wrong. First, the same deficiency can be found in many mutilative corporal punishments, *e.g.*, castration. Second, as he himself soon points out, the death penalty is totally "irremissible," and surely this is as grave a defect as is its invariability—indeed, it is graver. Finally, it is hard to see why invariability is much of a defect if we are concerned only with the punishment of one type of crime narrowly defined, *e.g.*, first-degree murder. Again, Bentham's failure to distinguish explicitly between assessing the death penalty as a general mode of punishment for a wide

⁷⁹ *Id.*

⁸⁰ *Id.* at 402-03; *cf.* INTRODUCTION, *supra* note 2, at 175.

⁸¹ 1 WORKS, *supra* note 2, at 403; *cf.* INTRODUCTION, *supra* note 2, at 175-76. One might well wonder whether there is *any* punishment such that when different people experience it they undergo exactly the same discomfort and deprivation; but let this doubt pass.

⁸² Recall that the first half of the 1775 essay is devoted to "afflictive" death penalties. See *supra* text accompanying note 4.

⁸³ 1 WORKS, *supra* note 2, at 447.1 (emphasis in original).

variety of crimes (where variability is surely an important factor) and assessing it as a mode of punishment specifically for the crime of murder (where variability is of little or no importance) undermines the persuasiveness and clarity of his criticism.

It is mainly the second point, concerning "equability" strictly so-called, to which he devotes his attention. For some offenders, Bentham allows that death constitutes "a very heavy punishment";⁸⁴ but for a person who is "a first-rate delinquent," long hardened to grim circumstances of life, it may be "next to nothing."⁸⁵ Bentham thus repudiates the seeming egalitarianism of the death penalty, admittedly one of its abstractly attractive features, which would hold that each of us has but one life to lose and that this life is as valuable for the rich as for the poor, for the talented as for the ungifted, etc. Bentham chooses to try to establish the inequability of the death penalty by means of an indirect argument that is of some interest in its own right and that has been and still is used in quite a different way. He argues to the conclusion that the death penalty cannot serve as an effective deterrent from the fact that the prospect of death has such a differential impact on the imagination and motivation of prospective criminals. No doubt inspired by Beccaria,⁸⁶ Bentham reasons that the death penalty is for the prospective criminal at the threshold of the criminal act "an event by no means certain,"⁸⁷ "at any rate distant,"⁸⁸ and not vividly imagined by most of those inclined to commit a capital crime in the first place. He infers from this that the impact of capital punishment must be uneven and so is "peculiarly defective in the case of the greater part of the most malignant and formidable species of malefactors"⁸⁹ Its inequability, in short, ill-fits it for influencing persons of limited imagination and lack of involvement in a broad and complex network of human relations, personal and family projects that stretch into the future. Thus, he concludes that there is no reason to hope that hardened criminals, or anyone else calloused and bruised by life, "ought . . . to be deterred from their profession [by the threat of the hangman any more] than [are] soldiers or sailors are from theirs, by the apprehension of bullets or of shipwreck."⁹⁰

As an argument against the death penalty, Bentham's reasoning

⁸⁴ *Id.* at 445.2.

⁸⁵ *Id.*

⁸⁶ Beccaria remarks on the importance of "certainty in punishment" as a factor in effective deterrence. C. BECCARIA, *supra* note 17, at 58.

⁸⁷ 1 WORKS, *supra* note 2, at 446.1.

⁸⁸ *Id.* at 446.2.

⁸⁹ *Id.* at 447.1.

⁹⁰ *Id.*

survives as a standard part of every abolitionist's argumentarium.⁹¹ As an attempt by Bentham to prove the inequability of the death penalty relative to its alternative, however, it is both confusingly presented and a failure. It is confusing because it needs to be linked directly to the reasoning he earlier advanced in criticism of the death penalty under the rubric of "Exemplarity." It is a failure, first, because he gives no reason (much less any evidence) to cause one to think that the death penalty is any worse in the respects in question than is imprisonment. He may have overlooked his failure in this regard because, as noted above, he uses the rubric of "Inequability" in his discussion to cover two different points, the other of which is "Variability," a respect in which imprisonment does have an obvious edge over executions. But the superiority of prison over death with respect to variability is completely independent of whether prison is more, less, or the same in equability (narrowly defined) as death. Finally, for all Bentham knows or shows, many persons executed for their crimes have suffered *exactly* the same degree of loss, deprivation and pain. To be sure, such a possibility is best viewed, in Bentham's time as well as in ours, as an unverifiable empirical hypothesis. Bentham seems to think, erroneously, that we can reject it merely because *some* persons show different reactions to the experience of their execution, including its prospect. No doubt they do, but no argument of this form can suffice to show that *all* do.

