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**ARTICLE:** FRAMED: UTILITARIANISM AND PUNISHMENT OF THE INNOCENT

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**BIO:**

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**SUMMARY:**

... Utilitarians such as Beccaria and Bentham championed such key reforms as the development of police forces, comprehensive penal codes and penitentiaries, the abandonment of torture and corporal punishment, and reduced reliance upon capital punishment. ... In the next section, we will examine Bentham's statements on punishment of the innocent and fictitious punishment of the guilty. ... An example of punishment of the innocent which in Bentham's view, can sometimes be useful, and thus also justified, is collective punishment. ... Thus in identifying the utility principle as the foundation of his book on legislation, Bentham by no means implied that individuals are morally obliged to serve the public welfare. ... The law would stand until legislatively altered: "on any occasion, an ordinance, which to some shall appear repugnant to the principles of this constitution, shall come to have been enacted by the legislature, such an ordinance is not on that account to be, by any judge, treated or spoken of, as being null and void. . . ." ... Yet there is a content to Bentham's conception of utility that is hard to disentangle from democracy. ... On this interpretation, utilitarian penology cannot be charged with condoning or demanding punishment of the innocent (except in the limited sense that all efforts to punish the guilty entail risks of inadvertently punishing the innocent and unfairly harming innocent associates of the guilty). ...

**TEXT:**

I. Introduction

Utilitarian penology treats punishment as a costly instrument of public policy, permissible only when its benefits in reducing future crime outweigh the pain, fear, and public expense it imposes. According to utilitarian penology, therefore, the aim of maximizing welfare both justifies and limits the institution of punishment. While utilitarian penology has traditionally emphasized deterrence, reform and incapacitation as mechanisms by which punishment might reduce crime, it values any crimeinhibiting effect of punishment. Utilitarian penology also compares punishment to other policies which might achieve greater crime reductions at less social cost. Deterrence, for example might be

most cost-effectively achieved by increasing the availability and benefits of lawful employment, or by technologies of law enforcement and urban design that increase the certainty of apprehension. Likewise, character reform might be better achieved by early education and by drug rehabilitation than by incarceration.

Utilitarian penology has a distinguished history. Utilitarians such as Beccaria and Bentham championed such key reforms as the development of police forces, comprehensive penal codes and penitentiaries, the abandonment of torture and corporal punishment, and reduced reliance upon capital punishment. Nevertheless, utilitarian penology has recently lost its luster, at least in the United States. The 1970's witnessed an explosion of retributivist thought among philosophers, legal scholars and publicists. Retributivists held that beneficial consequences provided neither a necessary nor a sufficient reason to punish, and that bad consequences provided neither a necessary nor a sufficient reason to refrain from punishing. Punishment could only be justified--and limited--by the moral desert of offenders.

Retributivists participated in public debates over criminal justice policy, attacking probation, parole, indeterminate sentencing, rehabilitative programs, and determinist accounts of crime, whether invoked to excuse individuals<sup>n1</sup> or to justify ameliorative social programs.<sup>n2</sup> Retributivists promoted determinate sentencing and thereby contributed to the passage of the harsh federal sentencing guidelines.<sup>n3</sup> Retribution was invoked by the Supreme Court as a constitutionally legitimate purpose of punishment in upholding the constitutionality of the death penalty.<sup>n4</sup>

Retributivist attacks on utilitarian penology resonated with some sectors of the American public: retributive punishment bore witness to the inviolability and inflexibility of certain moral standards during an era of social change and cultural conflict. Increasing pessimism about the efficacy of government policy--particularly in influencing the behavior and lifechances of the poor--decreased public confidence that a combination of penal and social welfare measures could control crime. Popular perception painted urban centers as dangerous jungles in which anonymous offenders confronted little meaningful risk of apprehension, and were pathologically resistant to rational incentives.

In the face of these public attitudes, criminal legislation seemed to shift from the domain of public policy to that of symbolic politics.<sup>n5</sup> Rather than serving as part of a public crime control policy, punishment became a medium for expressing hatred of criminals. Retributivism reassured decisionmakers and voters that it was unnecessary--and indeed unprincipled--to ask whether punishment would reduce crime or enhance social welfare. It sufficed that an offender deserved it. In short, the public effect of retributivist rhetoric was to erode the utilitarian scruple against unnecessary punishment.

Ironically, while the public effect of retributivist rhetoric was to increase punishment, the retributivist arguments that were most influential among philosophers and legal scholars asserted that utilitarianism could lead to excessive rather than insufficient punishment. Retributivists evoked the libertarian sensibilities of academics by warning that utilitarianism could justify punishment that transgressed the retributivist prohibition against undeserved punishment. Thus, indeterminate sentencing could lead to lengthy terms for minor offenses, based on discretionary and perhaps prejudicial predictions of dangerousness, or assessments of progress toward rehabilitation.<sup>n6</sup> Harsh punishment of a few hapless individuals might effectively deter millions from committing minor offenses. Worst of all, deterrence might be served, public fear might be dissipated, and vigilante violence forestalled, by framing and punishing innocent persons. A related argument, against utility as a limitation on punishment, contended that the benefits of punishing the guilty could be achieved at less cost by merely pretending to punish them.<sup>n7</sup> These claims about the unfair practices endorsed by utilitarianism depend on the image of a deceitful official, scheming to maximize utility by manipulating the public.

This paper is a defense of utilitarian penology, against the familiar retributivist charge that it promotes framing the innocent, and other charges similarly depending on the notion that utilitarianism encourages officials to deceive the public. Our defense proceeds from the striking fact that utilitarianism's critics do not cite textual evidence that the originators of utilitarian penology in fact endorsed punishing the innocent or deceiving the public. Instead, critics claim that these unsavory policies follow logically from the premises of utilitarianism. Our argument, in brief, is that the charge of framing the innocent rests on a misunderstanding of utilitarian penology as an application of an

"act-utilitarian" ethic governing individual behavior. We contend that utilitarianism began as a normative theory of law and legal process aiming not just at happiness in general, but also at security in particular, and that this theory was methodologically committed to publicity, regularity and representativeness of legal decisionmaking. We argue further that utilitarian penology was the original and paradigmatic application of this theory of law and legal process, and should be so understood. When understood in this way, utilitarian penology cannot endorse punishment of the innocent, which violates either the security aim, or the publicity condition, or both. Indeed, utilitarian penology cannot endorse any program of official manipulation of the public that restricts information to a putatively utilitarian elite.<sup>n8</sup> It is simply not true that eschewing unnecessary punishment of the guilty logically entails willingness to punish the innocent.

A further implication of our argument is that the enterprise of "actutilitarian ethics" bears little relation to the original project of utilitarianism. Other contemporary off-spring of utilitarianism are more deserving heirs of utilitarianism's legacy of accomplishment. These contemporary variants of utilitarianism emphasize its role as a public philosophy concerned with public policy, legal process and institutional design.<sup>n9</sup> By contrast, act-utilitarian ethics miscasts utilitarianism in the pastoral role of giving individuals advice about how to manage their moral obligations. Nor does it do justice to utilitarianism's status as a normative philosophy of law to redefine it as a "rule-utilitarian ethics" that urges individuals to follow rules that would maximize utility if followed universally. Rule-utilitarianism is the wrong answer because it answers the wrong question. The right question is not "what ethical standard for individual acts advances utility while still avoiding punishment of the innocent?" The right question is "what practice of philosophy helps us identify and administer the kind of institutional processes that will best secure happiness?"

Thus beyond the question of the nature of utilitarianism lie deeper questions of method in normative philosophy. What does it mean to have a theory of a practice like punishment? What does it mean to understand a school of thought like utilitarianism?<sup>n10</sup> The debate over utilitarian penology has been distorted by procrustean assumptions about the nature of normative philosophy. As a result, the critics of the utilitarian theory of punishment have attacked what they assume such a theory must be, rather than actually reading and attempting to understand utilitarian works about punishment.

Critics of utilitarianism have presumed a foundationalist model of justification in value theory. According to this model, normative theorizing must begin with a general conception of value, correct for all contexts, which must then be applied as an ethical criterion for evaluating all human acts. Since political and institutional decisions are made by means of human acts, political and legal theory are only applications of ethical theory which, in turn, is an application of the general standard of value. According to this model, the proper domain of any theory of value is universal, and the restriction of any normative standard to a particular context is an apparent inconsistency requiring explanation and defense.

Thus, if it is good for governments to seek to establish utilitymaximizing institutions and policies it must be good for individuals to seek to perform utility-maximizing acts. According to this way of thinking, all good things must share some quality in common, some essence of the good, which it is the task of philosophy to discover. Thus all normative theories must be founded on claims about the essence of value, if they are to count as philosophical theories. And such theories can be refuted if they are shown to rest on no foundational view about the nature of value, or a poor one. This is how critics of utilitarian penology can ascribe to it ethical claims about the obligations of individual actors to bear false witness without quoting or citing any such claims. And this is why they see efforts to clear utilitarianism of the charge of punishing the innocent as disingenuous attempts to artificially "restrict" utilitarianism.

We offer here a very different strategy for reading Bentham and other utilitarian writers on punishment. We do not assume that a normative theory about an institutional practice like punishment in particular, or about government more generally, must be tied to a theory about individual ethics. Nor do we assume that practices must rest on a universally applicable standard of value. The foundationalist model of justification inspiring these assumptions is unpragmatic: that a practice cannot be linked to some general account of value does not by itself give us a good reason to abandon that practice.<sup>n11</sup> Unless people are self-consciously engaged in a certain brand of moral philosophy they don't ordinarily

justify practices by reference to foundational conceptions of value. Instead, they commonly invoke the purposes the practice serves in some practical context. And so we need to be very sure that utilitarian penology was part of a practice of foundationalist philosophizing before we go ascribing foundationalist views to it. If we wish to understand utilitarian writings, we need to understand utilitarianism as a practice. We need to ask: What recommended utilitarianism to its original proponents? What features of their social context made it meaningful to them? How did they make use of it? What problems did utilitarianism address? What alternative views did it compete with?

We read Bentham and his colleagues as practical reformers and rhetoricians, developing a new discourse of value and a new method of analysis for use in an emerging context of democratically accountable legislation and administration. This new discourse of law and politics was not an application, let alone a "restriction" of some utilitarian ethical philosophy that existed apart from it. This new discourse of law and politics was utilitarianism itself. Indeed, a key to understanding Bentham is to bear in mind that his training and his interests were in law, not in philosophy, and certainly not in the academic discipline of "ethics." The "utilitarianism" to which modern penal institutions owe their inspiration is a legal theory and a rhetorical practice, not an ethical philosophy.

This Article is divided into seven sections. Section II explicates the charge that utilitarianism requires punishing the innocent, and the related charge that it requires the fictitious punishment of the guilty. It also examines five responses to these charges offered by contemporary utilitarians: acceptance, definitional evasion, minimization, comparison and restriction. This discussion will show that the charge of punishing the innocent depends on the premise that utilitarianism dictates public deception. Section III examines Bentham's actual statements on punishing the innocent and fictitiously punishing the guilty. It concludes that while Bentham permitted some exaggeration of the rigors of punishment, he opposed outright deception of the public and emphatically opposed deliberately punishing the innocent. He did recognize that some inadvertent punishment of the innocent was an inevitable cost of punishing the guilty, a cost that should discourage us from freely resorting to the punitive sanction.

If the founder of utilitarianism explicitly opposed framing the innocent, how can critics ascribe this practice to utilitarianism? They must argue that Bentham was confused about his own commitments and that framing the innocent is logically entailed by his premises and purposes. Thus, they assume that Bentham is committed to endorsing all acts that enhance utility in any conceivable world, including framing the innocent. But just as Bentham's particular views on punishing the innocent cannot be identified without reading him, neither can his premises and purposes. Accordingly, Sections IV and V examine these purposes and premises. Section IV shows that Bentham's theory of punishment did not derive from any general ethical theory. Bentham, like his chief forebears Hume, Helvetius and Beccaria, thought of public utility as a standard of value for public action, such as legislation. He assumed that private action was ruled by private utility (i.e. self-interest) so that there was little point in directing arguments about the general welfare to individual ethical actors. Section V shows that in assessing public action, Bentham was far less concerned about consequences than has generally been supposed and far more concerned about process. He identified utility with security of expectations and the rule of law. As a result, he endorsed public actions that could be seen to have emerged from a rational and well-informed debate about their consequences for the public welfare. Utility was not a definition of the good or a guide to conscience, but a standard designed for use in public, deliberative debate. And, utilitarianism was not so much a philosophical theory as a rhetorical practice, a transparent language of analysis and argument for use in political deliberation.

Section VI further elaborates the procedural conditions presupposed by utilitarian discourse. Section VI begins by demonstrating Bentham's commitment to a conception of legality, involving legislative promulgation of formal rules, faithfully and applied by rigidly constrained bureaucrats and judges. Next, it demonstrates Bentham's commitment to democratic representation of the public in devising legislation. Finally, it demonstrates Bentham's commitment to publicity in government decisionmaking. Utilitarian policy required public scrutiny of all decisions and the information and reasons considered in making them.

In sum, sections IV through VI show that Bentham's utilitarianism was primarily concerned with the problem of how to design government so that it could accurately identify and faithfully pursue the public good, and be seen to do

so. Bentham therefore conceived utility as a standard for official rather than private action. Bentham's utilitarianism is more fundamentally committed to publicity of official decisionmaking than to any particular policy judgment about the public welfare. It follows that Bentham's utility principle does not require him to endorse deceiving the public and framing an innocent person.

Section VII sums up the larger utilitarian project of legal reform that motivated utilitarian penology. It then turns to the question of where, if anywhere, the venerable project of utilitarian penology fits in the topography of contemporary utilitarian philosophy. Our conclusion is that utilitarian penology should not be seen as an extension or application of any modern doctrine of utilitarian ethics, since it preceded all such doctrines and does not rely on any ethical doctrine. The best contemporary analogue to early utilitarian writing is policy oriented legal scholarship. But we shall see that a number of contemporary utilitarian philosophers have begun to struggle towards a conception of utilitarianism as a political philosophy concerned with the design and function of institutions, rather than an ethical philosophy concerned with individual moral obligations. These efforts to develop a utilitarian "public philosophy"<sup>n12</sup> or "institutionalism"<sup>n13</sup> may be seen as extensions of Bentham's original project of legal reform. Their authors may proudly claim this heritage, which does not commit them to framing the innocent. That charge is a frame-up.

## II. The Debate Over Punishing the Innocent

### A. The Charge

Many philosophers have asserted that utilitarianism requires framing and punishing an innocent person when doing so will advance utility.<sup>n14</sup> Dozens of legal scholars have repeated some version of this charge, generally citing it as the principal objection to utilitarian penology.<sup>n15</sup> E.F. Carritt and H.J. McCloskey leveled the best known versions of this attack. Carritt reasoned that:

if some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty; indeed this would only fail to be an ideal instance of utilitarian 'punishment' because the victim himself would not have been so likely as a real felon to commit such a crime in the future; in all other respects it would be perfectly deterrent and therefore felicitic.<sup>n16</sup>

McCloskey posed the question:

whether all useful punishment is just punishment. When the problem of utilitarianism in punishment is put in this way, the appeal of the utilitarian approach somewhat diminishes. It appears to be useful to do lots of things which are unjust and undesirable. . . . what . . . most utilitarians now seek to avoid admitting is the implication that grave injustices in the form of punishment of the innocent, of those not responsible for their acts, or harsh punishments of those guilty of trivial offenses, are dictated by their theory. We may sometimes best deter others by punishing, by framing, an innocent man who is generally believed to be guilty, or by adopting rough and ready trial procedures, as is done by army courts martial in the heat of battle in respect of deserters, etc.<sup>n17</sup>

In a key example, McCloskey asked us to:

suppose that a sheriff were faced with the choice of either framing a Negro for a rape that had aroused hostility to the Negroes (a particular Negro generally believed to be guilty but whom the sheriff knows not to be guilty)--and thus preventing serious anti-Negro riots which would probably lead to some loss of life and increased hatred of each other by whites and Negroes--or of hunting for the guilty person and thereby allowing the anti-Negro riots to occur, while doing the best he can to combat them. In such a case the sheriff, if he were an extreme utilitarian, would appear to be committed to framing the Negro.<sup>n18</sup>

McCloskey concluded that utility requires the sheriff to sacrifice the welfare of the innocent person to save the many who might be killed or injured in the ensuing riot. McCloskey also provided a variant of the example, in which the utilitarian framer is a stranger passing through town rather than a public official.<sup>n19</sup>

McCloskey provides no textual evidence that Bentham, Beccaria or other utilitarian writers on punishment thought that framing the innocent was necessary or desirable.<sup>n20</sup> Neither do most of the scores of philosophers and legal scholars who have repeated this charge.<sup>n21</sup> Indeed, one legal scholar who recently charged that "under Bentham's form of consequentialism, the end of more total happiness justifies the means of punishing the innocent," was compelled to admit in the supporting footnote, that "Bentham actually opposed the punishment of innocent people . . . because Bentham believed it would not serve the ultimate aim of the criminal law, which was deterrence."<sup>n22</sup> Another accuser supported his claim that utilitarianism "would allow . . . for the punishment of the innocent," with Bentham's statement that "if hanging a man in effigy would produce the same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man in person."<sup>n23</sup> Thus, critics of utilitarian penology either ignore Bentham's writings altogether, or perversely present his arguments against unnecessary punishment as evidence of his willingness to punish the innocent.

## B. Five Responses

Surprisingly, modern defenders of utilitarianism have also ignored the writings of the original utilitarians.<sup>n24</sup> Instead of reexamining their proposals and premises, modern utilitarians have generally responded to the charge of punishing the innocent in one of five ways: by accepting that punishment of the innocent is an implication of utilitarianism, denying the possibility of this consequence by imposing a "definitional stop," minimizing the likelihood of such a consequence, charging that retributivism entails the same consequence, and reinterpreting utilitarianism as a "restricted utilitarian" or "rule utilitarian" ethics.