D. IRREMISSIBILITY

As for many abolitionists, this is Bentham's winning ace: "for death there is no remedy."⁹² First, as he recognizes, there is no way to *correct* the erroneous infliction of the death penalty; imprisonment, however, can be abruptly ended as soon as there is reason to conclude that an innocent person is being punished. Second, there is no way to *compensate* the wrongly executed person; the wrongly imprisoned person can be (and sometimes actually is) awarded a compensatory sum.⁹³ Bentham is also rightly skeptical of any prospect for ever perfecting the system of criminal justice so that such errors cannot occur. One might well say today what he wrote two centuries ago: "Judges will continue fallible; witnesses to depose falsehood . . . ; . . . circumstantial evidence . . .

⁹¹ See, e.g., H. BEDAU, *supra* note 47, at 66, 80, 284.

⁹² 1 WORKS, *supra* note 2, at 447.2.

⁹³ Several such cases are mentioned in H. BEDAU, *supra* note 59, at 440-52. A recent case involved Isidore Zimmerman, who was convicted of a murder he did not commit and sentenced to death in 1939. Narrowly averting execution, his sentence was commuted. Twenty-four years later his conviction was overturned on appeal. Twenty-one years later the New York State Court of Claims awarded him \$1 million in damages. *Boston Globe*, June 3, 1983, at 1, col. 4-6.

may be the effect of chance"⁹⁴ The proneness of the system to "caprice and mistake,"⁹⁵ as a leading contemporary abolitionist has neatly phrased it, Bentham fully appreciated.

When one pauses, however, to ask for evidence of the system's failures, Bentham does not have very much to offer. He does little more than to assure the reader that "the criminal records of every country afford various instances of these melancholy errors,"⁹⁶ and so "though unknown, many other innocent victims may have perished."⁹⁷ This will be far too vague to convince the skeptical. Bentham's only concession to our desire to know about actual cases is to cite without any elaboration "the melancholy affair of *Calas*."⁹⁸ His reference is to an international *cause célèbre*, the Dreyfus case of its day.⁹⁹ In 1762, in Toulouse, France, an elderly Huguenot merchant, Jean Calas, was executed for murdering one of his sons for converting to Catholicism. Three years of dogged work by hundreds, led by the aging Voltaire, were needed to secure an official acknowledgement of Calas's innocence. It was a momentous event and widely celebrated in the annals of eighteenth century liberalism. One commentator has even cited the struggle to free Calas as "the beginning of the abolition movement. . . ."¹⁰⁰

The Calas case is instructive for our purposes because it points directly to a criticism that has been made especially in recent decades by defenders of the death penalty, to the effect that abolitionists cannot point to erroneous *executions*, but only to erroneous death sentences, convictions, indictments, etc.—in short, only to cases where an innocent person was *not* executed. Bentham's example is invulnerable to this criticism. Can the same be said of a similar attack on the death penalty in the United States today? Since the moratorium on executions, which began in 1967 and ended in 1977, eight persons have been executed as of November 1983.¹⁰¹ I know of no claim that any were innocent of the crime(s) for which they paid with their lives. Of earlier executions in this century, however, there is no doubt that some were miscarriages of justice; the same can be said with even greater confidence regarding many whose death sentences were never carried out owing to timely intervention, newly discovered evidence, etc. As I have discussed the gen-

⁹⁴ *Id.*

⁹⁵ C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981).

⁹⁶ 1 WORKS, *supra* note 2, at 448.1.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See D. BIEN, THE CALAS AFFAIR: PERSECUTION, TOLERATION, AND HERESY IN EIGHTEENTH-CENTURY TOULOUSE (1960); E. NIXON, VOLTAIRE AND THE CALAS CASE (1961).

¹⁰⁰ J. JOYCE, CAPITAL PUNISHMENT 75 (1961).

¹⁰¹ Boston Globe, Nov. 28, 1983, at 12, col. 4.

eral topic at some length elsewhere already,¹⁰² I shall not pursue it further here.

During the course of his discussion of irremissibility, Bentham introduces two further objections to the death penalty that are strictly irrelevant to his theme but not irrelevant to the demerits of the death penalty. One, which he mentions in a footnote only, is to the effect that executing a convicted criminal "*destroys one source of testimonial proof*"¹⁰³ concerning other crimes, committed by the offender or by other criminals. That same criminal, however, if confined to prison may well be persuaded to divulge such information and thereby aid the cause of justice. In utilitarian terms, the usefulness of the convict to the administration of criminal justice is frustrated by the death penalty, at least by comparison with prolonged imprisonment. Again, however, Bentham fails to cite any instances where evidence was forthcoming from prisoners after incarceration that would have been lost to the authorities if the convict had been executed.

His other point is of considerable contemporary interest. It amounts to anticipation of one rationale for the current opposition to the death penalty by Amnesty International (AI), the international human rights organization. Since 1977, AI has stressed the connection between the death penalty, torture, "unexplained disappearances, extrajudicial executions and political murders."¹⁰⁴ As Bentham points out:

If we reflect on those very unfrequent [sic] occurrences, but which may at any time recur—those periods at which the government degenerates into anarchy and tyranny, we shall find that the punishment of death, established by law, is a weapon ready prepared, which is more susceptible of abuse than any other mode of punishment. A tyrannical government, it is true, may always re-establish [sic] this mode of punishment after it has been abolished by the legislature. But the introducing what would then become an innovation, would not be unattended with difficulty . . . Tyranny is much more at its ease when exercised under the sanction of law, when there is no appearance of any departure from the ordinary course of justice, and when it finds the minds of people already reconciled and accustomed to this mode of punishment.¹⁰⁵

In effect, therefore, Bentham has introduced two other categories or factors in terms of which punishments may be comparatively evaluated. We might call them, respectively, and in imitation of his style, Ancillary

¹⁰² See H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* xvi-xvii, 67-68 (1977); H. BEDAU, *supra* note 59, at 434-52; H. BEDAU, *supra* note 47, at 234-41. Further research is currently under way by the present writer and Michael Radelet to assemble and analyze all known miscarriages of justice involving criminal homicide in the United States since 1900. See H. BEDAU, *supra* note 47, at 235 n.1.

¹⁰³ 1 WORKS, *supra* note 2, at 447.1 (emphasis in original).

¹⁰⁴ AMNESTY INTERNATIONAL, *THE DEATH PENALTY* 1 (1979).

¹⁰⁵ 1 WORKS, *supra* note 2, at 448.2.

Administrative Advantage and Corruptibility. He is right, I believe, in concluding that on both points the death penalty scores lower than the alternative of imprisonment.

E. EVALUATION

In principle, an evaluation of Bentham's argument against the death penalty must proceed by means of the same distinctions introduced in order to evaluate his argument for it.¹⁰⁶ However, there is really no need to undertake the evaluative task here. One reason is that this task, insofar as it is merely the inverse of its predecessor, is to that extent implicitly completed, because whatever is a weakness (or strength, respectively) in Bentham's argument for the death penalty is so because it is an overlooked or underestimated strength (or weakness, respectively) in his argument against the death penalty. Another reason is that whereas Bentham adds nothing in his 1831 essay to the reasons he adduced in 1775 in favor of the death penalty, he does revise and supplement his argument against it; so it will be convenient to defer further evaluation of his case against the death penalty until we have these revisions and additions before us.

V. BENTHAM'S 1831 ESSAY

Bentham's critique of the death penalty in 1831 differs both in structure and in rhetoric from his essay of 1775. As was noted earlier,¹⁰⁷ he opens the 1831 essay by expressing his categorical opposition to the death penalty, a symptom of many changes (not all for the better), including an all-but-total neglect of reasons that seem to favor retaining executions. Instead of making the rather strict factor-by-factor critique that was so prominent a feature in the earlier essay (with roughly an equal number of factors to be weighed for and against the death penalty), Bentham builds his argument in 1831 entirely around four "bad properties" of the death penalty. Considerations "in favour of this punishment" he confines to one small paragraph,¹⁰⁸ and he delays rebutting that paragraph until the sixth and penultimate section of his essay, where it turns into a relatively lengthy examination of why the death penalty remains so popular. He concludes that it is owing entirely to a series of "prejudices" based on error, misunderstandings, tradition and the like, which blind the people and their rulers to the superior merits of imprisonment. The public especially should banish these prejudices, Bentham argues, because (in anticipation of a theme widely echoed in

¹⁰⁶ Recall *supra* section III, E.

¹⁰⁷ See *supra* section I.

¹⁰⁸ See *supra* text accompanying notes 1-32.

our time)¹⁰⁹ "wherever death has place, the lower are sure to stand more exposed to it than the higher orders."¹¹⁰ Thus, what in 1775 has seemed to Bentham the not entirely implausible sources of the death penalty's popularity, *viz*, belief in its superior deterrent and incapacitative power, turned out in 1831 to be irrational ignorance in the extreme. No doubt he was influenced in this harsh judgment by some unprecedented evidence relevant to deterrence, to be discussed shortly.¹¹¹

Of the reasons against the death penalty common to the two essays, the most obvious is "Irremissibility." In the 1831 essay, however, the scope given to this factor did not result from the discovery of new miscarriages of justice. Rather, it is owing entirely to the inclusion under this rubric of the impossibility of "compensation" under death penalties, a point that had been treated in his 1775 essay as a separate factor.¹¹² Also, in the 1831 essay irremissibility is no longer the chief objection to the death penalty; that role now seems to be assigned to "Bad property the first— inefficiency."¹¹³ This property was not even mentioned as such in the 1775 essay; nor should it have been, since if taken strictly, a punishment's inefficiency is both a composite of several of the other factors and also virtually indistinguishable from its overall inutility. In the earlier essay, it will be recalled,¹¹⁴ a property that might seem to be the opposite of inefficiency, *viz*, "Efficacy," was cited by Bentham as one of the chief virtues of the death penalty; in that essay, efficacy was in effect identified with incapacitation. In 1831, however, the incapacitative effect is merely one aspect of overall efficiency. Moreover, he discounts it to such an extent that he is ready to claim for his alternative (the "sucedaneum," he calls it)¹¹⁵ that it is "preferable to it [*viz*, the death penalty] in every imaginable particular . . . ,"¹¹⁶ a claim that goes well beyond anything advanced in 1775.