### 1. Acceptance

One response, favored by the unabashed act-utilitarian J.J.C. Smart, involves forthrightly, albeit reluctantly, embracing the potential conflict between desert and utility asserted by McCloskey:

Surely if it is shown that, in certain circumstances . . . a utilitarian ought, on his own principles, to commit a serious injustice, such as punishing an innocent man, then it seem that this does and should weaken the appeal of utilitarianism. And yet one can be made to vacillate back again. We also reflect that the serious injustice would ex hypothesi be the only possible alternative to an even greater total misery than would be caused by the injustice. . . . If a case really did arise in which injustice was the lesser of two evils (in terms of human happiness and misery, that is) the anti-utilitarian conclusion is a very unpalatable one too, namely that in some circumstances one should choose a greater total misery.<sup>n25</sup>

On these terms, the conflict between desert and utility is simply a tragic choice which the toughminded utilitarian faces candidly.<sup>n26</sup> Smart's response has the merit of consistency, but it seems unlikely to persuade anyone who is genuinely troubled by McCloskey's example. McCloskey claimed that Bentham also adopted this response to the charge of punishing the innocent, but cites no evidence.<sup>n27</sup>

### 2. Definitional Evasion

A second response is the so-called "definitional stop," which claims that punishment of the innocent is a logical impossibility because punishment implies inflicting harm on account of guilt. Stanley Benn insists that the charge of permitting punishment of the innocent rests:

on a misconception of what the utilitarian theory is about. 'Punishment' implies, in its primary sense, inflicting suffering only under specified conditions, of which one is that it must be for breach of a rule. Now if we insist on this

criterion for the word, 'punishment of the innocent' is a logical impossibility, for by definition, suffering inflicted on the innocent . . . cannot be 'punishment.' It is not a question of what is morally justified, but of what is logically possible. . . . The short answer to the critics of utilitarian theories of punishment, is that they are theories of punishment, not of any sort of technique involving suffering. <sup>n28</sup>

This response is obviously question-begging. It misses the point of McCloskey's example, which is that utilitarian ethics might tempt someone to misapply punishment by framing the innocent. Even if purposeful punishment of the innocent is a logical contradiction, framing the innocent so as to cause others to punish them is not. Neither is framing the innocent so as to create the public impression that they are being punished.

In any case, the definitional stop cannot be derived from Bentham's conception of punishment. Bentham carefully avoided defining punishment to require the deliberate punishment of the guilty, precisely to avoid begging the question of the utility of punishing the innocent. <sup>n29</sup> For like reasons, he argued against restricting the term punishment to the purposeful ("directly intentional") as opposed to the knowing or reckless ("mediately intentional") infliction of suffering on account of a prior act. <sup>n30</sup> On Bentham's definition, the suffering of an offender's family as a result of his incarceration or execution is also punishment.

This, however, is but a question of words. Take any lot of evil you will, . . . say that it is punishment, the reason for avoiding to produce it, if unavoidable, will not be the stronger; say that it is not punishment, the reason for avoiding to produce it, if avoidable, will not be the weaker. <sup>n31</sup>

### 3. Minimization

A third response argues that utility would never, or would only very rarely, be served by punishing the innocent in any realistic or probable scenario. First, utilitarians disfavor punishment in general because its immediate effect is to inflict pain with no compensating production of pleasure. Second, punishment can often be very expensive to inflict. Third, a publicly announced policy of punishing the innocent would appear to have antideterrent effects. In a world where only innocents are punished, everyone has an incentive to offend. And to the extent that there is even some chance of non-offenders being punished, the attractions of offending marginally increase. So in the ordinary course of things, an announced policy of punishing the innocent seems counter-productive.

Yet, there are many examples of societies or authorities that have adopted policies of deliberately harming nonperpetrators as a response to crime. Are these policies utility-maximizing? Let us consider four types of possibly rational policies that might be considered forms of punishing the innocent: punishment of associates, punishment based on low standards of proof, preventive incapacitation and, finally, framing the innocent.

#### (a) Punishment of Associates

We might hope to deter offenses by punishing the relatives or associates of offenders instead of the offenders. They might be easier to apprehend than the offender, or the offender might care more about them, or they might be more vulnerable to suffering, or the offender might be offending for the very purpose of benefitting them. We might also hope to increase deterrence by punishing an offender's associates in addition to the offender. In fact, punishing an offender usually does inflict suffering on the offender's family, an undeserved consequence of retribution which retributivists should not evade by means of a definitional stop.

We most often encounter the systematic punishment of offender associates in three closely related sorts of settings: bloodfeuds, campaigns of political or religious repression, and wars. None of these conflicts are utility maximizing. None would arise within a properly regulated utilitarian community. Bloodfeud societies have a highly solidaristic clan structure and no centralized authority with a monopoly on legitimate force. <sup>n32</sup> Punishment in such societies proceeds on the premise of group responsibility. <sup>n33</sup> Because the different groups are competing to out-offend one another rather

than cooperating to minimize the overall rate of offending, it seems unlikely that a bloodfeud system maximizes utility. By contrast, utilitarianism presumes a single overarching authority equally concerned for the welfare of everyone subject to its jurisdiction. Repressive regimes and occupying armies sometimes impose collective responsibility on subject populations for acts of resistance. Here too, there are special conditions that seem incompatible with the pursuit of utility. Such regimes are usually unrepresentative, unpopular and unconcerned with the welfare of the targeted population. Hence, they are unconcerned with the costs of deterrence, and they need to impose collective responsibility because they do not have public cooperation in identifying and apprehending offenders. Even liberal regimes impose a kind of collective responsibility when they defend themselves against enemy states. In organized warfare, in military reprisals, and in imposing "economic" sanctions against other nations, liberal regimes attack ordinary people rather than political leaders. And the more repressive and unrepresentative the enemy state is, the more undeserved these attacks on ordinary persons are likely to be. A utilitarian political community may decide to defend its boundaries at a great cost in welfare to those outside those boundaries. But in so doing it is probably not consulting utilitarian principles because the conditions for developing and implementing utilitarian policy do not obtain. In sum, groups may find it useful to impose collective responsibility on other groups, whose welfare they do not count as equal to their own. But that does not mean that collective responsibility is utilitarian.

#### (b) Punishment Based on Low Standards of Proof

Governments adopt varying standards of proof. The lower the proof standard, the more guilty offenders will be punished, but also the more innocent suspects. Governments may lower standards of proof for criminal offenses directly, or they may do so indirectly by criminalizing conduct which correlates with those offenses (e.g., inchoate offenses), attaching unpleasant sanctions to ostensibly noncriminal judgments (e.g., civil commitment, civil contempt, civil forfeiture, bail, deportation), or by redefining offense elements as sentencing factors. Regardless of what technique for lowering burdens of proof we are discussing, utilitarians have no more reason to risk punishing the innocent by adopting low standards of proof than retributivists. Both are interested in punishing the guilty, whether for deterrence or desert, and both are interested in avoiding punishment of the innocent. But only the utilitarian seeks to avoid profitless punishment of the guilty. Given that desert is violated by acquitting the guilty as well as by condemning the innocent, it does not appear that desert requires more exacting burdens of proof than does utility.

#### (c) Preventive Incapacitation

Utilitarian penology, concerned with prevention, seems open to preventive incapacitation of potential wrongdoers. Retributive penology, concerned primarily with denouncing past wrongdoing, might be thought to clearly oppose to preventive incapacitation. Yet things are not so simple. On the one hand, Bentham did not consider preventive incapacitation as punitive unless it was a response to a past criminal act.<sup>n34</sup> On the other hand, retributivists do not object to the use of coercive force to prevent crime, so long as it is not mischaracterized as punishment. Retributivists uniformly permit the preventive use of force by law enforcement officers and private citizens, provided that the threat of wrongdoing is sufficiently manifest and imminent.<sup>n35</sup> Apparently, the objection is to basing restrictive force on unreliable prediction rather than on prediction per se. Thus, there may be little practical difference between retributivist and utilitarian attitudes toward preventive detention.

The utilitarian may agree that, as things now stand, it is disutilitarian to detain based on predictions of future criminality because such predictions are often unreliable and are easily distorted by prejudice. These dangers would make the institution of preventive detention a source of constant anxiety for any who might be detained wrongly. The utilitarian may add that detention does not even succeed in preventing crime unless prisoners are kept isolated from one another at great public cost.

#### (d) Framing the Innocent

Finally, what about framing the innocent, the problem posed by Carritt and McCloskey? Here we must distinguish two variants of the problem: (i) a systematic policy of framing the innocent and (ii) the isolated act of an individual.

## (i) An institution

Rawls has argued that an institutionalized system of framing the innocent to enhance deterrence would be self-defeating if it were publicly known and that keeping it secret would require repression on a scale that would exact huge utility costs.

Try to imagine, then, an institution (which we may call "telishment") which is such that the officials set up by it have authority to arrange a trial for the condemnation of an innocent man whenever they are of the opinion that doing so would be in the best interests of society. The discretion of officials is limited, however, by the rule that they may not condemn an innocent man to undergo such an ordeal unless there is, at the time, a wave of offenses similar to that with which they charge him and telish him for. . . .

. . . .

Once one realizes that one is involved in setting up an institution, one sees that the hazards are very great. For example, what check is there on the officials? How is one to tell whether or not their actions are authorized? How is one to limit the risks involved in allowing such systematic deception? How is one to avoid giving anything short of complete discretion to the authorities to telish anyone they like? In addition to these considerations, it is obvious that people will come to have a very different attitude towards their penal system when telishment is adjoined to it. They will be uncertain as to whether a convicted man has been punished or telished. They will wonder whether or not they should feel sorry for him. They will wonder whether the same fate won't at any time fall on them. If one pictures how such an institution would actually work, and the enormous risks involved in it, it seems clear that it would serve no useful purpose. A utilitarian justification for this institution is most unlikely. <sup>n36</sup>

Igor Primoratz has responded that "Rawls' thesis that it is 'most unlikely' that the institution of 'telishment' could have a utilitarian justification simply will not stand." <sup>n37</sup> Primoratz dismisses the concern that such an institution will be liable to abuse by asserting "we can assume for the sake of the argument," that well-meaning people will administer the institution. But of course a utilitarian designing an institution to endure over time under unpredictable circumstances to be staffed by unknown persons cannot make such an optimistic assumption. Utilitarian psychology is premised on the assumption that persons pursue their rational selfinterest. Thus, utilitarians must assume that a governing elite which is in a position to systematically deceive the public will serve its own interests rather than those of the public.

Primoratz is obviously interpreting utilitarianism simply as the principle that each decisionmaker (whether individual or institutional) should do whatever will maximize utility on any conceivable set of empirical assumptions. He thereby ignores two aspects of utilitarian thought which Rawls apparently thinks make a utilitarian justification for telishment "most unlikely." First, utilitarianism cannot be "applied" to any conceivable set of empirical assumptions if it includes certain empirical assumptions--as, for example, about human psychology--among its fundamental premises. Second, utilitarianism does not treat individual decisionmakers and institutional decisionmakers as interchangeable. Individual decisionmakers predictably (perhaps even appropriately) maximize their own utility. Decisionmaking processes require an appropriate institutional design if the individuals participating in the process are to have the means to discover and the incentives to pursue the general welfare. Rawls is not simply arguing that telishment should only be used if its regular use would maximize utility. He is arguing that telishment should only be used if a utility-maximizing decisionmaking process can govern its use. He insists that we assess telishment not just as a government policy, but as a governing institution.

Primoratz concedes that a publicly announced policy of telishment would be self-defeating. <sup>n38</sup> But he goes on to argue that a secret institution of telishment is both a conceptual and an empirical possibility. <sup>n39</sup> It is a conceptual possibility because "internal institutional rules are . . . possible . . . rules which are known to those who hold offices within an institution and to them only. Some institutions, the secret police, for instance, have just such . . . rules. . . ." <sup>n40</sup> Primoratz proceeds to argue that an institutional practice of systematically framing and imprisoning the innocent is not

only a conceptual but an empirical possibility, pointing to the Gulag Archipelago.<sup>n41</sup> But this rejoinder misses Rawls' point, which is not that secret institutional practices are conceptually impossible. Rawls merely argues that such practices are unlikely to maximize utility. Obviously, the fact that the Soviet government adopted such a practice is no evidence that this practice served the welfare of the Soviet population--indeed, Primoratz quite obviously thinks it did not. Nor does the fact that the Soviet government claimed that it was acting in the public interest mean that it actually did so. Of course a utilitarian "justification" of any horrendous institution is possible in the trivial sense that officials might defend such an institution as welfare maximizing, just as they might defend any such institution as fair. But Rawls' claim is that a true--as opposed to a putative--utilitarian justification of telishment is most unlikely. Hence the horrors of the Soviet example support--rather than refute--Rawls' claim.

#### (ii) An individual act

McCloskey's example of an isolated act of framing the innocent by a sheriff or a passing stranger is designed to avoid the problems associated with a systematic policy of framing the innocent. Yet even here T.L.S. Sprigge finds the claim that utility would recommend such conduct implausible. Where Rawls focuses on the kind of institutions that would be required to implement a policy of framing the innocent, Sprigge focuses on the kind of information that would be required to justify an individual act of framing the innocent. He notes that framing the innocent produces certain misery for the person framed, that the expected benefits of the frame turn on the deception not being exposed, and that such exposure is highly probable. Then he points out how speculative the predicted benefits of the frame must be. How does the framer know that race riots will cease rather than being further fueled if he bears false witness against a member of the vilified group? How does he know they won't subside on their own? How does he know how violent they will be? Sprigge acknowledges that there are exceptional situations in which framing the innocent would produce the most felicitous results. What he denies is that an individual, acting alone and in secret, is ever likely to know this before the fact. The elaborate and exotic fact scenarios that retributivists dream up to confute utilitarians are necessarily highly unusual situations, in which it is impossible for individuals to rely on habits or time-tested generalizations. The decision to frame an innocent person, Sprigge argues, must rely on a "hunch" that is likely to be wrong. And if the hunch is indeed wrong, the resulting decision may be disastrously destructive of human happiness.<sup>n42</sup>

Retributivists sometimes argue that the infrequency with which utility demands punishing the innocent is normatively irrelevant as long as utilitarianism could conceivably approve punishing the innocent under some circumstances. But Sprigge responds that the infrequency with which framing the innocent serves utility is cognitively relevant, because prudence requires reliance on generalization. An implicit theme in Sprigge's argument is that practical judgment about the utility consequences of social action depends upon large numbers of people pooling information and experience and deliberating soberly. Individuals are likely to have very limited and misleading information, to interpret it in ways that are distorted by self-flattery, and to act on it impulsively. Isolated individuals are poorly qualified to serve as utilitarian policymakers.

#### 4. Comparison

A fourth response attacks the comparison between utilitarianism and retributivism implied by the charge that utilitarianism approves punishing the innocent. First, unlike retributivists, who see punishment of the guilty as an unalloyed good, utilitarians never approve punishment. They accept it as an evil, sometimes outweighed by beneficial consequences. And the bad consequences likely to follow from punishment of the innocent are very much greater than the bad consequences likely to flow from punishment of the guilty. So that even if a utilitarian were to accept punishment of the innocent in some exceptional circumstance, she would do so with considerable regret.

Now, consider the other side of the comparison, the implied claim that the retributivist could never under any circumstances accept punishment of the innocent. This might be plausible if retributivism were only a limiting principle, forbidding punishment of the innocent. But retributivism is also an affirmative principle, requiring punishment of the guilty. And since these two principles can come into conflict quite easily, both cannot be adhered to absolutely. In actual practice, neither can be adhered to absolutely, with the result that retributivists must, however reluctantly, expect

some punishment of the innocent, as David Dolinko explains:

Since any actual criminal justice system is inherently fallible, any such system will inevitably inflict punishment on some people who are actually innocent and thus do not deserve it. Unless the retributivist rejects all possible systems of legal punishment, therefore, she is endorsing a system that she knows will condemn and punish innocent people. Presumably, she believes that the unjustified punishment of these innocents must be accepted to avoid the far greater injustice that leaving all of the guilty unpunished would produce. But isn't the retributivist then "using" those actually innocent persons who end up wrongly condemned? To be sure, she is ignorant of exactly who those unfortunate persons are. Yet this seems irrelevant: the terrorists who blew up Pan Am Flight 103 over Lockerbie, Scotland . . . were "using" the hapless passengers to score a political point even if (as is likely) they were unaware of the passengers' identities.<sup>n43</sup>

Recall that McCloskey's accusations include the utilitarian's supposed tolerance for "summary" (and hence possibly inaccurate) trials. It looks very much as if the retributivist is in the same boat as the utilitarian: accepting as necessary, although not desiring, the infrequent punishment of the innocent. In fact, as we noted above, punishment of the innocent relatives of the offender is a frequent consequence of punishing the offender. And if punishment of the innocent is an inevitable byproduct of punishing the guilty, it may be that the retributivist--who sees punishment of the guilty as an intrinsic benefit--is more willing to accept punishment of the innocent than the utilitarian, who sees punishment of the guilty as an intrinsic cost.

One may argue that the utilitarian is more culpable than the retributivist in accepting punishment of the innocent although, as Dolinko points out, it is hard to specify a culpability standard that distinguishes them. Is it that the utilitarian desires the punishment of the innocent? No, even McCloskey's sheriff regrets it. Is it that utilitarian knows it will result from her acts and the retributivist does not? But--and this is Dolinko's point--in adopting a proof standard of less than a hundred percent the retributivist also knows that innocents will be punished. And we might add that where the retributivist punishes the parent of young children, she even knows which innocents she will cause to suffer.