Bentham is also now confident that the death penalty is deficient in every other aspect of efficiency, because of a "counteracting force,"¹¹⁷ the increasing hostility to the death penalty among the accused, witnesses, prosecutors, judges, and juries. All of these parties to the admin-

¹⁰⁹ "One searches our chronicles in vain for the execution of any member of the affluent strata of this society." *Furman v. Georgia*, 408 U.S. 238, 251-52 (1972) (Douglas, J., concurring); cf. C. Darrow, in *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT 1787-1975*, at 178 (P. Mackey ed. 1976) ("[I]t . . . is the poor who fill prisons and who go to the scaffold . . .").

¹¹⁰ 1 *WORKS*, *supra* note 2, at 531.1.

¹¹¹ See *infra* text accompanying notes 136-38.

¹¹² See *supra* section IV, A.

¹¹³ *Id.* at 526.2.

¹¹⁴ See *supra* section IV, D.

¹¹⁵ 1 *WORKS*, *supra* note 2, at 526.1.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 526.2.

istration of justice in effect conspire to withhold the death penalty, so that "this punishment fails of being productive of the preventive effect looked for and endeavored to be produced"¹¹⁸ in a manner unlike what happens with "any other mode" of punishment.¹¹⁹ What Bentham is complaining of is the problem of administrative and judicial nullification, a phenomenon that played a conspicuous part in the movement toward abolition of the death penalty both in England¹²⁰ and in the United States.¹²¹ Interestingly, Bentham takes no notice of two developments in the criminal law of the United States that were directly responsive to this problem, growing as it did out of the practice in England of mandatory death penalties.¹²² I refer to the introduction of degrees of murder, with the death penalty confined to first-degree murder (introduced in Pennsylvania in 1794),¹²³ and to the statutory authority for the trial court to impose a sentence of life rather than of death even after the offender had been convicted of a capital crime (a practice sporadically present in American criminal law since colonial days).¹²⁴

Three other changes distinguish the 1831 argument from its predecessor. Apparently unlike anything to be found in the 1775 essay, Bentham's readers in 1831 were presented with an objection to the death penalty he called its "Bad property the third—Tendency to produce Crimes."¹²⁵ Under this heading he does not have in mind, as we might today, the alleged generally brutalizing effect of executions upon the public,¹²⁶ notably if not originally stressed by Karl Marx two decades after Bentham's death.¹²⁷ Nor was it pathological criminal behavior attested to both in anecdote and in clinical analysis, such as "suicide by murder."¹²⁸ Bentham seems to be unaware of all such counterdeter-

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See L. RADZINOWICZ, *supra* note 1, at 83-106, 138-64, 727-32.

¹²¹ See Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32 (1974).

¹²² Bentham did, however, interest himself in several facets of law and legal institutions in the United States. See H. HART, *supra* note 16, at 53-78.

¹²³ Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 772 (1949); see H. BEDAU, *supra* note 47, at 4-6.

¹²⁴ See H. BEDAU, *supra* note 47, at 9-12. An adequate history of the origin and development of discretionary death sentencing in the United States has yet to be written.

¹²⁵ 1 WORKS, *supra* note 2, at 528.1.

¹²⁶ For a full discussion of the history of this idea, as well as for the most recent research to favor "the brutalization hypothesis," see Bowers & Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980).

¹²⁷ Marx, *Capital Punishment*, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY: KARL MARX AND FRIEDRICH ENGELS 485-89 (L. Feuer ed. 1959).

¹²⁸ T. SELLIN, THE DEATH PENALTY 65-69 (1959); Solomon, *Capital Punishment as Suicide and Murder*, 45 AM. J. ORTHOPSYCHIATRY 701 (1975); cf. Diamond, *Murder and the Death Penalty: A Case Report*, 45 AM. J. ORTHOPSYCHIATRY 712 (1975); West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689 (1975).

rence factors. Instead, his point here is merely an amplification of his 1775 footnote to the effect that the death penalty silences a source of testimonial evidence. "[D]eath-punishment puts it in the power of any ill-disposed person, by extinction put upon true evidence, to produce any evil, producible by him by means of false evidence."¹²⁹ Thus, although the point is the old one, it has now assumed larger proportions in his mind. Once again, however, he cites no evidence from actual cases to confirm his objection that it "produces crimes" of the sort alleged.

The most peculiar addition to Bentham's argument against the death penalty in the 1831 essay is "Bad property the fourth—Enhancing the evil effects of undue Pardon."¹³⁰ He dilates on this theme at length, giving to it as much space as he does to the other three "bad properties" combined. That he should do so to this extent cannot be explained by his utilitarianism or by any other relevant consideration. As a utilitarian, he would of course oppose executive meddling into the application of general laws to particular cases—but only so long as there was good reason to believe that strict enforcement of those laws would maximize utility (and, of course, if it would not, then the laws should be changed until they would). Pardon, as Bentham rightly says, is an act of "mercy,"¹³¹ and as such is a "mischievous"¹³² eruption of god-like attributes that have no place in a society governed by a penal code that takes "for its first principle the greatest-happiness principle."¹³³ Even though there is no evidence that by 1830, royal pardon of capital offenders in England had reached alarming frequency,¹³⁴ Bentham may have formed an impression of the facts (though he alludes to none) that provided him with cause for worry in the vein of his argument here, addressed as it ostensibly was to his "fellow citizens of France." What he overlooks, of course, is that, since on his own account of the matter, capital laws cannot be penal laws of maximal utility, in France or any country like it, the suspension of those laws by executive acts of mercy cannot be so easily attacked on utilitarian grounds. To think otherwise is to attach an excessive belief in the utility of obedience to law, in recent years attacked by utilitarians as mere "rule worship,"¹³⁵ and rightly so. In any case, Bentham's preoccupation with the whole theme is bound to strike even the sympathetic observer today as tedious, eccentric, and unmotivated.

By far the most important improvement in the 1831 essay over its

¹²⁹ 1 WORKS, *supra* note 2, at 528.2.

¹³⁰ *Id.*

¹³¹ *Id.* at 529.1.

¹³² *Id.* at 529.2.

¹³³ *Id.*

¹³⁴ L. RADZINOWICZ, *supra* note 1, at 107-37, 158-64, 470, 555-57.

¹³⁵ J. SMART & B. WILLIAMS, *supra* note 22, at 10.

predecessor, the one crucial respect in which Bentham's argument is conspicuously superior on utilitarian grounds to what he offered in 1775, is in regard to the deterrent efficacy of executions. It will be recalled that in 1775 Bentham evaluated most (but not all) of the considerations relevant to deterrence under the rubric of "Exemplarity," a factor he held tended to favor the death penalty over the alternative, though not as much as its supporters believed. In 1831, he ignored this factor entirely, perhaps by then aware that "Exemplarity" was not an adequate rubric for his purposes. Instead, he argued that the death penalty, in addition to its four "bad properties," also suffered from another, *viz*, "needlessness."¹³⁶ We reach this conclusion, he says, "by experiments actually made, and the experience thereby obtained."¹³⁷ What he has in mind he saves to the very end of his essay, where he reports the following:

In *Tuscany*, in the whole interval between the abolition of death-punishment, in that Grand Duchy, by the Emperor Leopold, while Grand Duke [beginning in 1765]—and the re-establishment [sic] of it [under Bonaparte in 1795]—the average number of crimes was considerably less than those after that same re-establishment [sic]: length of the interval many years: and, in that same interval, *assassinations* no more than *six*: while, in the Roman States, not much larger than *Tuscany*, the number, in a quarter of a year, was no less than *sixty*.¹³⁸

These data, primitive though they are by today's standards, would seem to be typical of those available at that time¹³⁹ and perhaps among the first ever used to establish that the death penalty is a less effective deterrent than imprisonment. In the 1775 essay, there is nothing remotely like this attempt to marshal empirical data to support the general argument; it represents in principle the most salient improvement in Bentham's 1831 essay over his earlier critique,¹⁴⁰ but only in princi-

¹³⁶ 1 WORKS, *supra* note 2, at 526.1. Elsewhere, Bentham had explained that a punishment is "needless" whenever "less expensive [*i.e.*, painful] means" would have sufficed to achieve the same benefits; thus it is tantamount to a broad reading of the earlier category of "frugality." *Id.* at 397.2; cf. INTRODUCTION, *supra* note 2, at 164.

¹³⁷ 1 WORKS, *supra* note 2, at 526.1.

¹³⁸ *Id.* at 531.2 (emphasis in original). Bentham cites John Howard, the English prison reformer, as his source for the information about Tuscany under Leopold, and the French penologist, Charles Lucas, for his information about the Roman States. The Tuscany experiment was a favorite among abolitionists during the late eighteenth and early nineteenth centuries; it is cited in various forms by such leading American abolitionists as Benjamin Rush, William Livingston, John L. O'Sullivan, Robert J. Rantoul, and Charles Spear. On Howard and Bentham, see M. IGNATIEFF, *supra* note 36, at 47-71. On Charles Lucas, see Normandeau, *Pioneers in Criminology: Charles Lucas—Opponent of Capital Punishment*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 218 (1970).

¹³⁹ As an indication of the sorry state of statistical data in the eighteenth century in terms of which to evaluate the deterrent and other effects of the death penalty, see L. RADZINOWICZ, *supra* note 1, at 139-48.