The utilitarian may point to additional predictable violations of desert accepted by the retributivist. Crime imposes undeserved harm on victims. Since the retributivist is indifferent to crime prevention, she is indifferent to these violations of desert. If retributivist punishment predictably permits more crime than utilitarian punishment, additional desert violations are likely to result as the criminal justice system predictably errs in responding to some of these additional crimes. More criminals will wrongly go unpunished and more innocents will be punished unfairly.<sup>n44</sup>

##### 5. Restriction, or Rule Utilitarianism

A fifth response involves interpreting utilitarianism in a different way than do its retributivists critics. According to this response, utilitarianism does not judge acts by the standard of their contribution to utility. Instead it judges acts by the standard of their conformity to a rule which, if universally followed, would advance utility. In other words, utilitarian ethics is "rule-utilitarian" rather than "act-utilitarian."<sup>n45</sup> It follows from this interpretation that utilitarianism could only endorse acts of framing the innocent if it also endorsed a general rule or policy of framing the innocent. This interpretation of utilitarianism, if accepted, considerably eases the utilitarian's task. The utilitarian need not show, as Sprigge attempted to do, that an individual act of framing the innocent could never be foreseen to be utility maximizing. The utilitarian need only show, as Rawls tried to do, that a systematic policy of framing the innocent would not be utility maximizing. Indeed, Rawls argument has been interpreted as an endorsement of a rule-utilitarian ethics.<sup>n46</sup>

Rule-utilitarianism has traditionally been attacked, however, on the grounds that it arbitrarily restricts the utility principle. If the good is that which produces the happiest consequences, then the best act under the circumstances is the act producing the happiest consequences, even if under most circumstances that act would produce unhappy consequences. If the rule-utilitarian agrees that the ultimate good is the production of happy consequences, she has no reason to shrink from breaking a rule in the exceptional circumstance when that will produce more happiness. And to admit that it is sometimes better to produce less happy consequences is to admit that the production of happy

consequences is not the ultimate good. If the utility principle does not apply universally, the critic reasons, the utility principle is wrong. <sup>n47</sup>

A second powerful argument against rule-utilitarianism is that the distinction between acts and rules for acting is a purely formal distinction with no normative significance. If under some state of affairs act x appears to be the most felicitic act, then presumably that state of affairs includes some set of conditions sufficient to make x appear to be the most felicitic act. Hence, in all states of affairs sharing all of those conditions, x will also appear to be the most felicitic act. In other words, for every act judged utility-maximizing, it should be possible to state a rule of conduct applying to relevantly similar cases. Hence, if it sometimes seems advisable to frame the innocent, the rule-utilitarian would have to endorse a rule of framing the innocent under some set of conditions. Thus, rule utilitarianism would appear no less vulnerable to the charge of framing the innocent than act-utilitarianism. <sup>n48</sup>

It seems to us that these arguments demonstrate that the ruleutilitarian position fails to capture the considerable insight in Rawls's argument. Rawls does not succeed in demonstrating that no class of cases could ever be identified in which it was felicitic to frame the innocent. He does show that it would be imprudent to set up a legal institution to define and carry out the function of framing the innocent. The position supported by such an argument is not a rule-utilitarian ethics, or indeed any ethics. It is the position that legal and political institutions should be designed to maximize happiness. This position need not be formulated as a restriction on utilitarian ethics or some general utilitarian theory of the good. It may be formulated simply as a normative theory of social control.

### C. The State of the Debate

What is left of the charge of punishing the innocent after considering the five modern responses?

It seems to us that the strategies of acceptance and definitional evasion leave the charge untouched. Anyone disturbed by the prospect of undeserved punishment is unlikely to be soothed by the revelation that technically, it is not punishment. Nor are they likely to be persuaded that they should just grow up and accept life's unfairness.

The strategies of minimization and comparison, however, do succeed in reducing the scope of the charge. They reveal that there is little reason to think that utilitarianism requires lower burdens of proof or readier resort to preventive coercion than does retributivism. They show that a utilitarian regime is no more likely than a retributivist regime to impose burdens on the family and associates of offenders. They show that however useful collective punishment may be to a repressive regime, it is not utilitarian. And they show that a utilitarian regime cannot pursue a systematic policy of framing the innocent, whether in public or in secret.

Thus, the strategies of minimization and comparison dispose of a good deal of the charges on the retributivist indictment. Yet they leave open whether utilitarianism permits individuals to frame the innocent, if sufficiently confident that they can keep their deception secret. The strategy of restriction is a failed attempt to answer this question in the negative. It fails because it interprets utilitarianism as hedonistic ethics, but offers no very good reasons why hedonistic ethics should be restricted to universalizable rules, and why it is not possible to universalize a rule of framing the innocent whenever it can be done secretly and beneficially. Ultimately, the strategy of restriction fails because it misconceives utilitarianism as an ethical theory (which can only be defended by restricting it to the ethics of policymaking). But utilitarianism is not an ethical theory. It is a legal theory.

Most critics and some defenders of utilitarianism have assumed that deception of the public cannot be ruled out categorically as a means to the public good, because they assume that utilitarianism is a theory only about the appropriate ends of human action, not about the appropriate institutional means for defining and pursuing those ends. If instead we assume that utilitarianism is a theory about both ends and the institutions and procedures for defining those ends, then it is possible that it could prioritize institutional over individual actors, and certain procedural devices like publicity of decisionmaking over certain substantive goals like deterrence. Such a theory could eschew framing of the innocent as a counterproductive policy without committing itself to the view that framing the innocent would always be

a counterproductive act. Moreover, a theory about institutions and procedures can be contingent on empirical facts, perhaps concerning human psychology, available technology, or prevailing cultural norms. Thus, a utilitarian theory of institutions can condemn framing of the innocent as a counterproductive policy without demonstrating that it would be counterproductive in all possible worlds. Such a theory would be a theory for its own world and time as Bentham's was.

In the next section, we will examine Bentham's statements on punishment of the innocent and fictitious punishment of the guilty. This discussion will demonstrate that Bentham rejected these practices. Later sections will show why this view followed from Bentham's conception of the utilitarian project.

### III. Bentham on Punishing the Innocent

The one critic of utilitarianism who actually examines any of Bentham's writings about punishment is Igor Primoratz. In developing his charge that Bentham approves punishment of the innocent and fictitious punishment of the guilty, Primoratz focuses almost entirely on two brief sections of Bentham's *Principles of Penal Law*: Part II, Book IV, "Of the Proper Seat of Punishment," and Part II, Book I, Chapter V, "Expense of Punishment."

#### A. "Unavoidable Mis-Seated" Punishment

Primoratz introduces his interpretation of Book IV by noting correctly that Bentham "emphasizes that it is (logically) possible to punish an innocent man. . . ." <sup>n49</sup> Primoratz then poses the question "may it be done, morally speaking?" <sup>n50</sup> Primoratz concedes that Bentham refers to such punishment "as 'mis-seated,' 'misapplied' or 'mistaken' punishment," <sup>n51</sup> but denies that these designations entail any disapproval. According to Primoratz,

The crucial role belongs to the distinction between the cases in which such punishment can be avoided and those in which it is unavoidable. The word "unavoidable," however, is not taken in its usual, literal sense--for in that sense no punishment is unavoidable--but with an important qualification: "without preponderant inconvenience." On account of this qualification, his distinction is actually a distinction between cases in which punishment of the innocent cannot be avoided, except at the price of mischief, harm, pain, or evil greater than that which would affect the innocent person punished, and cases in which we can desist from such punishment without thereby opting for such an inconvenient result. In a word, the distinction comes down to the one between profitable and unprofitable punishment of the innocent. <sup>n52</sup>

The implication of this paragraph is that the terms "mis-seated," "misapplied," and "mistaken" have no normative significance or negative connotations, but are simply categories of possibly profitable punishment; and that the word "unavoidable" means the same thing as "profitable," "beneficial" or "good." Thus, Primoratz implies, we should not be misled by Bentham's statements that punishment is misapplied to the innocent or that punishment of the innocent should be avoided, to the extent possible. What Bentham really means, Primoratz insinuates, is that we should zealously punish the innocent as often as is profitable, and for any purpose we desire. According to Primoratz, Bentham:

Does not take innocence in itself to be a limit to legitimate punishment. For him it is only the ground for a utilitarian presumption against punishing: punishment of the innocent is generally unprofitable, and therefore generally unjustified. Thus his demand that punishment be remissible is not based simply on the fact that an innocent person can be punished by mistake; it is based on the fact that an innocent person can be punished by mistake and without a good utilitarian justification for punishing her. . . . <sup>n53</sup>

But of course this is not what Bentham is saying at all. The fact that a person is known to be innocent is always a sufficient reason to not punish her. Bentham is simply saying that while the innocent should never be punished intentionally, some mistaken punishment of the innocent is an unavoidable price of punishing the guilty, because errors are inevitable. Thus:

When . . . punishment is inflicted on any person by whom no part is borne in the offense, it may be said to be misseated. . . . Where it is avoidable, mis-seated punishment ought in no case to be employed. Wheresoever punishment not being, in the case in question, in itself undue, it is in your power to apply to the guilty . . . without having recourse to the innocent, there the evil . . . that would be produced by the infliction of punishment on the innocent, is avoidable. . . . Wheresoever the nature of the case admits of the distinguishing who is innocent from who is guilty, the infliction of suffering on the innocent is avoidable. <sup>n54</sup>

Harming the innocent loved ones and dependents of the guilty--which Bentham regards as derivative or "extravasative" punishment--is another unavoidable price of punishing the guilty.

Whether in the way and for the purpose of punishment, or in any other way, and for any other purpose, a man cannot be made to suffer, but his connexions . . . are made to suffer along with him; and forasmuch as it can only be by some rare accident that a man can be found who has not . . . any connexions; thense it follows, that if, where it is unavoidable, the certainty or probability of its extravasation were regarded as a sufficient cause for forbearing to inflict punishment, it would only be by a correspondingly rare accident that any thing could be done for the prevention of offences of any sort; the consequence of which would be general impunity to crimes of all sorts, and with it the destruction of society itself. <sup>n55</sup>

These predictable harms of deserved punishment are not of course absolutely unavoidable, since we could avoid such harms by avoiding all punishment. Nevertheless some mistaken and derivative punishment of the innocent is unavoidable relative to the goal of punishing the guilty.

When the epithet unavoidable is on this occasion employed, some such limitative clause as is expressed by the words without preponderant inconvenience, must be understood. For, in point of possibility, punishment . . . being on the part of the legislator and the judge an act of the will, to avoid inflicting it will . . . be respectively in their power at all times. . . . On so simple a condition as that of seeing government, and with it society itself, perish, you may avoid inflicting punishment altogether. <sup>n56</sup>

Bentham is trying to be clear about two points that retributivists typically obscure: that punishment of the innocent is an unavoidable concomitant of punishing the guilty, but that punishment of the guilty is an avoidable policy choice. Thus, when retributivists claim to adhere rigidly to the principle of no undeserved punishment, they deceive themselves. If they really regarded avoiding punishment of the innocent as an absolute duty they could in fact adhere to it by avoiding punishment. They do not appreciate that they are responsible for choosing to punish the innocent because they do not see punishment of the guilty as discretionary.

Retributivists in fact treat punishment of the guilty as an absolute duty which compels sacrifice of the innocent. Bentham points out that mistaken and derivative punishment of the innocent is not absolutely necessary, but necessary only relative to the goal of punishing the guilty. This goal is merely a contingent instrument of social welfare to Bentham, though an intrinsic good to retributivists like Primoratz. Accordingly, Bentham regards punishment of the innocent as less justifiable than do his retributivist critics, because he does not assume the necessity of punishing the guilty. Thus "to inflict punishment when, without introducing preponderant inconvenience, the infliction of such punishment is avoidable, is, in the case of the innocent, contrary to the principle of utility. Admitted:--and so is it in the case of the guilty likewise." <sup>n57</sup>

Unnecessary punishment of the innocent, like unnecessary punishment of the guilty is "groundless: as such it is thrown away; it is so much evil expended in waste. . . ." <sup>n58</sup> But, by the same token, where punishment of the guilty is on balance beneficial, taking account all of its costs, it is necessary to the public welfare. And if these costs include mistaken and extravasative punishment of the innocent then these are necessary as well. This is all that is meant by

Bentham's provocative sounding statement that "to punish where, without introducing preponderant inconvenience, such punishment is unavoidable, is not . . . contrary to the principle of utility;--not in the case of the guilty: no, nor yet in the case of the innocent." <sup>n59</sup> This is not an endorsement of purposeful punishment of the innocent. It is a justification of the unintended costs predictably imposed on the innocent in punishing the guilty.

#### B. "Collective" Punishment

Citing only the statements quoted above, Primoratz insinuates that Bentham regards purposeful punishment of the innocent as permissible for any goal whatsoever. He supports this insinuation with another misleading gloss. Primoratz asserts that Bentham thinks it is sometimes necessary to punish a large number of innocent people in order to ensure punishment of a few guilty persons:

Sometimes . . . it cannot be established who is guilty and who is innocent. Then the aims of punishment cannot be attained by inflicting it exclusively upon the guilty, and therefore punishment of the innocent cannot be avoided "without preponderant inconvenience." In such cases the course of action with the best consequences attainable will not be to desist from punishing the innocent, but to punish them.

. . . .

An example of punishment of the innocent which in Bentham's view, can sometimes be useful, and thus also justified, is collective punishment. When it cannot be established who is the perpetrator of an offense, and therefore the guilty cannot be punished without the innocent being punished at the same time, and when the suffering [that is inflicted on the former is not greater than the good secured by such punishment,] it will be useful, and therefore also justified, to punish the whole group which is known to include the unidentifiable offender or offenders. <sup>n60</sup>

But of course, Bentham does not think it is ever absolutely necessary to punish anyone. To mistakenly punish some innocent people is necessary only to the goal of intentionally punishing some guilty persons. But since punishment of the guilty is itself only a particularly costly and cruel means to the public welfare rather than an intrinsic value, it should only be employed where the costs (i.e., the wasted capacities and suffering of the guilty and innocent punished, the suffering of their families and friends, the expense of imprisonment, and the public insecurity, antideterrent incentives and popular disaffection arising from the inevitable punishment of the innocent) are not too great. Thus, the "aims of punishment cannot be attained" by punishing anyone, where the offender cannot be identified with a very high degree of probability.

Bentham does indeed discuss collective punishment, and he does state that it can only be justified where the guilty cannot be distinguished from the innocent and where "the suffering of the innocent, when added to that of the guilty will not, in the whole, compose a mass of evil more than equivalent to the benefit of the punishment." <sup>n61</sup> But this is not an endorsement of collective punishment and he does not endorse it. Quite the contrary. He continues that whether the guilty can be distinguished from the innocent "is easy enough to be judged of." Whether the benefits of collective punishment outweigh the combined suffering of the innocent and the guilty, however, "must be left to vague conjecture." <sup>n62</sup> It would seem that the first criterion will often condemn collective punishment as unnecessary and the second criterion will never recommend it as clearly beneficial.

And this is indeed how Bentham applies these criteria to three illustrative examples. His first example is the well "settled" but "rarely exercised" power to forfeit the privileges of a municipal corporation for "the misconduct of the corporators." Bentham concludes that "the insidious and unconstitutional use that was attempted to be made of it in the reign of Charles II has cast a stigma on the general doctrine. . . . Such a mode of punishment is plainly unnecessary and inexpedient. The particular delinquents in this way may always be ascertained. . . ." <sup>n63</sup> Bentham's second example involved a fine assessed against the city of Edinburgh after a mob stormed a prison and lynched a reprieved prisoner. Bentham observes that the fine probably had little effect, but served as an appropriate expression of disapproval and in any case was deserved because "it may be presumed . . . that there was a complicity of affection, in virtue of which all

the inhabitants joined in endeavouring to protect the offenders from the visitation of the law." <sup>n64</sup> If so, it did not qualify as collective punishment of a largely innocent group. Bentham's third example would not strike us as a punishment: a legislature responded to a vote selling scheme by some members of the gentry in a given locale by broadening the franchise throughout the electoral district to all smallholders. Bentham concludes reasonably that this diminution of the gentry's power was not justifiable as a collective punishment, since the guilty parties were known, but was justifiable as a democratic reform. <sup>n65</sup> None of these discussions concludes that the collective punishment of a largely innocent group is justified by the goal of punishing a few offenders. Certainly these discussions do not endorse executing or imprisoning groups on such a basis. Nor is such a conclusion likely on Bentham's premises. If "it cannot be established who is guilty and who is innocent," punishment of the innocent can and should be avoided by simply "desisting" from punishing anyone. This choice best serves "the aims of punishment" which are not to maximize punishment but to maximize happiness and security.

Primoratz's characterization of collective punishment as "an example" of useful punishment of the innocent that Bentham would endorse implies that there are other such examples. But there are not. Bentham's critical discussion of collective punishment appears in the course of a systematic analysis and critique of all forms of "mis-seated punishment." <sup>n66</sup> Bentham divides these into vicarious punishment whereby an innocent only is made to suffer for the act of a related guilty party; transitive punishment, where an innocent is punished along with a related guilty party, collective punishment and random punishment, where an unrelated innocent alone is made to suffer. Of vicarious punishment, Bentham expostulates:

I was about to exhibit the absurdity and mischief of this mode of punishment, but what end would it answer? A simple statement that, that one man is punished for the offense of another, is calculated to produce a stronger impression on the mind, than could be produced by the aid of logic and rhetoric. <sup>n67</sup>

Against transitive punishments, Bentham reasons that offenders are more likely to be moved by the prospect of their own suffering than that of their relatives and that these relatives are unlikely to have much control over the offenders. <sup>n68</sup> He considers such penalties costly, inefficient and unpopular. <sup>n69</sup> He does suggest that forfeiture of the property of entire families may be warranted for the crime of rebellion, when the entire family is guilty. <sup>n70</sup> In the category of random punishments, Bentham places forfeiture of property purchased in good faith from an offender, and punishment of persons convicted because of arbitrarily excluded evidence. Bentham attacks both practices at length. <sup>n71</sup> Bentham concludes by explaining "mis-seated punishment" as arising from the hatred felt by men in power, which they gratify at public expense. <sup>n72</sup>

Bentham considered mis-seated punishment extremely dangerous to public confidence in government. Even inadvertent punishment of the innocent could produce a state of "alarm" <sup>n73</sup> if it became known. According to William Twining, the idea that Bentham saw utility in punishing the innocent "overlooks the disrespect and loss of confidence arising from admission that the laws cannot protect the law-abiding; that the courts may make terrible mistakes and that each wretch who goes to the scaffold may be an innocent victim." <sup>n74</sup> In his *Treatise on Judicial Evidence*, Bentham instructed the judiciary to take every precaution against punishing the innocent:

It ought to be a maxim with the judge, that it is better to let a guilty man escape, than to condemn an innocent one; or, in other words, he ought to be much more on his guard against the injustice which condemns, than the injustice which acquits. Both are great evils, but the greater is that which produces most alarm. . . . Generally speaking, a too easy acquittal excites regret and uneasiness only among men of reflection; while the condemnation of an accused, who turns out to have been innocent, spreads general dismay; all security appear to be destroyed; no defense can any longer be found, when even innocence is insufficient. <sup>n75</sup>

Bentham here recognizes the possibility that punishing an innocent person could undermine the legitimacy of the government. By threatening citizens with arbitrary punishment, a policy of framing the innocent would squander the

public sense of security that deterrent punishment aims to produce.