¹⁴⁰ As Bentham must have known from reading Beccaria, the death penalty had been

ple. While it is true that the form of Bentham's argument is precisely the sort that sociologists used until a decade ago, when the jurisdiction-matching techniques pioneered by Karl Schuessler¹⁴¹ and Thorsten Sellin¹⁴² were challenged by multiple regression analysis using aggregate national data,¹⁴³ the particular data on which Bentham relies can easily be explained away by anyone who believes that the death penalty really is a deterrent-cum-incapacitator *par excellence*. For example, perhaps detection and enforcement in Tuscany were much more efficient than in the Roman States (Bentham seems to assume that they were equally effective or ineffective); perhaps the population variation in the two districts makes the murder rates (which Bentham neither reports nor calculates) more nearly the same. Until one's mind is set at ease by the right sort of answers to these and other questions, the gross disparity in volume of murder, on which Bentham relies, is not plausibly regarded as persuasive evidence that imprisonment is an even more effective deterrent than the death penalty.

As a summary and convenient display of Bentham's 1775 and 1831 discussions, taking into account all and only the various factors he identifies in the *Rationale* for the general evaluation of modes of punishment Table 1 may prove helpful. Dates are entered into a column according to whether Bentham cites the factor in question as such in his essay of that year. If the date is in parentheses, then Bentham mentions the factor but fails to isolate it as such. A check is entered in the appropriate place whenever Bentham failed to take a factor into account that in my opinion he should have, given his own analysis. Footnotes indicate whether Bentham confines the factor in question to the death penalty for murder, or applies it to any crime.

Of the four properties of punishment that appear in Table 1 and are not mentioned as such in either of Bentham's two examinations of the death penalty, a word of explanation is needed here in regard to two of them. "Commensurability" is that property of punishments by virtue of which, given any two crimes that a would-be criminal might commit, the heavier punishment is attached to the graver offense.¹⁴⁴ In the case of the punishment of any single crime, such as murder, this factor is

abolished in Russia even prior to its abolition in Tuscany. C. BECCARIA, *supra* note 17, at 46. Apparently, however, no data on the volume of crime was made available concerning the periods before, during, or after the experiment. For general discussion, see Adams, *Capital Punishment in Imperial and Soviet Criminal Law*, 18 AM. J. COMP. L. 575, 576 (1970).

¹⁴¹ Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 57-58 (1952).

¹⁴² T. SELLIN, *supra* note 128, at 23-38; T. SELLIN, *supra* note 67, at 140-56.

¹⁴³ Ehrlich, *The Deterrent Effect of Capital Punishment: A Matter of Life and Death*, 65 AM. ECON. REV. 397 (1975). For a comparison of the methods of Ehrlich and Sellin, see Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975).

¹⁴⁴ See 1 WORKS, *supra* note 2, at 403; cf. INTRODUCTION, *supra* note 2, at 177.

TABLE 1
SUMMARY OF BENTHAM'S 1775 AND 1831 ARGUMENTS

Factors Relevant to Assessing the Utility of a Mode of Punishment ^a	Relevance to the Death Penalty as Viewed by Bentham			
	Favors	Opposes	Divided	Ignored
Variability ^b		1775		1831
Equability		1775		1831
Commensurability		✓		1776 1831
Characteristicalness ^c	1775 ^g	✓ ⁱ		1831
Exemplarity	1775			1831
Frugality		1775 (1831) ^j		
Subserviency to Reformation		(1775)		1831
Efficacy with respect to Disablement	1775 (1831)			
Subserviency to Compensation ^d	(1831)	1775	✓	
Popularity	1775 (1831)			
Simplicity of Description ^e	✓ ^h			1775 1831
Remissibility ^f		1775 1831		

^a Bentham, *Rationale of Punishment*, in 1 WORKS 402-06 (Bowring ed.); INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 175-86 (H.L.A. Hart ed.).

^b Discussed in 1775 under "Equability."

^c In 1775 called "Analogy."

^d In 1775 called "Unprofitability;" in 1831 included under "Remissibility."

^e Not cited as a factor in INTRODUCTION.

^f In 1775 includes also destruction of testimonial evidence; in 1831 includes as well liability to judicial abuse (nullification) and executive abuse ("Undue Pardon").

^g Not cited as a factor in INTRODUCTION.

^h Indicates what Bentham could have concluded, but did not.

ⁱ As applied to all crimes other than murder.

^j Discussed in 1831 under "Needlessness."

irrelevant; but given any two crimes of different gravity, their punishment would be incommensurable with their gravity if both are punishable with death. "Subserviency to Compensation" involves the idea of "profit" or gain from the offender's undergoing the punishment itself.¹⁴⁵ Assuming that the friends of the victim, and perhaps society generally, are vindictively inclined, no matter what the crime or who the criminal, then the death penalty presumably provides more compensation than

¹⁴⁵ See 1 WORKS, *supra* note 2, at 405; *cf.* INTRODUCTION, *supra* note 2, at 192.

any less severe alternative. However, since the death of the offender under this penalty also prevents any other "gain" from the punishment, whereas imprisonment does not, the factor admits of no uniform application to the issue at hand.

This attempt at tabular summary of Bentham's argument has its limitations, notably in failing to capture the quality of his argument in either essay on the deterrence question. But that, as I have suggested earlier, is owing primarily to his own method of organizing his argument, especially in the 1775 essay.