### C. "Apparent" Punishment

Primoratz bases his charge that Bentham approves pretending to punish the guilty on a brief chapter of the *Principles of Penal Law* entitled "Expense of Punishment." The basic idea of this chapter is that "a punishment is economic when the desired deterrent effect is produced by the employment of the least possible suffering."<sup>n76</sup> Bentham next introduces a distinction between the "real value" of a punishment, experienced by one subjected to it, and the "apparent value" anticipated by one who might yet be subjected to it. Bentham adds that "it is the real punishment that is the expense--the apparent punishment gives the profit."<sup>n77</sup> Bentham next argues that since the welfare of the offender counts equally with that of all other community members, punishment should be as "economical" as possible:

Ought any real punishments to be inflicted? Most certainly. Why? For the sake of producing the appearance of it. . . . Every particle of real punishment that is produced, more than what is necessary for the production of the requisite quantity of apparent punishment, is just so much misery run to waste. Hence, the real punishment ought to be as small, and the apparent punishment as great as possible. If hanging a man in effigy would produce the same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man in person.<sup>n78</sup>

Note that Bentham does not in fact say that real punishments ought not be inflicted or that purely apparent punishments ever can achieve deterrence. A policy of fictitious punishment could only succeed in utilitarian terms if systematic deception of the public were possible--in utilitarian terms. Such a policy would only succeed if it achieved deterrence or other benefits exceeding its utility costs. And systematic deception of the public would only count as possible in utilitarian terms if it could be done at a utility cost below the utility gain achieved thereby. Does Bentham suggest that the marginal gain from avoiding actual harm to the offender outweighs the very considerable utility costs of systematically deceiving the public? We will later see the enormous emphasis that Bentham places on the transparency or publicity of government decisionmaking as a "security against misrule." But for now it is enough to note that Bentham never presents fictitious punishment as a realistic possibility, nor proposes it as a policy. He speaks of it hypothetically, in order to clarify the analysis of the costs and benefits of punishment. He uses this arresting hypothetical to dramatize the point that utilitarianism counts the suffering of the offender as a cost, whereas conventional retributivist thinking treats it as a benefit. But the entire book is dedicated to the proposition that actual punishment of some offenders is necessary despite its human costs.

If Bentham does not think fictitious punishment of offenders is a useful policy, does he think it can be done at all? In a footnote, he offers one recorded example of fictitious punishment, which Primoratz reads as an endorsement of the practice:

At the Cape of Good Hope, the Dutch made use of a stratagem which could only succeed among Hottentots. One of their officers having killed an individual of this inoffensive tribe, the whole nation took up the matter, and became furious and implacable. It was necessary to make an example and pacify them. The delinquent was therefore brought before them in irons, as a malefactor: he was tried with great form, and was condemned to swallow a goblet of ignited brandy. The man played his part;--he feigned himself dead, and fell motionless, His friends covered him with a cloak and bore him away. The Hottentots declared themselves satisfied. "The worst we should have done with the man," said they, "would have been to throw him into the fire; but the Dutch have done better--they have put the fire into the man."<sup>n79</sup>

What are we to make of this passage? Certainly it serves Bentham's pedagogic purpose in graphically illustrating fictitious punishment. It is also calculated to identify readers with the interests of the offender, a European like themselves, facing what they were bound to see as a horde of angry savages. A trading ship or colonial garrison is an insular and precarious micro-society in which the utility of each individual to the welfare of the whole is magnified. Thus a reader could be expected to approve of the clever ruse devised by the Dutch to save the garrison and a valued

officer.

Nevertheless, this is far from an endorsement of fictitious punishment. What are its utility benefits here? Saving lives by preventing war or massacre? But this could have been accomplished by actual as well as by fictitious punishment. The utility benefits lie only in saving the life of the offender, a benefit achieved at a cost and a risk. The cost is in deterrence--the Dutch party is taught it need not fear punishment for offenses against the Hottentots. This cost to the welfare of the Hottentots is presumably ignored by the Dutch, who would not similarly indulge the murderer of a Dutchman. The risk is that the deception will be discovered and many lives will be lost after all. This risk is presumably minimized by the naivete of the Hottentots and the limited contact they have with the Dutch interlopers. Bentham characterizes the ruse as one which "could only succeed among the Hottentots." The implication is that it is not so easy to fool Europeans. Not so easy, but also not so justified if the reader assumes that their welfare counts--that the legal authorities are their servants, not their masters. Bentham is certainly not proposing that his own compatriots subject themselves to a regime of fictitious punishment. Nor is he proposing that the British public authorize officials to deceive it. Nevertheless Primoratz offers this gloss on the above passages:

Whenever the deterrent effects of punishment on the general public can be attained by having the offender punished only apparently, without actually inflicting punishment, this will be the best option from the utilitarian point of view. . . . According to the utilitarian theory of punishment, whenever this would be the alternative with the best possible consequences, a feigned punishment should be staged instead of a real one. <sup>n80</sup>

These claims are exaggerations of the chapter's actual conclusion, which is "that a punishment that appears of greater magnitude, in comparison of what it really is, is better than one that appears of less magnitude." <sup>n81</sup>

It is of course true in the abstract that whatever alternative has the best consequences is best from a utilitarian point of view, but this begs many important questions about who judges what is best, and how, and for whom. If, for example, the public is to be the judge of what policies yield the best consequences for themselves, then a policy of deceiving the public will not likely recommend itself. To contemporary retributivist critics of utilitarianism, these questions of institutional competence and design are irrelevant. What policies and institutional arrangements actually serve utility is merely an empirical question, whereas they are interested only in ethical principles which hold regardless of the circumstances. But Bentham's enterprise was to develop a clear-sighted and empirically informed analysis of policies and institutions. For him, empirically informed judgments about what institutional arrangements create the best chance of advancing the public welfare in the face of uncertainty and venality are the very heart of the matter.

#### D. Public Deception

In neither of the sections of the "Principles of Penal Law" glossed by Primoratz does Bentham endorse fooling the public. In the chapter "Expense of Punishment," he does identify an overlooked benefit of fictitious punishment, not in order to recommend that practice, but in order to remind the reader the offender's welfare must be considered in evaluating any practice. In Book IV, "Of Mis-seated Punishment," Bentham does not discuss or consider, let alone endorse, framing the innocent. He is again primarily concerned with pointing out the utility cost of punishment--in this case, the inadvertent but predictable harm to innocent persons. Bentham's relentless message is that we are not obliged to punish all the guilty and we cannot hope to spare all the innocent. Punishment is a necessary evil, a blunt and brutal weapon that harms the innocent along with the guilty. In reiterating these impious truths, Bentham is not approving but combatting deception of the public.

Bentham occasionally sees utility in deceiving individuals--e.g., to spare their feelings or prevent their malicious use of information--but we will look in vain for recommendations to deceive the public. We can imagine why some critics of utilitarianism might be led to believe that Bentham would condone telling lies in certain circumstances, since Bentham expressed no ethical aversion to dishonesty. <sup>n82</sup> His objection to it was purely prudential. As a result, some modern critics have cast Bentham as a proponent of deception, <sup>n83</sup> and this reading of Bentham is encouraged by Henry

Sidgwick's later reconstruction of utilitarianism as an ethical theory. In his *Methods of Ethics*, Sidgwick argues that lying is often the lesser evil:

There seems to be circumstances under which . . . Honour prescribes lying. . . . Just as each man is thought to have a natural right to personal security generally, but not if he himself is attempting to injure others of life and property: so if we may even kill in self-defense of ourselves and others, it seems strange that we may not lie, if lying will defend us better against a palpable invasion of our rights. . . . just as the orderly and systematic slaughter which we call war is thought perfectly right under certain circumstances, though painful and revolting: so in the word-contests of the law-courts, the lawyer is commonly held to be justified in untruthfulness within strict rules and limits. . . . And . . . Common sense . . . seems to concede that it may sometimes be right [to deceive men for their own good]: for example, most persons would not hesitate to speak falsely to an invalid, if this seemed the only way of concealing facts that might produce a dangerous shock: nor do I perceive that anyone shrinks from telling fictions to children, on matters upon which it is thought well that they should not know the truth. But if the lawfulness of benevolent deception in any case be admitted, I do not see how we can decide when and how far it is admissible, except by considerations of expediency; that is, by weighing the gain of any particular deception against the imperilment of mutual confidence involved in all violation of truth. <sup>n84</sup>

Here Sidgwick reasons that if utility, not veracity, is the ultimate value, dishonesty may often be utility maximizing.

One token of Bentham's supposed tolerance of dishonesty is his statement that "Falsehood, taken by itself . . . can never, upon the principle of utility constitute any offense at all." <sup>n85</sup> Yet read in its context--a discussion of criminal fraud and libel--this statement simply says that lying should not be defined as a criminal offense unless it yields harm. This hardly commends lying to officials entrusted with maximizing the public security. The paragraph continues, "combined with other circumstances, there is scarce any sort of pernicious effect which falsehood may not be instrumental in producing." <sup>n86</sup> Bentham believed lying tended to produce undesirable results. <sup>n87</sup> As Sissela Bok explains, "utilitarian calculation . . . often appears to imply that lies, apart from their resultant harm and benefits, are in themselves neutral [since i]t seems that a lie and a truthful statement which achieve the same utility are equivalent." However, she continues, "in ordinary life, as Bentham would be the first to agree, falsehood cannot be taken 'by itself'; most lies do have negative consequences for liars, dupes, all those affected, and for social trust." <sup>n88</sup> Instead of maintaining an abstract aversion to lying, Bentham expressed his disinclination in terms of the consequences usually resulting from deception.

Due to these consequences, Bentham "elevated honesty to the chief, if not sole, virtue," <sup>n89</sup> and he believed it was "necessary as the light of day to us." <sup>n90</sup> Bentham regarded falsehood as the "common instrument of all wrong" and the "irreconcilable enemy of justice" which is "passed off as the true friend and necessary instrument of justice." <sup>n91</sup> Bentham believed that:

veracity is one of the most important bases of human society. The due administration of justice absolutely depends on it; whatever tends to weaken it, saps the foundations of morality, security, and happiness. The more we reflect on its importance, the more we shall be astonished that legislators have so indiscreetly multiplied the operations which tend to weaken its influence. <sup>n92</sup>

Such was the importance of official veracity, that dishonesty was a "poison" debilitating political life, and Bentham believed publicity was the only antidote. <sup>n93</sup> Any assertion that official deception maximized utility was "the product of erroneous conceptions, the effect of which was to engage men to concur in the sacrifice of the universal to the sinister interest." <sup>n94</sup> Bentham expected that utilitarian justifications of lying would be self-serving and would accordingly tend to discount its public costs.

Proponents of political deception are likely to have failed to consider the entire scope of effects such a decision

will cause.<sup>n95</sup> If I lie to achieve some perceived good, I will lie again to shore up the original lie. My integrity might suffer, and I could come to lie whenever it suited my purposes.<sup>n96</sup> If my lie is ever discovered my credibility will be diminished, and "so dishonorable and pernicious to a man is the reputation of habitual or frequent falsity . . . that, without the least prejudice to any other individual, by even a single departure from veracity it may happen to a man to do irremediable mischief to himself."<sup>n97</sup> Such a blemish would be particularly damaging if I were a public official or representative, since if the public came to believe that government lies and secretly breaks rules, it would have a profoundly subversive effect on the community's respect for the law. A "truly massive utility loss" can result from lying, and thus there is a "very heavy surcharge, in utility terms, to be assessed against" any act of deception.<sup>n98</sup>

While the framing of an innocent man might produce certain immediate benefits, these necessarily speculative gains are arguably outweighed by the risks. Robert Goodin imagines that:

Once it becomes public knowledge that, as a matter of policy, we are willing to hang innocent people to assuage a baying mob . . . then everyone starts worrying: Who will be next? The anxieties associated with such thoughts systematically occurring across the whole population will more than suffice to cancel the utility advantages of . . . throwing one prisoner to the mob on any given occasion.<sup>n99</sup>

In sum, Bentham disapproves of punishing the innocent, and deceiving the public. Thus, the charge of framing the innocent is belied by Bentham's own statements. How can so many philosophers and legal scholars have attributed this view to Bentham? The answer is that they consider Bentham's own tediously detailed statements about his views irrelevant. To them, he is a utilitarian moral philosopher and is therefore chargeable with all implications of the principles that the good is pleasure, that ethical acts are those which maximally produce pleasure or reduce pain, and that laws and policies are good in so far as they are ethical acts. Bentham's own beliefs about what institutional arrangements and policies would best serve utility are irrelevant because these are empirically contingent, and hence unphilosophical. We shall next examine the question of whether Bentham is a moral philosopher in this sense, and whether his utilitarianism is such a moral philosophy.

#### IV. Utility an Ethical Principle?

Critics of utilitarian penology ascribe a willingness to frame the innocent to Bentham belied by his own statements. They do so on the assumption that, as a utilitarian moral philosopher, Bentham is committed to approving any act that could maximize utility under some conceivable set of circumstances. Bentham appears to give some warrant for this interpretation in a few passages appearing at the beginning of his best known book, *An Introduction to the Principles of Morals and Legislation*. Particularly interesting to modern professional philosophers is the following statement:

The principle of utility is the foundation of the present work. . . . By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question. . . . I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government.<sup>n100</sup>

But we will argue here that this passage is misunderstood as a claim that the work to follow is the application to legislation of an ethical philosophy. Hence, it would be a mistake to conclude from this passage that Bentham's legislative proposals commit him to some view about the moral obligations of individuals.

##### A. Utility in Bentham's Predecessors

To understand Bentham's conception of utilitarianism, it is helpful to consider the work of the three predecessors who most influenced him, David Hume, Baron Helvetius and Cesare Beccaria. Bentham derived his formulation of the

utility principle from Beccaria,<sup>n101</sup> who in turn drew it from Helvetius.<sup>n102</sup> Helvetius in turn drew many important elements of his thought from Hume.<sup>n103</sup> Bentham claimed to have been greatly inspired by a reading of Hume, and to have borrowed the term "utility" from him.<sup>n104</sup> Of these three writers only Hume had any real interest in morality, and this was a sociological interest in the genesis and function of social norms rather than an ethical interest in the obligations of individuals. All three conceived of utility as a public value, to be pursued through institutions.

### 1. Hume

Hume's credentials as a utilitarian rest primarily on two works: Volume three of his *Treatise of Human Nature*, first published in 1740, and the more popular and accessible *Enquiry Concerning the Principles of Morals*, first appearing in 1751. In both works he applied his empiricist methodology to problems of value, arguing that judgments of value were ultimately based on sense impressions. Hume did not distinguish among different types of value: "morals" included the subjects of aesthetic, economic and, especially, political value.<sup>n105</sup> Rather than deriving standards of law and morals deductively from some concept of the good, Hume proceeded inductively, by examining social practices of praising and blaming.<sup>n106</sup> He concluded that prevailing ideas of virtue were associated with practices generally promoting human welfare or "utility."<sup>n107</sup> These practices became widely endorsed because they were frequently associated with the experience of pleasure or of sympathy. While personal pleasure and sympathy for those nearest us were more powerful motives for action than concern for the general welfare, they were less prominent in moral discourse because they could not ground persuasive, or even intelligible arguments.

'Tis impossible we could ever converse with one another on any reasonable terms, were each of us to consider characters and persons, only as they appear from his peculiar point of view. In order, therefore, to prevent those continual contradictions, and arrive at a more stable judgment of things, we fix on some steady and general points of view; and always, in our thoughts, place ourselves in them, whatever may be our present situation.<sup>n108</sup>

By the exercise of imagination we are able to extrapolate from our own situation to that of other persons, both real and hypothetical and so to identify generally beneficial qualities and practices, worthy of praise. We thereby correct for our own partisan and ephemeral points of view in developing moral claims that will be intelligible to others and that will remain persuasive to ourselves over time. "Experience soon teaches us this method of correcting our sentiments, or at least, of correcting our language. . . ." <sup>n109</sup> Morality requires a common point of view because it is a public, discursive practice.<sup>n110</sup>

Thus, Hume concluded, the attitude of disinterested benevolence that characterizes much moral discourse should not be taken as evidence that morality is founded on reason.<sup>n111</sup> All human values, Hume insisted, spring from hedonic sensation. The common moral attitude of impartial benevolence emerges from the discursive filtering of hedonic sensation in the context of a social practice of praising and blaming. Hume reasoned that a hedonistic style of valuation comes naturally to creatures that are selfinterested and endowed with a capacity for sympathy. Concern for the abstraction of public welfare is "artificial" rather than natural, however. It arises from the human need to cooperate in developing and sustaining mutually beneficial institutions.