VI. THE BALANCE OF CALCULATIONS

In his *Rationale of Punishment*, Bentham made great strides in identifying factors relevant to any possible utilitarian evaluation of the death penalty versus the alternatives. The dozen factors produced by his analysis are an enormous improvement over anything contributed by his predecessors toward constructing a general theory of punishment. This enables him to lay out a form of argument, particularly in his 1775 essay, that surpasses in its scope and clarity anything achieved by others before him. Henceforth, utilitarian arguments could in principle (even if they did not always in fact) proceed to focus upon details and subsidiary matters, because the general form of the argument had been settled once and for all and in a way neutral to the outcome. That is, Bentham's analysis enables a utilitarian to defend or attack the death penalty in a way that any other utilitarian could immediately grasp and either reinforce or undermine, depending upon further empirical considerations independent of the form of the argument itself.

This acknowledgement only brings us face to face with the two great weaknesses of Bentham's argument, defects so substantial that no utilitarian could possibly have adequate grounds for believing that in 1831, much less in 1775, Bentham had proved his case on his own premises. The first defect is that Bentham does not adequately explain why the dozen factors he identifies have the relative importance he thinks they do. For example, he believes the "Remissibility" of a punishment is of greater weight in its effect on the general happiness than is either "Simplicity of Description" or "Characteristicalness." Why is this so, if it is? Similarly, Bentham seems to believe that "Remissibility" is the gravest defect of the death penalty relative to imprisonment, whereas "Efficacy" (incapacitation) is its greatest advantage. Which effect is the greater upon the general happiness, and why? In neither case does Bentham tell us. He does not even always show us his own convictions about the factors he mentions, so that we are left to guess what he thinks their relative weights are; much less does he provide any way in which

we might make these judgments rationally. These omissions lead directly to the second objection.

Except for the data from the experience during abolition in Italy, Bentham's entire argument proceeds without any empirical evidence whatsoever. As was noted earlier,¹⁴⁶ it is impossible to give an adequate utilitarian argument for any law, policy, or act without some (preferably substantial) empirical evidence to back up each of the empirical premises in the argument. In addition to having the correct variables in the correct form of an equation, one must also be able to introduce real numbers, whether as approximations, estimates, or actual measurements, in order to use the equation to calculate a result. Laying out the correct form of an argument, by itself, can never suffice to prove its conclusion. To be sure, the social sciences were at best in their infancy when Bentham wrote, hardly less so in 1831 than in 1775. Still, no thoroughgoing utilitarian can overlook this striking insufficiency about Bentham's argument, even if the scholarly critic of today can excuse it.

There is, finally, an even more fundamental problem with Bentham's argument, one that plagues at least his form of utilitarianism if not every other. It arises from the impossibility of measuring the end-state and effects on it from various alternative acts. What, after all, do we really mean by "the greatest happiness," or maximizing the general happiness? How, in actual practice, are we to tell which of two alternative penalty schemes has the more favorable (or the less unfavorable) effect on the desired end-state? Bentham is under a profound illusion that either there is no problem here or that it is easily solved. Neither is true. For one thing, if maximizing the general happiness requires us to have a measure of interpersonal cardinal utility, then it is impossible to tell which of two alternatives tends toward this maximum, because we have no method for measuring interpersonal cardinal utility.¹⁴⁷ Even if we can get by with some ordinal method that will suffice to rank alternatives, as almost all contemporary utilitarians do,¹⁴⁸ it is still far from clear whether we can do anything more than conjecture which of two alternatives is the more likely to increase (or less likely to decrease) the general happiness. Even this is not the chief problem. The very idea of "the greatest happiness" is itself so vague, abstract, unstructured, and all-encompassing that it is virtually impossible to have a grasp of how it is affected by one rather than another small-scale social policy. The choice between the death penalty and long-term imprisonment for a specific statutory offense in a given society at a given time is a choice of precisely this nature. What in fact tends to happen is that talk about

¹⁴⁶ See *supra* section II.

¹⁴⁷ See Brock, *Recent Work on Utilitarianism*, 10 AM. PHIL. Q. 241, 245-46 (1973).

¹⁴⁸ J. SMART & B. WILLIAMS, *supra* note 22, at 32, 38.

rational choice between alternatives in such a case reduces (and some utilitarians have proposed that it should reduce)¹⁴⁹ to a question of individual preference: Which do *you* prefer, a world in which there is a death penalty for murder (with all the empirical consequences thereof) or a world in which there is long-term imprisonment for murder (ditto)? Bentham's preferences are clear, and clearer in 1831 than in 1775. Whether there were objective reasons for others to share his preferences is less evident.

This difficulty about measuring effects upon the elusive and amorphous general happiness is what leads a utilitarian to content himself with measuring something more manageable. In the present context, choosing between alternative modes of punishment and sentences for grave crimes tends to rest largely upon the effect these alternatives have on the crime rate. For all practical purposes, this is as far as contemporary utilitarians seem willing to go, and it accounts for the prominence in their discussions about the death penalty of the impact on deterrence and incapacitation of executions versus imprisonment.¹⁵⁰ There is, however, no simple analytic or empirical connection between the concept of the greatest happiness and the crime rate. About all one can say is that, *ceteris paribus*, the lower the crime rate the greater the general happiness. But this is a gross oversimplification, and, in any case, other things are never equal so the generalization does not take us very far.