In analyzing moral discourse, Hume observed that value judgments are typically expressed as character judgments, ascriptions of praise or blame to persons for manifesting virtues or vices.<sup>n112</sup> Virtues were divisible into kinds, "natural" and "artificial." Natural virtues, such as courage and kindness, benefited particular persons and could be explained by the selfinterest or sympathy of the actor.<sup>n113</sup> "Artificial" virtues involved adherence to social norms which generally benefited the public.<sup>n114</sup> For the whole complicated enterprise of valuing, praising and blaming to have any point, virtues had to be beneficial to human welfare most of the time. But that did not mean that moral discourse must refer directly to utility, nor did it mean that every act must advance utility to be considered praiseworthy. Utility would more likely be advanced by inculcating and enforcing generally beneficial rules than by encouraging each individual to judge for him or herself how best to serve the general welfare on a given occasion.<sup>n115</sup> Pursuing utility was a cooperative enterprise, best mediated by institutions. Accordingly, Hume was far more interested in artificial than in

natural virtues. <sup>n116</sup>

Hume's paradigmatic virtue was "justice," the virtue of obedience to useful laws. The types of laws he chiefly emphasized were those that encouraged productive labor, investment and exchange by securing property and enforcing promises. <sup>n117</sup> Such laws were necessary for human flourishing in a world in which human beings were self-interested but not self-reliant, and in which necessary goods were available but scarce, and capable of being appropriated by individuals. <sup>n118</sup> In such a world, rules of property and contract would enhance human welfare, provided that they were generally respected and enforced. Different regimes of property and contract could fulfill this function: the specific content of such a regime mattered much less than its widespread acceptance and enforcement. <sup>n119</sup> Since particular rules of property and contract were useful only as part of regimes that were generally accepted, obedience to such rules was useful only when it was widespread. This meant in turn that the "virtue" of justice depended upon an institutionalized social practice. It was an "artificial" virtue depending on a social convention. <sup>n120</sup> If a particular society were to suddenly alter its regime of property and contract, obedience to the old regime would be disruptive rather than useful, and so would no longer be virtuous. <sup>n121</sup>

According to Hume, acts tend to be deemed virtuous within the context of legal regimes and other cooperative social practices useful to the public welfare. Hume has sometimes been classified a "rule utilitarian" <sup>n122</sup> because he did not offer any criterion of value for acts. <sup>n123</sup> It would be more accurate to say that he developed the concept of utility as part of a description of how institutions like law solve problems of cooperation. Hume saw morality itself as an institution, a discursive social practice of praise, blame and argument, <sup>n124</sup> that helped form and sustain utilitarian institutions. Because he sought to understand morality as a contingent social practice, he did not seek to discover the foundation of morality in some essence of the good. Morality was "founded" on utility <sup>n125</sup> only in the sense that morality grew out of the practical need to cooperate in securing the conditions of human survival, peace, and prosperity. Thus, that utility was the "foundation" of morality did not mean that individuals were obliged to cast prevailing moral norms aside and maximize utility. Although socially useful, morality remained morality: a social practice of invoking and following norms. <sup>n126</sup>

## 2. Helvetius

Helvetius was chiefly a psychologist, philosopher of mind and political theorist. His most influential work, *Of the Spirit* (1758), was devoted to two parallel arguments: that genius was entirely a function of education and did not depend on personal characteristics, and that the good was entirely a function of institutional arrangements and did not depend on personal qualities of virtue at all. <sup>n127</sup> These arguments proceeded from three key premises, all traceable, in part, to Hume: (1) an empiricist account of mind, according to which all our ideas result from sense impressions, combined and associated together; <sup>n128</sup> (2) an emotivist account of value, according to which all our judgments are rooted in passions, and especially in self-interest; <sup>n129</sup> and (3) an egoist characterization of human nature as essentially self-interested.

Helvetius proceeded to argue that both virtue and vice are illusions <sup>n130</sup> in that both good and evil actions proceed from the same sources: passion and self-interest. Moreover, all that we mean in characterizing another's action as good is that it serves our aims. Since we can only derive our ideas of the good from the experience of desire and its gratification, the only common or public meaning this term can be given is that of serving the welfare of the largest number of people. <sup>n131</sup> The language of evaluation is meaningful only in so far as it refers to the self-interest of the audience; the language of obligation is meaningful only in so far as it refers to the self-interest of the actor.

This point about the language of value is crucial in understanding the focus of early utilitarians like Helvetius and Bentham on public policy rather than private ethics. <sup>n132</sup> Since Helvetius and his readers have a common interest in inducing others to serve the public welfare, he can use the words "good" and "virtuous" in referring to behavior that serves the public welfare. These terms have a common meaning only in the context of a public discussion about how to influence the behavior of third parties. Little is gained by addressing individuals and urging them to sacrifice their own interests to the public welfare so as to be "good"--for "goodness" would not have that meaning to them. Instead, "the

good" would be synonymous with their own self-interest.<sup>n133</sup> It only makes sense to urge the pursuit of the public welfare if one is addressing the public or its institutional representatives. Helvetius identifies his subject as including "that part of morality at least, which is common to men of all nations, and which in all governments can have no other object in view than the public advantage."<sup>n134</sup>

From this public perspective, "a man is just when all his actions tend to the public welfare."<sup>n135</sup> For Helvetius, this principle can dictate that those exercising public power must cruelly sacrifice individuals for the public good. Helvetius offers, as an example, the practice among stranded and starving sailors of drawing lots to determine who should be killed to feed the rest: "this vessel is the emblem of the nation; everything becomes lawful, and even virtuous, that procures the public safety."<sup>n136</sup> A second example involves undeserved punishment. To stop a wave of nocturnal murders, a sultan imposes a capitally enforced curfew; he then enforces the curfew strictly against a stranger who was not aware of its imposition.<sup>n137</sup> For our purposes though, the significant thing about these examples is that they are open and candid exercises of public authority, in keeping with a focus on policy rather than private ethics.

Thus, for Helvetius, public happiness is the aim of public policy, not of private morality. Only by influencing laws can the philosopher hope to improve behavior:

If morality hitherto has little contributed to the happiness of mankind it is not owing to any want of perspicuity . . . in the moralists; but . . . it must be owned, that they have not often enough considered the different vices of nations as necessarily resulting from the different form of their government; yet it is only by considering morality in this point of light, that it can be of any real use to men.<sup>n138</sup>

. . . .

I say, that all men tend only toward their happiness; that it is a tendency from which they cannot be diverted; that the attempt would be fruitless, and even the success dangerous; consequently, it is only by incorporating personal and general interest, that they can be rendered virtuous. This being granted, morality is evidently no more than a frivolous science, unless blended with policy and legislation: whence I conclude that, if philosophers would be of use to the world, they should survey objects from the same point of view as the legislator. . . . The moralist is to indicate the laws, of which the legislator insures the execution, by stamping them with the seal of his authority.<sup>n139</sup>

Helvetius conceives of law as a scheme of positive and negative incentives to encourage individual service of the public interest. He also urges a regime of broad education and unrestricted speech, to encourage intellectual achievement and ensure public scrutiny of the performance of government. Indeed, an enlightened and vigilant public is the only means by which lawmakers can be compelled to listen to the prescriptions of moral philosophers. While not explicitly advocating democracy, Helvetius comments that "if force essentially reside in the greater number, and justice consist in actions useful to the greater number, it is evident that justice is in its own nature always armed with a power sufficient to suppress vice, and place men under necessity of being virtuous."<sup>n140</sup>

### 3. Beccaria

Beccaria's immensely influential reformist tract, *On Crimes and Punishments* (1764) was greatly inspired by the utilitarianism of Helvetius, but also by Rousseau's *Social Contract*.<sup>n141</sup> Beccaria offered his extensive package of criminal law reforms as an application of political theory rather than ethics. His political theoretical premises were essentially liberal and contractarian. Thus, the government was legitimate in so far as rationally consented to, and rational persons would consent only to so much public coercion and injury as served their common interests.<sup>n142</sup> While law should serve the common welfare, "the greatest happiness of the greatest number," lawmakers inevitably served their own interests and profited by the public's ignorance and misplaced trust.<sup>n143</sup> Hence legitimate law could only arise from the will of an enlightened general public, and the function of the philosopher was to enlighten the public as to its own interest.<sup>n144</sup> Like Helvetius, Beccaria used utility as the touchstone of policy analysis, because it was a principle on which individuals of differing views could rationally agree;<sup>n145</sup> hence it could provide the basis for a

social contract.<sup>n146</sup>

Beccaria argued that public coercion and injury served the common interest only to the extent that they prevented greater private coercion and injury.<sup>n147</sup> It followed that deterrence of crime was the only legitimate basis for punishment, and then only where noncoercive measures would not suffice.<sup>n148</sup> And the most important noncoercive crime control device was the "public tranquility" achieved by establishing legitimate government.<sup>n149</sup> Like Helvetius, Beccaria assumed that citizens were by nature ruled by passion and self-interest,<sup>n150</sup> and that all social achievement proceeded from harnessing or enabling these energies rather than unnaturally suppressing them.<sup>n151</sup>

Beccaria also insisted that both laws and their enforcement be public<sup>n152</sup> and regular.<sup>n153</sup> He reasoned that certain punishment deterred more effectively than severe punishment for two reasons. First, certain punishment did not allow the offender the hope of escaping punishment. Second, both severity and discretion undermined deterrence and security by delegitimizing the law. If laws were too severe, citizens would refuse to cooperate with the investigation, prosecution and punishment of crimes. Hence, the more severe punishments became, the less certain, and so the less deterrent.<sup>n154</sup> Moreover, if the law could be bent, citizens would seek advantage by turning their energies to intrigue rather than productive accomplishment.<sup>n155</sup> Citizens would lose respect for law, and perhaps oppose it by force.<sup>n156</sup> Rulers would criminalize dissent, causing unnecessary unhappiness and squelching enlightenment, art and science. Thus Beccaria was profoundly wary of discretion in the administration of justice.<sup>n157</sup> Beccaria accordingly insisted that justice was public and that private forgiveness of crimes should not play a role in the administration of criminal law. In a well-conceived regime of punishment, characterized by mildness and regularity, pardons would also be unnecessary.<sup>n158</sup>

Thus Beccaria concluded that optimal deterrence of crime depended on avoiding over-criminalization, on certain but mild punishment, and above all, on regular administration of the criminal law. However, Beccaria's concerns transcended optimal deterrence. His larger concern was with rational, utility-maximizing governance. Here, governmental rationality depended on popular enlightenment,<sup>n159</sup> participation in lawmaking, and scrutiny of the administration of the laws.<sup>n160</sup> In sum, Beccaria's theory is about the legitimate use of public coercive power, rather than the private moral obligations of officials. "Only the law may decree punishments for crimes, and this authority can rest only with the legislator, who represents all of society united by a social contract."<sup>n161</sup> Officials are expected to openly serve utility as an enlightened public defines it, by rigorously adhering to rules.<sup>n162</sup> If they do so, an enlightened public will accept and abide by the laws,<sup>n163</sup> the great aim of public security will be achieved,<sup>n164</sup> the productive energies of society will be freed, and public happiness will flourish.<sup>n165</sup>

Utility plays two primary roles in this argument. First, utility is a principle of psychology: thus elites, potential offenders and the wider public are presumed to be bent on maximizing their self-interest. Elites are presumed either to know their own self-interest or to profit unwittingly from received arrangements. The general public, however, depends on philosophical enlightenment for knowledge of the public interest. Thus, the second role for the idea of utility is evaluative and forensic. In arguing to the general public for law reforms, the philosopher should advert to the effect of the proposed reforms on the general welfare. If a proposed reform serves the public welfare, it may be rationally consented to. If there is rational consent, the reform is legitimate. Thus, the normative significance of utility rests on a contractarian theory of the legitimacy of laws, not on a general theory of value, or a theory of moral obligation. There is no room for officials to secretly pursue utility since this contributes nothing to the legitimacy of government and risks destroying it. "The right to inflict punishment does not belong to an individual, but to all citizens or to the sovereign."<sup>n166</sup> Accordingly, officials charged with the administration of punishment had to be closely observed, to prevent their betraying the public interest in favor of their own.<sup>n167</sup>

Now that we have examined the utility principle and the place of private ethics in the writings of Bentham's most important predecessors, we are in a better position to read Bentham's statements about the utility principle in the Introduction to the Principles of Morals and Legislation. None of Bentham's main influences proposed utility as an ethical principle for evaluating or directing individual acts.<sup>n168</sup> Hume identified utility primarily with the artificial virtues that depended upon social institutions like law. Helvetius argued that an ethical philosophy would be useless, and that philosophers could only serve utility by proposing legislation. Beccaria proposed such legislation, and

endeavored to show that it would be perceived as politically legitimate, rather than showing that it would meet some ethical standard. All three authors offered public utility as an appropriate evaluative criterion for use in publicly legitimating legal policy, because it was a criterion on which they thought self-interested actors were able to agree. Utility also provided a standard by which the public could monitor and control self-interested officials.

### B. Bentham's Utility Principle

Bentham's use of the utility principle in the Introduction is consistent with this general approach. Despite the title, the book is almost entirely about penal legislation and hardly about morals at all. Bentham's preface describes the work as an introduction to a penal code,<sup>n169</sup> and confesses that it does not live up to its title.<sup>n170</sup> According to Bentham, the book's contribution to the study of morals consists only of its "analysis of . . . pleasure, pain, motive and disposition."<sup>n171</sup> He notes that he has nothing to say on the subjects of virtue and vice. He does not even include within the subject the topics that a contemporary ethicist would expect to find: an analysis of the nature of the good, and of personal duties. He apparently considers morals to be the descriptive and normative study of character. The former is what we would today call psychology, and it is only that part of the subject of "morals" that the book addresses. The preface goes on to outline an ambitious plan involving ten more books, all on the subject of legislation, none on the subject of "morals."<sup>n172</sup>

The forensic function of the principle of utility is announced in the opening paragraph of the book. It exactly parallels the place of utility in the arguments of Beccaria and Helvetius:

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. . . . They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.<sup>n173</sup>

This is the now familiar argument: individuals are self-interested, and cannot be persuaded to be good at their own expense. They can only be induced to be good by laws offering rational incentives. Arguments supporting such laws either rationally explain how such laws will gratify the audience or they are empty cant, merely indicating that such laws will gratify the speaker. When equated with utility, "the words ought, and right and wrong, and others of that stamp, have a meaning: when otherwise, they have none."<sup>n174</sup> This is not a claim about the nature of the good, but about the nature of political discourse among self-interested actors. As H.L.A says of this passage, "it is . . . intended to convey an idea which is central to his whole argument, namely that when so used [the words ought and right and wrong] raise a rationally settleable issue because only then do they invoke an external standard which reasonable men would accept for the determination of right and wrong."<sup>n175</sup>

It is in this limited sense that the principle of utility provides the foundation of Bentham's argument. Bentham's argument is about good legislation. The audience for such argument is necessarily a public audience, and such an audience can only be rationally persuaded by arguments about the consequences of laws for the public welfare. And evaluation of acts according to the public welfare is the meaning of the utility principle when the actor one is trying to persuade is the public. When the actor one is trying to persuade is an individual, the principle of utility has the quite different meaning of self-interest. Here is how Bentham draws the line between the subjects of ethics and legislation:

Private ethics teaches how each man may dispose himself to pursue the course most conducive to his own happiness, by means of such motives as offer themselves: the art of legislation (which may be considered as one branch of the science of jurisprudence) teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is most conducive to the happiness of the whole community, by means of motives to

be applied by the legislator. <sup>n176</sup>

Just as Bentham conceives morals as psychology, the study of character, he regards ethics as something like psychological therapy or self-help, the art of composing one's character so as to achieve happiness.

Thus in identifying the utility principle as the foundation of his book on legislation, Bentham by no means implied that individuals are morally obliged to serve the public welfare. Such a claim would be pointless, since individuals are naturally compelled to serve their own welfare. It is only in the context of a work on legislation that utility stands for the greatest happiness of the greatest number. And it is only from this legislative perspective that even individual acts are to be evaluated and encouraged or discouraged according to their contribution to the public welfare. <sup>n177</sup> Thus the "utility principle," interpreted as a public welfare standard, is fundamental to a work on legislation because it provides a useful standard of value. That does not mean that public welfare is foundational in the sense that it constitutes the essence of the good.

### C. Bentham's Institutional Account of Morality

In moral psychology, Bentham followed Helvetius: all passions are good, or at least not bad. Actions are valuable according to their effects, <sup>n178</sup> and every passion or "motive" can be rendered useful by appropriate sanctions. <sup>n179</sup> In general, self-love is a highly useful passion, because individuals can be counted upon to augment their own happiness efficiently, expertly, and spontaneously, without any legislative prompting, thereby contributing to the aggregate welfare of society. <sup>n180</sup> Like Helvetius, Bentham based libertarian policies on utilitarian reasons.

Bentham discussed morality in one other way in the Introduction: as an informal system of social sanctions, deploying the currencies of honor and shame, esteem and contempt. <sup>n181</sup> The availability of such informal "moral" sanctions reduces a society's need for formal legal sanctions. Such sanctions may achieve the utilitarian aims of the law at less cost. Bentham further developed this conception of morality in his one work on ethics, *Deontology*, assembled posthumously by his disciple John Bowring, from notes and fragments. A striking feature of the view of morality revealed in this book is how much it resembles Bentham's positivist conception of law. Bentham shared with Hume and Paley the view that morality is an institution, like law. Like law, morality is an instrument of social control, that cannot exist without enforcement sanctions.

Where actions are supposed to be beneficial over so large an extent as to demand the attention of the legislative or administrative authorities, public recompense is brought to reward them. Beyond these limits vast masses of enjoyment and suffering are produced by human conduct, and here is the province of morality. Its directions and its sanctions become a sort of factitious law. Those directions are of course dependent on the sanctions to which they appeal; and it is only by bringing men under the operation of these sanctions that the moralist, or the divine, or the legislator, can have any success or influence. <sup>n182</sup>

Just as there can be no descriptive claims about law that are not claims about positive law, there can be no descriptive claims about morality that are not claims about a functioning system of social control. Terms like "the right," "the good," and "virtue" have the same status for Bentham as terms like "natural law." They are nonsense.

Of course, one can make prescriptive claims about morality, just as one can about law. But these are not, for Bentham, claims about how it is right to act. They are claims about what acts we should encourage and with what reasons, and what acts and reputations we should esteem and approve. These are prescriptive claims about institutional reform--about how the informal sanctions of morality should be organized and directed. And just as it would be puerile to propose a legal conduct rule without giving any thought to how that rule could be enforced, it would be silly to propound a dictate of morality without giving any thought to whether and how that dictate could be realized.

For Bentham, the overwhelmingly salient constraint on any program of social control was the hedonistic basis of

human motivation.<sup>n183</sup> Thus, actors would only obey conduct standards if those standards either served their interests or were backed by sanctions.<sup>n184</sup> A moral sanction involves societal disapproval rather than state coercion, but is nonetheless a sanction.<sup>n185</sup> A moral standard has no validity unless a society can be induced to approve and disapprove conduct on its basis. A morality, then, is not a conception of the good, but a policy. A moralist proposes and advocates a morality not primarily to those who must decide whether to obey it, but to those who must decide whether to enforce it. He advocates it not on the basis of its rightness, but on the basis of its realizability and its service to the interests of its enforcers.

Bentham's Deontology, accordingly, endeavored to show that a good deal of conventional morality could be defended as compatible with the enlightened self-interest of the actor.<sup>n186</sup>

'Give me,' may the utilitarian teacher exclaim,--'give me the human sensibilities--joy and grief, pain and pleasure--and I will create a moral world. I will produce not only justice, but generosity, patriotism, philanthropy, and the long and illustrious train of sublime and amiable virtues, purified and exalted.'<sup>n187</sup>

Bentham argued that most "virtues" can be reduced to prudence or benevolence.<sup>n188</sup> We can easily encourage prudent behavior by teaching actors that it serves their long terms interests.<sup>n189</sup> And we can reward benevolent behavior with gratitude and esteem--thereby encouraging behavior that serves our own interests.<sup>n190</sup> By presenting benevolence as a means to gratitude and esteem, utilitarian morality encourages the actor to make these social responses the measure of benevolence. In this way utilitarian morality discourages paternalism. Bentham denied that a high opinion of one's own motives qualifies individuals to define the interests of others. Individual moral actors are simply not sufficiently competent or trustworthy institutions to identify or pursue the welfare of others, let alone the general welfare.<sup>n191</sup>

Bentham advocated reforming moral discourse<sup>n192</sup> to emphasize the compatibility of virtue and self-interest,<sup>n193</sup> because only by these means could we render morality effectual as a tool of social control.<sup>n194</sup> This would involve some reform in the content of moral discourse as well. Bentham advocated these changes not to bring morality in line with "the right" or "the good" (these terms are empty vessels)<sup>n195</sup> but to make it effectual. The reform of moral discourse also would ensure that it would make a rational appeal to its audience and not deceive them into a blind subjection to the will of the moralist.<sup>n196</sup>

If morality is a sanctions system, backed by public opinion, it makes little sense to say that McCloskey's sheriff is morally obliged to secretly frame a scapegoat. Morality in Bentham's sense only comes into play in judging acts that are publicly known and therefore capable of being encouraged or condemned by public opinion. Successful deception of the public may or may not maximize utility; it cannot be commanded by utilitarian morality because utilitarian morality can offer the actor no reason to fool the public. Indeed, deception of the public subverts the sanction system of utilitarian morality. Perhaps for this reason, Bentham's Deontology emphasizes veracity as a virtue,<sup>n197</sup> and publicity as a requisite for morality's efficacy. "The more men live in public, the more amenable they are to the moral sanction. The greater dependence men are in to the public, that is, the more equality there is among them, the clearer the evidence comes out, the more it has of certainty in its results."<sup>n198</sup> While morality cannot coerce publicity, it can reward those who make their behavior easy to monitor with public esteem and punish those who are secretive with disapproval. Law can assist morality by ensuring freedom of press and speech.<sup>n199</sup> Should the law further restrict privacy in order to strengthen the moral sanction? Doing so threatens utility by reducing the autonomy of individuals and excessively empowering government officials. Utility is probably best served by holding only official conduct to the most stringent standard of publicity, even at the cost of weakening the moral sanction.

This Benthamite conception of morality as a practical system of social control rather than an ideal standard of behavior has implications for another traditional criticism of utilitarianism. Critics have assumed that utilitarian ethics required each individual to maximize the public welfare. This would seem to require enormous individual sacrifices of energy, attention and wealth: e.g. giving all of one's money to Oxfam, adopting and caring for dozens of orphans,

directing all of one's attention to the welfare of strangers.<sup>n200</sup> But readers of Bentham's Deontology are not likely to conclude that utilitarian morality imposes such burdens. Such an ethic would make no appeal to the rational self-interest of the actor. It would be totally unrealizable and hence pointless as an institutionally enforced standard of behavior. No one would follow it and no one would cooperate in disapproving those who refused to follow it. Bentham does urge benevolence as a source of pleasure: but the pleasure derives from the gratitude of those helped, the admiration of others, and from selfapprobation. If morality sets an impossibly high standard of benevolence, it strips all attainable levels of benevolence of these pleasurable consequences and so proves an impediment rather than an encouragement to benevolence. Such a severe morality would not advance utility.<sup>n201</sup> Hence it would not be utilitarian.

Bentham recognized a further difficulty with the notion that each individual is morally obliged to act so as to maximize the public welfare. Not only have individuals little motivation to pursue the public interest to the detriment of self-interest, but they are not especially competent to do so. They may know a great deal about their own preferences, but little about those of other people, or of the circumstances facing them, and even that knowledge is likely to be distorted by self-interest. Bentham found individuals to be "essentially unapt"<sup>n202</sup> to perform the skills of utility calculation, lawmaking, and governance, and therefore he wrote:

Were every man his own legislator laws would be made as badly as cloathes would be, if every man were his own tailor . . . it is not every man that can make a shoe; but when a shoe is made every man may tell whether it fits him without much difficulty. Every man can not be a shoe maker but any man may chose his own shoemaker.<sup>n203</sup>

It should be clear that for Bentham, utility is not an ethical principle. Instead, utility is a practical standard for judging institutions. It follows that Bentham's theory of legislation is not subordinate to an ethical view. Instead, his proposals for reforming law and his proposals for reforming morality are both subordinate to utility, his standard for evaluating institutional reforms. Morality has exactly the same logical status as law in his theory. Both are institutional means to advance value.<sup>n204</sup> Neither is a standard of value. But while morality and law have the same derivative status in his theory, they are not equally important. Morality is a less effectual instrument of the public welfare than legislation, and less amenable to systematic reform.<sup>n205</sup> In any case, morality does not supply the utility principle. Instead, the utility principle is a procedural standard for resolving policy disputes among self-interested actors of relatively equal power and authority.<sup>n206</sup>

## V. Utility as Process and Discourse

Utilitarianism is ordinarily thought of as a substantive theory of value, concerned with the good consequences, rather than the right origins, of action. Yet our recharacterization of utilitarianism as a theory of government rather than a general theory of value complicates this picture. Bentham turns out to be very concerned about the procedures by which governmental decisions are made. The rightness of action turns out to be role-dependent: some acts may be done only by persons acting in an official capacity and pursuant to a public decision. As in any theory about law, the normative status of action often depends on whether it is duly authorized. The correctness of a decision often turns on the process by which the decision is made.

Moreover, Bentham's substantive criterion of value, happiness, turns out to be less consequentialist than is commonly supposed. Human happiness, as Bentham defines it, is not simply a function of actions. It is substantially influenced by the procedures that exist for determining action. This result follows from Bentham's assumptions about the phenomenology of pleasure and pain.

### A. Security and Procedure

For Bentham, the distinctive feature of human hedonic experience was the human ability to anticipate future experience and to feel pleasure and pain about these expectations. This capacity to anticipate the future enables humans to sustain personal identity and to formulate and calculate self-interest. It also greatly expands the capacities of human creatures to enjoy and suffer and accounts for their superior weight in the felicific calculus.<sup>n207</sup> But the human capacity

to anticipate future hedonic experience had another implication for Bentham as well. It meant that humans were generally risk-averse, deriving constant pleasure from the contemplation of security, and constant anxiety from the contemplation of danger and risk. Declining marginal utility<sup>n208</sup> meant that humans were more interested in securing for themselves the basic constituents of survival and contentment, than in risking all for a chance at ecstatic heights of pleasure. Bentham's strong identification of happiness with security made security the primary aim of his normative theory of law. As Frederick Rosen comments,

The importance of security in Bentham's utilitarian system has often been overlooked. . . . Security became, for Bentham, a means to the end of happiness and a necessary condition for its maximization. As with Hume, the maintenance of secure possession of one's life and property was considered the main task of government, and Bentham was led through the emphasis on security to embrace an indirect form of utilitarianism. This interpretation of Bentham's utilitarianism . . . rejects the view that Bentham was a simple act-utilitarian intent upon the maximization of pleasure and minimization of pain without regard to its distribution. . . .<sup>n209</sup>

Because of the importance of secure expectations for public happiness, Bentham emphasized clearly defined and securely protected entitlements, and predictability of government action. The result was a theory of government emphasizing the rule of law.

While guaranteeing physical security and property was the main function of government, there was of course no guarantee that necessarily self-interested officials would carry out their public function. In addition, the coercive powers necessary to carry out government functions also posed a threat to security. Government officials could only be expected to fulfill their public functions if their personal interests were tied to the public interest by a disciplinary regime of positive and negative sanctions combined with public monitoring. Accordingly, Bentham devoted considerable attention to designing a utilitarian process of policymaking and administration equipped with "securities against misrule." These securities involved the subordination of judicial and administrative functions to legislative functions; legislating formal rules rather than teleological standards; the democratic election of legislators; a clear, analytically precise, and common language of legislation and policy debate; and, above all, publicity of government operations.

For Bentham utility was not, as it is for many modern academic philosophers, an ideal standard for judging hypothetical actions in hypothetical worlds. Bentham acknowledged that a judgment about the public interest requires information about preferences and consequences, and a judge whose personal interest is tied to the public interest by political and legal sanctions, backed by the monitoring of an enlightened, mobilized public. Thus Bentham's utilitarian standard of value cannot be separated from the institutional process by which it is formulated and applied. For all practical purposes, there is no utility apart from some reliable institutional process of gathering information about the public interest, conducted under the scrutiny of a public with the means to protect itself.

Utilitarian procedures must precede any substantive definition of the public welfare. Otherwise, the utility costs resulting from the insecurity of a public vulnerable to despotic oppression would dwarf any conceivable good consequences achieved by a "dictatorship of the utilitariat." Nor, on Bentham's psychological assumptions, would any good consequences accrue from such elite rule. Rulers capable of ruling in their own interest would be virtually certain to do so. Hence, what utility demands must be determined by a democratically controlled process of inquiry and deliberation, not by isolated sheriffs--or moral philosophers. If the utilitarian standard of value is freed from procedural constraints tying it to the interests of actual people it ceases to have any empirical referent. It becomes no more meaningful than the idle chatter of moralists about right and good and virtue and natural law.

## B. Utilitarian Language in the Policy Process

### 1. Utilitarianism as a Rhetorical Practice

To understand the meaning of Bentham's utility standard it is necessary to understand the rhetorical practice in

which Bentham used it and intended that it be used. What Bentham proposed and defended was the practice, not the standard. Bentham famously eschewed any logical "proof" of the utility principle: "for that which is used to prove everything else, cannot itself be proved: a chain of proofs must have their commencement somewhere. To give such a proof is as impossible as it is needless." <sup>n210</sup> The proof was in the performance. As H.L.A. Hart notes,

Bentham is plainly not at his ease in philosophical argument as he is in the close, minute analysis and classification of concrete detail, attention to which is required in the application of the principle of utility. . . . He writes as one too long convinced of the principle and too eager to hurry on to demonstrate how it could be fruitfully applied to the practical problems of social life to pause long over metaphysical argument. <sup>n211</sup>

Hart adds that Bentham did not consider his distinctive contribution to be discovering the normative importance of hedonic consequences--this had been pointed out by Helvetius, among others. <sup>n212</sup> Bentham considered his distinctive contribution to be developing and demonstrating a method for reasoning about such consequences. Helvetius had shown to Bentham's satisfaction that the "moral philosopher" must adopt the perspective of the legislator. Bentham resolved to do what Helvetius had not done: to adopt that perspective and to develop and put into practice a science of legislation. The result was the discursive practice of public policy analysis. That today we have difficulty imagining how modern governance would proceed without this tool is precisely the sort of practical proof at which Bentham aimed. Bentham did not care whether the utility principle was a true definition of the good for all possible worlds; he sought to show that it was a useful criterion in his world by showing how it could be used beneficially.

Before we can evaluate Bentham's "moral philosophy" we must understand it. And we cannot understand it unless we recognize that the function he ascribed to moral philosophy is very different from the function presupposed by the discipline of ethics today. The function of moral philosophy laid down by Helvetius and pursued by Beccaria was to improve human happiness by proposing useful laws. The aim of the utilitarian "system," according to Bentham was "to rear the fabric of felicity by the hands of reason and law." <sup>n213</sup> Moral philosophers of course had no armies or police or formal lawmaking authority. They could improve legislation and contribute to happiness only by mobilizing public opinion, their only enforcement sanction. Moreover, since laws can best produce utility by inspiring a feeling of security, moral philosophers could enhance the utility of good laws by explaining their operation and effects. Accordingly, the job of the utilitarian "moral philosopher" is to propose laws and to equip the public to rationally evaluate these proposals and alternatives.

Accordingly, a major aim of Bentham's utilitarianism was to develop and put to use a transparent language of legislation and public policy analysis. A precise terminology, free of such spectral entities as legal fictions, natural rights, and moral virtues, would preclude legislatures from disguising the operation and effect of laws. A precise language would prevent judges and officials from legislating under the guise of interpreting ambiguous terms. Finally, a precise language would discipline participants in political debate to offer reasons intelligible to all. In Bentham's view, the public should treat obfuscatory laws as bad laws and obscure reasons as no reasons. Because the utility of laws could not be guaranteed without transparency, transparency was lexically prior to utility as a criterion of legitimacy.

## 2. The Language of Law

Bentham believed that the "excellence and efficacy of every system of Laws will depend upon two grand points belonging to it: the policy or matter or purport of the laws . . . and the form or tenor of them." <sup>n214</sup> All types of obscurity corrupted the tenor of the law and therefore prevented it from achieving its objectives. If laws were not clear and accessible, the public would not be aware of the rules governing them. This would compromise the expressive, formative, and deterrent effects of the law. And without a clear understanding of the contents of the law, the public would have little opportunity to critically evaluate and reform its legal system.

The whole of the law was "of no use farther than it is known." <sup>n215</sup> A body of law should be judged, therefore, "not from the quantity of what is extant, but from the quantity of what is known." <sup>n216</sup> Yet while the "notoriety of every law

ought to be as extensive as its binding force" and "no axiom can be more self-evident: none more important," none was "more universally disregarded." <sup>n217</sup> By Bentham's count, "the greatest part of the people are unapprised of the 99 parts in a hundred of the Laws that govern them." <sup>n218</sup> Until this "grievance was remedied," he declared, "the business of legislation is from the beginning to the end of it cruel mockery." <sup>n219</sup>

Bentham's career as a notable reformer and polemicist began with his *Comment on the Commentaries*, <sup>n220</sup> a critique of the obscurity of the common law as distilled and defended by Blackstone. Bentham complained of the "dark Chaos" and "glorious uncertainty" of the common law, that set the interpreter "loose into the wilds of perpetual conjecture." <sup>n221</sup> Rife with technical legal terminology, "smothered amidst a redundancy of words," riddled with "unmeaning," and often contradictory, the law appeared to the lay reader as a "flock of chimeras." Blackstone's *Commentaries* <sup>n222</sup> only compounded the common law's incomprehensibility. "His nomenclature," wrote Bentham, "is like a weathercock: you never meet the same term twice together in the same place" and his definitions provided "strings of identical propositions . . . explaining ignotum per ignotius." <sup>n223</sup> Antiquated legal terms lived on without any consensus on their contemporary meaning, and encouraged lazy habits of thought:

The long acquaintance we have had with it makes us take for granted we have searched it already; we deal by it, in consequence, as the custom-house officers in certain countries, who, having once set their seal upon a package, so long as they see, or think they see that seal upon it, reasonably enough suppose themselves dispensed with from visiting it anew. <sup>n224</sup>

The obscurity of the common law produced an uninformed public.

For Bentham the incomprehensibility of the law not only reduced the ability of legitimate laws to deter, but it cloaked counterproductive rules and unregulated official discretion. Concealed from public scrutiny by the law's unintelligibility, ambition and corruption stood a greater chance of going undetected: "The case is this. A large portion of the body of the law was, by the bigotry or artifice of Lawyers, locked up in an illegible character, and in a foreign tongue. . . . The pestilential breath of Fiction poisons the sense of every instrument it comes near." <sup>n225</sup> "A fiction of law may be defined," Bentham explained, as "a willful falsehood, having for its object the stealing legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the illusion thus produced, could not exercise it." <sup>n226</sup> More broadly, Bentham defined "fiction in the sense in which it is used by lawyers . . . as a false assertion of the privileged kind, and which, though acknowledges to be false, is at the same time argued from, and acted upon, as if true." For Bentham such deception could never maximize utility: "fiction of use to justice? Exactly as swindling is to trade." <sup>n227</sup> Bentham complained that

by wrapping the real dispositions of the law in a covering of nonsense, the knowledge of it is rendered impossible to the bulk of the people--the bulk of those whose fate depends upon it. What meets their eyes is gross and palpable nonsense. . . . In jargon such as this, no man in whose brain the natural provisions of common sense has not been eaten out by false science can avoid beholding so much vile and scandalous nonsense; but if, by the help of that portion of common sense which each man's fortune has imparted to him, it were possible to him to divine what disastrous sense may be at the bottom of this nonsense, the nonsense would miss its mark. <sup>n228</sup>

Worse even than a deception and confusion of the public wrought by legal fictions, was its corruption of the public mind. The law's use of fiction taught the lesson that deception was an acceptable practice and even a necessary condition of justice, <sup>n229</sup> thus "corrupting the morals of the people." "Wheresoever the use of fiction prevails," Bentham maintains, "every law book is an institute of vice; every court of judicature is a school of vice." <sup>n230</sup> Fictions were also responsible for "corrupting the intellectual faculties of the people. . . . To what state of debility and deprivation," he asks, "must the understanding of that man have been brought down, who can really persuade himself that a lawyer's fiction is anything better than a lie of the worst sort. . . ." <sup>n231</sup> Bentham complained that lawyers

. . . refuse to administer justice to you unless you join with them in their fictions; and their cry is, see how

necessary fiction is to justice! Necessary indeed; but too necessary; but how came it so, and who made it so?