Utilitarian arguments over the death penalty have not disappeared from the contemporary scene, but I know of none that attempts to improve upon Bentham's, much less any that succeeds in doing so.¹⁵¹ Actual arguments, whether for or against the death penalty, usually turn out to be a mixture of utilitarian and nonutilitarian considerations¹⁵²

¹⁴⁹ *Id.*

¹⁵⁰ Usually, social scientists who investigate the issues relating to the death penalty do not avow a utilitarian outlook, even though they often seem to accept it tacitly. For a complaint that "the capital punishment debate has been framed largely in utilitarian terms," see J. WILSON, *THINKING ABOUT CRIME* 208 (1977). For a criticism of thinking about the controversy on utilitarian-like premises that focuses almost exclusively on the crime rate, see Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 539, 541 (1971).

¹⁵¹ As an instructive example, consider the argument a generation ago by Professor Hart in Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U.L. REV. 433 (1957), reprinted in H. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 54-89 (1968). Hart carefully lays out a purely utilitarian view of the death penalty controversy (curiously enough, however, with virtually no reference to Bentham's views). Yet he does not rest his own opposition to the death penalty exclusively on such grounds, as his appeals to "civilized moral thought" and the constraints it places on an unqualified "pursuit of the utilitarian goal" (which he seemingly has identified, wrongly, with reductions in the crime rate) indicate. *Id.* at 80. The result, as he points out, is that his argument is only a "qualified utilitarian" criticism of the death penalty. *Id.* at 88.

¹⁵² See, e.g., Hart, *supra* note 151. This is how I would characterize my own arguments

(where they are not¹⁵³ openly antiutilitarian) —and for good reason, if my criticisms above are, in the main, correct.¹⁵⁴ Moreover, whereas one might expect utilitarian-type considerations to dominate in legislative chambers, much of the debate over the death penalty in this country during the past two decades has been influenced by constitutional considerations, the key ideas of which—"due process," "equal protection of the laws," "cruel and unusual punishment"—take us in directions where purely utilitarian arguments cannot reach, or reach only with difficulty and obscurity.¹⁵⁵ As things stand at present, therefore, despite the impressive amount of information that has been collected relevant to the many empirical questions concerning the way the death penalty functions in our society,¹⁵⁶ we cannot say with any precision whether the death penalty or its alternative is to be preferred on the kinds of grounds Bentham identified. Whether a utilitarian argument could be constructed that would accomplish all Bentham believed his argument did, and whether if it could its conclusion on the policy question would be the same as Bentham's in favor of recommending complete abolition of all death penalties, has yet to be decided. This much does seem likely, however: If executions are to be brought to an end, as Bentham hoped they would be, it may well have to be without our having first carried out his utilitarian project to its proper conclusion.¹⁵⁷

against the death penalty. See BEDAU, *supra* note 65; see also Bedau, *The Death Penalty: Social Policy and Social Justice*, 1977 ARIZ. ST. L.J. 767.

¹⁵³ W. BERNIS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979) gives a strongly antiutilitarian defense of the death penalty. For an equally antiutilitarian argument but to the opposite conclusion, see Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501 (1981).

¹⁵⁴ A conspicuous exception may be Ernest van den Haag, who has recently written that "I now find a pure deterrence theory sufficient to justify threats, punishments and their distribution." van den Haag, *Comment on "Challenging Just Deserts: Punishing White-Collar Criminals,"* 73 J. CRIM. L. & CRIMINOLOGY 764, 764 (1982). As he notes, this represents a shift in his views; in his book, E. VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* (1975), he endeavored to defend a theory of punishment that would accommodate the claims both of "justice" and "utility." *Id.* at 24-25. No utilitarian, however, can hope to "justify threats, punishments and their distribution" by appeal to *nothing* but "pure deterrence," as I once pointed out elsewhere in specific criticism of van den Haag's views in defense of the death penalty, see BEDAU, *supra* note 154, at 541, and as is obvious from Bentham's own avowedly utilitarian theory.

¹⁵⁵ See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). I have argued this point further on the death penalty issue in an as yet unpublished paper on "cruel and unusual punishment."

¹⁵⁶ See H. BEDAU, *supra* notes 47 & 59; CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau & C. Pierce eds. 1976); S. DIKE, *CAPITAL PUNISHMENT IN THE UNITED STATES: A CONSIDERATION OF THE EVIDENCE* (1982); T. SELLIN, *supra* note 67. The notes and bibliographies in these sources make available most, though by no means all, the literature on the subject as of 1980 or so.

¹⁵⁷ I have discussed elsewhere in somewhat greater detail the obstacles to carrying out a full-scale purely utilitarian (I called it a "cost-benefit") approach to the death penalty. BEDAU, *supra* note 65, at 165-73.