As well might the father of a family make it a rule never to let his children have their breakfast till they had uttered, each of them, a certain number of lies, curses, and profane oaths; and then exclaim, "You see, my dear children, how necessary lying, cursing, and swearing are to human sustenance!"<sup>n232</sup>

Bentham concluded that obfuscation "has never been employed but to a bad purpose. It has never been employed but to any purpose but the affording a justification for something which otherwise would be unjustifiable."<sup>n233</sup> A legal system's tolerance of such artifices therefore "affords presumptive and conclusive evidence of the inaptitude of the form of government in support of which it is employed . . . and of intellectual weakness, stupidity, and servility, in every nation by which the use of it is quietly endured."<sup>n234</sup>

The project of cleaning up legal "word magic" became the "necessary concomitant and forerunner of improvement of the law."<sup>n235</sup> Laws must be written in the common language of the people, and "wheresoever it is seen to differ, it will be seen to differ to its disadvantage:--peculiar absurdity the immediate effect--peculiar mischief the result."<sup>n236</sup> Law should be comprehensible to "the meanest understanding" and should aspire toward "the maximum of comprehensive simplicity." To achieve such clarity, the law must possess four qualities: "Precision, Apprehensibility, Brevity, and Amplitude."<sup>n237</sup> Since "all questions of Law are no more than questions concerning the import of words," the process of securing proper definitions was essential. "Nothing has been, nothing will be, nothing ever can be done on the subject of Law that deserves the name of Science," Bentham believed, "till that universal precept of Locke, enforced by Helvetius, be steadily pursued, 'Define your words.'"<sup>n238</sup> "Fixation" of words "has for its purpose, the removal of ambiguity: explanation, the clearing up of obscurity,"<sup>n239</sup> and for Bentham these "verbal distinctions are equally tedious and indispensable."<sup>n240</sup>

Bentham took pains to separate and clarify terms such as power, right, and trust. He replaced eulogistic terms like "purity" and dyslogistic terms like "lust" with neutral language in order to rid arguments of their emotive appeal. Bentham sought to replace all references to institutions and principles "considered an object of respect and veneration" with references to the fallible legal actors representing them. Bentham's famous renunciation of the language of natural rights as imaginary "nonsense upon stilts" belongs to this project to purge the law of fictions and he devotes a chapter in his *Theory of Fictions* to this problem.<sup>n241</sup>

### 3. The Language of Policy Reform

Bentham believed that the discourse of policy reform was just as corrupt as the discourse of law. He reasoned that would-be despots and aristocrats would naturally seek power by criticizing corrupt leaders rather than the institutional arrangements that bred corruption, and by proposing ineffectual reforms that left opportunities for corrupt leadership in place. Accordingly, every corrupt, deceptive regime was destined to generate its own equally corrupt and deceptive dissenters and reformers. The existence of vigorous political debate might create the appearance of democratic participation in policy formation, but such debate was often nothing more than squabbling among thieves, designed to mislead the public and preempt meaningful critique and reform.

Unhappily, for the members of the democratical section, their conceptions, their judgments, their suffrages, their language, have till this time been placed almost completely under the guidance, and almost, as it were, under the disposal of, those of the aristocratical: and thus it is, that by the sinister interest of these their adversaries, not only have they been placed and kept under the yoke of misrule, but the only instrument in which they could seek relief . . . has been employed . . . in the aggravation of it, and in keeping them, as far as may be, from all thoughts of applying a remedy.<sup>n242</sup>

No meaningful criticism and reform was possible unless the public's attention was directed at the consequences of

policy for their interests. And this was only possible if debate was conducted in the lucid terminology of costs and benefits, interests and desires, pleasures and pains, incentives and sanctions. Thus a transparent language of policy debate was just as important as a transparent language of law. Chapter II of the Introduction to the Principles of Morals and Legislation is largely devoted to a critique of phrases used in 18th century moral and political argument like "moral sense," "common sense," "understanding," "rule of right," "fitness of things," "law of nature," "right reason," and "natural justice." <sup>n243</sup> "The mischief common to all these ways of thinking and arguing," Bentham concluded, "is their serving as a cloak, and pretence, and ailment, to despotism. . . ." <sup>n244</sup> These were all empty phrases, conclusions about right and wrong masquerading as reasons. It was not that arguments from religious revelation, or moral sense, or aesthetic judgments of fitness, were necessarily wrong. It was just that arguments of this type had no discursive function: privately experienced intuitions could not justify an action to anyone else or settle a disagreement.

'But is it never, then, from any other considerations than those of utility, that we derive our notions of right and wrong?' I do not know: I do not care. Whether a moral sentiment can be originally conceived from any other source than a view of utility, is one question: whether upon examination and reflection it can, in point of fact, be actually persisted in and justified on any other ground, by a person reflecting within himself, is another: whether in point of right it can properly be justified on any other ground, by a person addressing himself to the community, is a third. The first two are questions of speculation: it matters not, comparatively speaking, how they are decided. The last is a question of practice: the decision of it is of as much importance as that of any can be. <sup>n245</sup>

By contrast to the various languages of moral intuition prevalent in eighteenth century writing, utilitarian discourse was uniquely suitable for reasoned public deliberation about public policy.

In his quest to reform the language of law and politics, Bentham devoted considerable energy to inventing and defining terms for use in legislation and policy analysis. Some of these neologisms, "international," "maximize" and "codify" for example, have proved their utility and entered the language. Most, like "adscitious" remain on the shelf. Bentham's esoteric terminology and his interminable litanies of definitions and distinctions render his voluminous writings unbearably tedious, which probably accounts for their unfamiliarity among commentators on utilitarianism. Thus at one level, Bentham's efforts to reform political and legal discourse were ironically Quixotic: his idiosyncratic terminology constitutes a sort of jurisprudential esperanto. But at another level, his efforts were a resounding success: all contemporary policy analysis begins with costs and benefits; all contemporary jurisprudential analysis begins with an analysis of authoritative sources, competent decisionmakers, and sanctions; all legal analysis begins with written instruments.

Utilitarianism was not a reflective or theoretical enterprise, but a discursive practice of public enlightenment. It aimed at creating a transparent process of government. This process would permit the public to contribute information about its interests, to see that information being used to develop and justify policy, to see that policy being faithfully implemented, to reward dutiful officials, and to punish delinquent ones. By these means the public welfare would be looked after, but more importantly, by these means the public could assure itself its welfare was being looked after. The entire project of securing utility depended upon public information and public understanding.

The first requisite was a transparent language of legal and policy analysis. But there were three other procedural conditions for a utilitarian policy process. First, legality, involving a clear separation of lawmaking functions from law applying functions. This would require legislative supremacy, formal (and clearly intelligible) rules of law, and sanctions against the exercise of administrative and judicial discretion. Second, democracy, requiring the popular election of legislative representatives. Third, publicity, requiring that the public be informed of every government decision and the information, policy reasons, and legal authority supporting it. The next section examines these three "securities against misrule," which comprise the requisite conditions for the utilitarian policy process.

## VI. Securities Against Misrule: Legality, Democracy, Publicity

### A. Legality

Bentham's notion of legality had two key components: legislative supremacy, and administrative regularity. Bentham's complaints about the common law drove him to design a political system in which all law was promulgated by a legislative body based on a calculation of utility.<sup>n246</sup> To remedy the common law's obscurity, inaccessibility, and ambiguity,<sup>n247</sup> Bentham proposed that laws should be codified by elected legislators, publicized and distributed widely, and subject to as little judicial interpretation as possible.

Much of Bentham's animosity toward the common law focused on judges. He saw government as a self-promoting enterprise he called "Judge and Co.," and he saw "judge made law" as a corrupt enterprise like "priest made religion."<sup>n248</sup> Bentham charged that the bench and bar "love the sources of their power, of their reputation, of their fortune: they love unwritten law for the same reason that the Egyptian priest loved hieroglyphics, for the same reasons that the priests of all religions have loved their peculiar dogmas and mysteries."<sup>n249</sup> He also argued that the object of judicial legislation was "the sacrifice of the universal interests of all men in the character of the justiciables, to the particular and sinister interest--either of the Judge, or of the despot, whose creature and instrument he is, or both together."<sup>n250</sup>

In response to these concerns, Bentham proposed to vest lawmaking power exclusively in legislators who would be directly accountable to the public for their decisions, would have access to all the information necessary to calculate under the utility principle, and would deliberate publicly. Once promulgated, these laws would govern all members of the community, particularly government officials, such as McCloskey's sheriff. The judiciary would have to render decisions in strict compliance with such laws.<sup>n251</sup> The role of the judiciary would therefore be confined to "giving due execution and effect to the Laws, whatsoever they may be,"<sup>n252</sup> but not to extending or limiting them by interpretation.

Bentham's legislature was omnicompetent, and Bentham held that the executive's "sole declared end and purpose is the giving execution and effect to the will formed and declared by the members of the legislature."<sup>n253</sup> Executive and judicial officials were denied any authority to create law. Within the executive, Bentham envisioned a tight chain of command.<sup>n254</sup> For example, if a subordinate abused her post, or otherwise breached an order, her superior would dismiss her.<sup>n255</sup> Inversely, if a subordinate believed her superior had betrayed the will of the legislators, she would report it to the legislature and protect herself by sending copies of her complaint to the press and every official in the dominion.<sup>n256</sup> L.J. Hume commented that "Bentham was opposed to a fermenting bureaucracy whose members might develop and apply their own standards of what was tolerable and intolerable, or their own notions of the public interest,"<sup>n257</sup> and thus "only the public--acting through the legislature--could speak for the public interest."<sup>n258</sup>

This structure permitted officials no opportunity to exercise independent judgment regarding the good of the community or to act outside of designated channels. In fact, the oath taken by the judiciary captures this relationship:

I will on each occasion use my best endeavors to give execution and effect to every part of [the law], according to what shall appear to me to be the intent of the Legislature for the time being: not presuming on any occasion to substitute any particular will of my own, to the will of the Legislature, even in such cases, in any, where the provisions of the law may appear to me inexpedient: saving only the exercise of such discretionary suspensive power . . . with which the Legislature may have thought fit to intrust me.<sup>n259</sup>

The above named "suspensive power" provided the judge's only authorized procedure for initiating reform in the legislative code.<sup>n260</sup> John Dinwiddy explains:

Bentham recognized that cases would arise in which the strict application of the code as it stood would produce an outcome that conflicted with the greatest happiness principle. In such circumstances, the judge could not simply override the code, basing his decision on a direct appeal to the principle of utility. This would be tantamount to making or amending law on his own authority. . . . but what the judge could do was to postpone a final decision on the case, and to propose to the legislature, through the Justice Minister, an amendment or refinement of the law.<sup>n261</sup>

Hence, instead of determining what decision would maximize utility in the particular case, Bentham expected the judge either to apply the law, or propose a more efficacious rule to the legislature and the public. <sup>n262</sup> Any ad hoc exception made by a judge or other administrator would be unauthorized and thus unlawful. <sup>n263</sup> The law would stand until legislatively altered: "on any occasion, an ordinance, which to some shall appear repugnant to the principles of this constitution, shall come to have been enacted by the legislature, such an ordinance is not on that account to be, by any judge, treated or spoken of, as being null and void. . . ." <sup>n264</sup>

Bentham's scheme would require officials like McCloskey's sheriff to carry out the law, regardless of the consequences. Bentham demands that both private individuals and officials follow the maxim: "To obey punctually: to censure freely." <sup>n265</sup> While the sheriff must yield to the legislature's will, the authorized means of reform remain available to her. A sheriff could only frame the innocent if the legislature were to prospectively and publicly permit this. Should legislators authorize government officials to frame the innocent? As Sissela Bok points out, we do occasionally legislate to allow certain forms of governmental deception, for example in our use of unmarked police cars to discourage speeding. <sup>n266</sup> Yet, a public policy of framing the innocent whenever officials deem it useful seems far less likely to advance utility, for reasons explored earlier. As Bok poses the question,

Do we want to live in a society where public officials can resort to deceit and manipulation whenever they decide that an exceptional crisis has arisen? Would we not, on balance, prefer to run the risk of failing to rise to a crisis honestly explained to us, from which the government might have saved us through manipulation? And what protection from abuse do we foresee should we surrender this choice? <sup>n267</sup>

For Bentham, the latter consideration would have been decisive. The constant threat of despotism inherent in ad hoc and secret official decisionmaking exacts a huge cost in security, far outweighing the satisfaction derived from any dubious prospect of enhancing utility on a given occasion. Bentham thought security best ensured by subjecting executive and judicial officials to legislatively defined rules. The next problem was how to ensure that the legislature would pursue the public interest. Bentham solved this problem by placing the legislature under the supervision of the public by two devices: elections, and publicity.

## B. Democracy

Bentham voiced an increasing commitment to representative democracy over the second half of his life, particularly in three important works on constitutional law: *Plan for Parliamentary Reform in the Form of a Catechism*, *Constitutional Code* and *Securities Against Misrule and Other Writings for Tripoli and Greece*. In his *Constitutional Code*, Bentham defines "good rule" as follows:

The only species of government which has or can have for its object and effect the greatest happiness of the greatest number, is . . . a democracy: and the only species of democracy which can have place in a community numerous enough to defend itself against aggression at the hands of external adversaries, is a representative democracy.

...

....

Every other species of government has, necessarily, for its characteristic and primary object and effect, the keeping the people or non-functionaries in a perfectly defenceless state, against the functionaries or rulers, who being, in respect of their power and the use they are disposed and enabled to make of it, the natural adversaries of the people, have for their object the giving facility, certainty, unbounded extent and impunity, to the depredation and oppression exercised on the governed by the governors. <sup>n268</sup>

Bentham's mature views are summarized by Frederick Rosen:

Bentham's aim was to achieve intelligent and responsible government at minimum expense, and he believed this could only be achieved through a representative democracy based on near universal suffrage, the secret ballot, frequent elections, a free press, open government, and military and judicial systems which incorporated accountability to the people wherever possible. He believed strongly in the virtues of popular participation but saw the real danger to representative democracy not in too little participation but in the power of ruling elites, even those elected or removable by the people, to use their powers to profit at the expense of the people generally. Many of the detailed provisions of Constitutional Code are designed to increase accountability and to place educated and competent officials in positions of power. Bentham was less interested in simply limiting the powers of government and more interested in limiting the powers of government to rule arbitrarily and oppressively.<sup>n269</sup>

Elie Halevy dates Bentham's enthusiasm for democracy from 1808 and explains it as the product of two factors: Bentham's resentment of the aristocratic government's indifference to his prison reform proposals, and the influence of James Mill.<sup>n270</sup> Yet H.L.A. Hart rejects Halevy's account as too crude to explain Bentham's vacillating enthusiasms.<sup>n271</sup> Hart, instead divides Bentham's thinking about democracy into two distinct phases; the first exemplified by his "antipathy and rejection" toward the Declaration of Independence and its guiding principles of natural rights, and the second characterized by an "indiscriminate admiration" for the actual forms of governance at work in the young United States.<sup>n272</sup>

Much of the difficulty of tracing the development of Bentham's political attitudes can be attributed to the presence of so many implicit democratic principles in his early work. As early as the 1776 Fragment on Government, Bentham resolved "to call the cause of the people the cause of virtue."<sup>n273</sup> During the early years of the French Revolution Bentham had already "recommended first for France and then for Britain, . . . a system of representative democracy with near universal suffrage."<sup>n274</sup> Instead of finding a single definitive moment of democratic revelation, we see Bentham slowly losing reasons to support his monarchy, while gaining reasons to endorse democratic structures. When the scales of utility tipped against his previously held positions, around 1809, he then endorsed the superior model.

Some have argued that, since Bentham's utilitarianism commits to nothing without an analysis of utility, there is nothing inherently democratic about the system. Such critics cite the example of Catherine the Great of Russia despotically applying similar principles,<sup>n275</sup> and add that utilitarianism could approve a totalitarian system that successfully conditioned its citizens into happy submission.<sup>n276</sup> R.C. Pratt has even argued that Bentham's ultimate theory of democracy is "sharply inconsistent with the main body of Benthamite doctrine."<sup>n277</sup> Such arguments live off of Bentham's refusal to proclaim inherent goods and truths before actually applying the utility calculus.

Yet there is a content to Bentham's conception of utility that is hard to disentangle from democracy. Public utility, after all, means "that which gratifies popular preference." Frederick Rosen has argued that "what counted with a proposed reform was that the people for whom it was intended saw it as being in the public interest to adopt it."<sup>n278</sup> Moreover, to the extent that Bentham identified utility with security of expectation, public utility became closely identified with institutional conditions that could guarantee the gratification of popular preference. Finally, when one recalls that the utility principle presupposed the prevalence of egoistic motives, it would seem that no official could be counted on to serve popular preference unless checked and overseen by popular will. Only popular sovereignty could insure the subservience of government to popular preference. The association of utility with democracy therefore seems hard to escape.

How, then, can one account for Bentham's long periods of ambivalence about democracy? These are largely explained by his spirit of positivism. This spirit not only inspired, but transcended the notion that law had no existence unless embodied in effective institutions. His writing is pervaded by a suspicion that normative ideals such as right, good, virtue and morality have no precise meaning unless embodied in effective institutions. So too, with democracy. Accordingly, when democracy was advocated as an abstract ideal of popular sovereignty founded on the chimera of natural liberty, Bentham was skeptical. And when such rhetoric was invoked to support a demagogic reign of terror that attacked the security of civil liberty, he was repelled. By contrast, governing institutions that secured civil liberty and

thereby maintained the consent of a populace with the practical power to remove them had greater claim to legitimacy. In Bentham's view the power even of a monarch was entirely constituted by the obedience of the governed, and hence by public opinion. <sup>n279</sup>

Whether particular institutions in fact responded to popular preference was therefore an empirical question. The important point to grasp is that Bentham's positivist spirit impelled him to reduce all abstract values to concrete institutions. This is no less true of "utility" than of "democracy." After all, he spent his entire professional career on the task of giving institutional definition to the utility principle, and devoted very little effort to giving it conceptual definition. Modern critics of utilitarianism ignore the details of Bentham's proposals which they regard as empirically contingent judgments about the means to achieving utility in one possible world. But Bentham's proposals about political process are not so much means to achieve utility as they are means to identify it and to insure its influence. Over a lifetime of experience in promoting reform, Bentham became convinced that democratic representation, like linguistic transparency, legislative supremacy, and administrative regularity, was a procedural precondition to the pursuit of utility. <sup>n280</sup>

By his own admission, Bentham was initially blinded to the complementary relationship between utility and democracy by the references to natural rights in the founding documents of the United States. Bentham's initial polemics against natural rights appeared under the name of John Lind, a business acquaintance of Bentham's father who became Bentham's close friend and collaborator. In 1775, Bentham assisted Lind with his *Remarks on the Principal Acts of the Thirteenth Parliament of Great Britain*, which argued that the British parliament was justified in its enactment of the "Intolerable Acts" of 1774. <sup>n281</sup> Bentham also worked with Lind on his 1776 *Answer to the Declaration of the American Congress*, which began, in Hart's words, a "long sceptical campaign against the doctrine of natural and unalienable rights of man." <sup>n282</sup> Lind and the young Bentham held that the "terms natural and inherent rights, when applied to men in such a state, are . . . perfectly unintelligible," and therefore he believed "the Citizen is to look for his rights in the laws of his country." <sup>n283</sup>

Bentham and Lind coined the slogan that "liberty is the name of nothing positive" and rejected the notions of natural property and natural rights in favor of legally constructed versions of these goods. <sup>n284</sup> Thus the colonists' cry of no taxation without representation rested on a mistake: colonists mistakenly believed their property belonged to them independent of law, and therefore they understood taxation as a form of a payment for services that they could withdraw when dissatisfied. For Bentham and Lind, property is constituted by law and is inherently subject to legal burdens: "Take away the fence which the law has set around this thing . . . and where would your right or property be then?" <sup>n285</sup> Taxation was such a legal burden that defined and conditioned entitlements to property. <sup>n286</sup> The notion of a right antecedent to law was for Bentham an absurdity, famously "nonsense upon stilts." Such talk of natural rights sprung from the "imagination" <sup>n287</sup> and signaled the "effusion of a hard heart operating upon a cloudy mind." <sup>n288</sup> "Deaf, unyielding, and inflexible," principles of natural rights "will hear of no modification . . . and will look at no calculation." <sup>n289</sup> Thus when Bentham read the Declaration of Independence, with its preamble infused with references to unalienable rights, he saw merely "bawling upon paper." <sup>n290</sup> To Bentham's annoyance, the Englishman Richard Price sought to justify the American cause with the maxim "Every Man His Own Legislator." Once Bentham looked beyond the fallacies of the new nation's arguments and into the merits of its practices, he admitted that irritation might have distorted: "Dr. Price with his self-government made me an anti-American." <sup>n291</sup>

As late as 1782 Bentham could find little to reform in his home constitution: "The Constitutional branch of the law of England, taking in its leading principles, would probably be found the best beyond comparison that has hitherto made its appearance in the world; resting at no very great a distance, perhaps, from the summit of perfection." <sup>n292</sup> By 1809, Bentham still believed England lived under a "Matchless Constitution," but now "matchless in rotten boroughs and sinecures!" <sup>n293</sup> Throughout his career Bentham struggled with the problem of fashioning a form of government that would genuinely serve the greatest happiness for the greatest number. If individuals are primarily motivated to serve their own interests, how can a community ensure that its governors will serve the interests of their constituents rather than their own? Maintaining the dominion of "majority interests" of the people over the "sinister interests" of the rulers remained a central concern throughout Bentham's work, and this difficulty ultimately led to his disillusionment with

English institutions. Bentham became increasingly dismayed by the amount of patronage controlled by the King. This power rendered the King unduly persuasive with Parliament, thereby compromising its ability to challenge the King's agenda. Once the party leader and members became indebted to the King for favors, the King could then quash or pass legislation, extending his power.<sup>n294</sup> The King's power of patronage also contaminated the press. Under the pretense of maintaining loyalty and military secrecy during the Napoleonic Wars, the press failed to remark the King's gradual rise to absolute rule, and when *The Times* refused to print Bentham's calls for reform in 1809,<sup>n295</sup> he concluded that they had been "bought or intimidated into a state of mendacious slavery."<sup>n296</sup> Without an independent press, the King's march toward despotism could proceed unchecked, to the people's detriment.<sup>n297</sup>

With the aristocrats "powerful, opulent, and tired,"<sup>n298</sup> and the King fully disassociated from the interests of the masses,<sup>n299</sup> political reform was imperative: "the country, if my eyes do not deceive me, is already at the very brink:--reform or convulsion, such is the alternative."<sup>n300</sup> The prospect of reform, however, seemed unlikely, since it required the legislators to take a position contrary to their own interests. At the very least, reform required an extension of the franchise that would make the legislators subordinate to the will of the people, and it seemed improbable that the legislators would initiate such a sacrifice of their power. As Steintrager wrote such reforms would entail the "end to sinecures, and places for themselves and for their friends and relatives . . . a loss of power to borough holders and opulent country gentlemen . . . and the Members in general would actually have to attend the sessions of Parliament and to work at their legislative duties."<sup>n301</sup> Additionally, Napoleon's threat made calls for reform particularly untimely, and the increasing limitations on the press and fear of sanction caused Bentham to refrain from publishing on these matters from 1809 until 1817.<sup>n302</sup> Considering these conflicts between the governors and press and the governed, Bentham's outlook was bleak:

Gagging Bills--suspension of the Habeas Corpus Act--interdiction of all communication between man and man for any such purpose as that of complaint or remedy--all these have already become precedent--all these are in preparation--all these are regarded as things of course.

The pit is already dug: one after another, or all together, the securities called English liberties will be cast into it.  
n303

At this point, Bentham began thinking more seriously of the advantages of democracy and the apparent success of the United States. The United States represented the very obverse of English repression: it had "No dungeon acts, no gagging acts, no riot act," freedom of press and speech, public offices filled by skill rather than family name, no standing army, no established church, no hereditary honors, no sinecures, and a simple functionality that operated "without so much as a single useless place, needless place, overpaid place, unmerited pension--not to speak of sinecures--not so much as a peerage, to settle or a borough to buy off a country gentleman."<sup>n304</sup> In contrast to the situation in France, Bentham heard of growing propriety and safety with the expansion of suffrage. It now seemed possible, in light of the American model, that the sinister interests of the governors could be successfully harmonized with and subordinated to the interests of the majority, and the fears he partially shared with the English aristocracy that majority rule would result in the dissolution or radical redistribution of private property were allayed.<sup>n305</sup>

As evidence that a viable form of government could indeed promote the greatest good for the greatest number, the United States became Bentham's favorite topic, and "Look to America" his favorite slogan.<sup>n306</sup> The democratic themes in his theories now advanced to the fore, and he urged England and all nations to adopt universal suffrage, secret balloting, short parliaments, equal electoral districts, and a general system of representative democracy. He hailed the United States as "that newly created nation, one of the most enlightened, if not the most enlightened, at this day on the globe,"<sup>n307</sup> "the best government that is or ever has been,"<sup>n308</sup> and a "matchlessly felicitous system."<sup>n309</sup> Although Bentham retained his distaste for the natural rights doctrines Americans invoked, he was quick to dissociate bad philosophy from good government:

Who can help lamenting, that so rational a cause should be rested upon reasons, so much fitter to beget objections,

than to remove them? But with men who are unanimous and hearty about measures, nothing so weak may pass in the character of a reason: nor is this the first instance in the world, where the conclusion has supported the premises, instead of the premises the conclusion. <sup>n310</sup>

Bentham confessed his own past misconceptions of democracy in order to ease the conversion of others. "Anarchy is one bugbear; Democracy another," he wrote, and conflation of the two "are sent forth to strike terror into weak minds . . . to frighten men out of their wits and prevent them from forming any sound judgement." <sup>n311</sup>

Bentham was now prepared to support a fully representative democracy. His overriding objective, to establish a government that would achieve the greatest good for the greatest number, required that the interests of the legislators be reconciled with the greatest good of the people. Bentham viewed constitutional law as he viewed criminal law: as a means to artificially reconcile the interests of a potential malefactor with the interests of the general public. The threat of punishment causes each individual to re-evaluate the potential costs and benefits of criminal acts, and thereby steers the self-interest of the potential criminal back in line with the general interest of the public. Bentham viewed legislators with the same eyes: forever tempted to favor their own interests over the public's, they were potential criminals in need of legal deterrents. Bentham repeatedly warned the public to "Minimize Confidence" and "Maximize Control," and he concluded that the only way to control the legislators was to subject them to appointment and dismissal by the majority whose interest they were to serve. Constantly scrutinized by a public that could remove him from his post, the legislator, like the criminal, would be forced to find her own best interests in service to the majority interest.

While originally Bentham believed that a mixed constitution with some elected elements would suffice to identify the governors with the governed, he later became convinced that only a full democracy would ensure this coincidence. <sup>n312</sup> Although he would not publish such an argument until 1817, <sup>n313</sup> he formulated it in 1790, in his unpublished *On the Efficient Cause and Measure of Constitutional Liberty*:

The propositions I lay down are these: (1) That the efficient cause of constitutional liberty or of good government which is another name for the same thing is not the division of power among the different classes of men entrusted with it but the dependence immediate or mediate of all of them on the body of the people. (2) That the whole sovereign power ought to rest in the hands of persons placed and displaceable by the body of the people. <sup>n314</sup>

Bentham reasoned that the people will choose representatives who will serve their interests, and those who seek to gain and hold an office therefore must attend to the popular will. <sup>n315</sup> In his *Constitutional Code*, Bentham argued that the desire of the legislator to become and remain a legislator will form a "junction of interest" with the interests of the people to elect and be served by someone advocating their desires. <sup>n316</sup> Thus, Bentham writes to the legislator

Should it be asked, Why it is your desire that the greatest happiness of all . . . should be the end to which . . . government should be directed? My answer is,--because on the occasion in question, such is the form, the establishment of which would in the highest degree contributory to my own greatest happiness. <sup>n317</sup>

Once the interests of the governed and the governors have been harmonized, sinister interests must be continually guarded against. Since the legislators were the lynchpin in Bentham's representative democracy, he insisted on reforming the process of their election. <sup>n318</sup> Representation of the welfare of all required universal suffrage (including females and resident aliens) and any exceptions needed to be justified by a utility analysis. In addition to the extension of franchise, ballots were to be secret, elections annual, and electoral districts equal. <sup>n319</sup> The function of the election process was to choose legislators competent to act in the interests of their constituents, not simply to translate their opinions into law. Bentham considered the layman "essentially unapt" to make law, but fully competent to select a good lawmaker. <sup>n320</sup> An election, therefore, is not intended to collect the people's views on any particular substantive issue, but rather merely to appoint competent and conscientious officials. <sup>n321</sup> Like a doctor, the legislator is judged by the success of her treatment, not her conformity to the patient's prescriptions.

To ensure personal accountability for legislative action, Bentham strongly discouraged decisions by committee, devised clear parliamentary procedures, and demanded uninterrupted attendance of all sessions.<sup>n322</sup> Publication of the legislatures' proceedings, determinations, and conflicts was essential to enable voters to assess each legislator's representation of their interests. In addition to outlining proper reporting and publication procedures for legislative action, Bentham devised a system of bookkeeping that would ensure transparent execution of legislatively mandated policy. Bentham demanded "clear, correct and comprehensive" records be kept, so that the public could assess the effects of policy and uncover corruption.<sup>n323</sup> An unrestricted press would call attention to this information.

Bentham believed that, when protected by these safeguards, the community could not be wrong about its own interests. Bentham thought a community's pursuit of its own desires, even if misguided, was always preferable to the sinister rule of oligarchs. Even if the public occasionally judges its interests poorly, or ineffectively pursues those interests by electing the wrong legislator, its judgment would improve with experience--provided that publicity, and a transparent language of governance enabled the public to understand its own experience. Bentham envisioned a time when the desires of the public would be synonymous with their true best interests:

Even at the present stage in the career of civilization, its dictates coincide, on most points, with those of the greatest happiness principle; on some, however, it still deviates from them: but as its deviations have all along been less and less numerous, and less wide. Sooner or later they will cease to be discernable.<sup>n324</sup>

The public comes to best comprehend its own interests through experience, examination, explanation, and argumentation, and therefore education and the free exchange of information became imperative. Thus John Stuart Mill spoke of the emphasis on education in the thought of James Mill, Bentham's partner in electoral reform:

So complete was my father's reliance on the influence of reason over the minds of mankind, whenever it is allowed to reach them, that he felt as if all would be gained if the whole population were taught to read, if all sorts of opinions were allowed to be addressed to them by word and in writing, and if by means of the suffrage they could nominate a legislature to give effect to the opinions they adopted.<sup>n325</sup>

Bentham and the elder Mill believed the strength of the best arguments and legislation would win over all citizens who were allowed to freely examine their desires and the objectives of their community. Government was not a forum for the struggle of interest groups, but for the discovery and rational justification of policies that could generate a consensus among participants.<sup>n326</sup>

### C. Publicity

To ensure that self-interested officials would properly perform the utility calculus, Bentham proposed a public process of governance. Bentham had little confidence in his legislators, and he took every precaution to ensure that the public could monitor their every move.<sup>n327</sup> Publicity of political process, according to Bentham, was a necessary safeguard against misrule, and he barred any suspension of this security. Bentham's constitutional scheme guaranteed that his public would know, or at least could know upon inspection, all of the information available to the legislature, the decision made by the legislature, and its stated rationale. In order to assure that each decision would be made by the appropriate legislator and that no administrator could overstep her authority, Bentham erected a hierarchy of decision-making responsibility. He sought to ensure that the decision-maker would always be the person most knowledgeable about the issue, and would be held accountable for her decision. The "public must keep a careful eye on legislators and administrators alike," he believed, "lest they corrupt one another to the detriment of the greatest happiness of the greatest number," and thus only "when such suspicion exists will the services that can be rendered to the public actually be given."<sup>n328</sup> Bentham saw public inspection of governmental decisions as the only sure safeguard against corruption and misrule, and he therefore constructed a transparent deliberative structure which would allow the public full access to all of the state's proceedings. This public review of governmental functions was a *sine qua non* of security.<sup>n329</sup>

To watch over the judges and lawyers Bentham proposed:

a constantly existing body of assessors to the Judge . . . under the name of a Jury. . . . Of this Jury the decision might either be obligatory, as according to the present practice, on the Judge, or not. One great service will be rendered by it in either case: namely the imposing on the Judge a sort of moral necessity to lay open to the public ear the grounds of every thing that he does. For this reason the Jury should be in attendance whensoever the judge himself is in attendance, for if the intentions of the Judge are evil, a single moment in which he acts by his own uncontrolled authority may suffice to deprive the party who is in the right of the benefit looked for at the hands of a Jury.

. . . .

In Judicature, where there is no publicity, there is no justice: no tolerably adequate security for the giving due execution and effect to the laws, whatsoever they may be. That justice should have been the object where the doors of the Judicatory have been kept regularly closed is not possible. <sup>n330</sup>

The primary function of this jury is not to render verdicts, but to witness the judge's work. When drafting a plan to reorganize the French judiciary, Bentham stated that "publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial." <sup>n331</sup> The jury would hear evidence, ask any relevant question, inspect documents and exhibits, render opinions, and while the judge was not obligated to follow the jurors' decisions, their statements would be recorded in the official record. <sup>n332</sup> In addition, Bentham would have filled the court with spectators, representing public opinion. He named the members of this audience "Judicial Inspectors," and suggested legislation to ensure their presence at every trial. <sup>n333</sup> "Their mere presence," he believed, "would guarantee publicity and assure that some attention would be paid to the Greatest Happiness Principle." <sup>n334</sup> Bentham's similar use of surveillance as a disciplinary technique in his model prison fascinated Foucault. In this "Panopticon" the behavior of all prisoners and the performance of all employees are transparent to the director; yet any member of the public can similarly survey and assess the director's management of the facility. <sup>n335</sup> Bentham's courtroom was a similar Panopticon, putting both the defendant and the law on public display.

In order that both the judge and jury hear any and all information that might be relevant to a decision, Bentham endorsed exceedingly liberal rules of evidence. <sup>n336</sup> In his study of Bentham's theory of evidence, William Twining nicely captures Bentham's position when he explains that the "direct end of evidence and procedure is to implement substantive laws deemed to be consonant with utility . . . [and t]he means of achieving this end is by establishing the truth through the rational and efficient collection, presentation and weighing of evidence." <sup>n337</sup> With this end in mind, Bentham stated that the court should "hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it--the parties." <sup>n338</sup> Bentham opposed evidentiary constraints based on the protection of confidential relations, <sup>n339</sup> attorney-client privilege, <sup>n340</sup> the right against self-incrimination, and the right to silence. <sup>n341</sup> These same evidentiary rules would apply, when relevant, to the legislator investigating questions of policy.

Bentham also insisted that all proceedings of the state should be printed in the newspapers, <sup>n342</sup> including the issues under review, the evidence offered, and the conclusion reached. <sup>n343</sup> This, in Bentham's opinion, allowed the community to monitor and assess governmental decisions, and enabled the citizenry to report abuses of executive authority to the violator's superior. Bentham believed such critical exchanges between the rulers and the ruled should be encouraged, and that these lines of communication should be "as free and unclogged as possible." <sup>n344</sup>

As an additional benefit of such publicity, citizens would become aware of the decisions made and reasons cited by their appointees, and voters could hold officials politically accountable at the next election. <sup>n345</sup> For the populace to cast their vote for the candidate who best deserved their confidence, they had to know the legislator's opinions. Bentham wondered "how are they to know this but by knowing . . . how he has given his vote and what reasons if any he has

assigned for giving it? And in nine cases out of ten how can they judge . . . without learning any thing of the reasons?"<sup>n346</sup> Debates, hearings, and legislative sessions would be transcribed, relayed by the press, and reviewed by the public, and the electorate would choose their leaders based on this information.<sup>n347</sup> Because transgressions would be punished by a loss of popularity, Bentham thought publicity would discipline politicians: "the eye of the public makes statesmen virtuous."<sup>n348</sup> Bentham realized that a "law conformable to utility may happen to be contrary to public opinion," but he believed this to be "only an accidental and transitory circumstance" since "all minds will be reconciled to the law as soon as its utility is made obvious. As soon as the veil which conceals it has been raised, expectation will be satisfied, and the public opinion will be gained over."<sup>n349</sup> Bentham believed it was the legislator's duty to convince the community of the merit of the laws it endorsed, and if it failed to do so it would suffer at the next election.<sup>n350</sup>

Bentham saw publicity as the dominant protection against misrule. He saw no need for a system of checks and balances, distributing power through separate branches of government.<sup>n351</sup> "Without publicity," he writes, "all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in character of checks, would be found to operate as cloaks rather than checks; as cloaks in reality, as checks only in appearance."<sup>n352</sup> He proclaimed the most insidious political disease to be "political gagging: i.e. obstruction in any way of the communication between mind and mind for the melioration of the common lot on any subject of discourse: more especially on a political subject."<sup>n353</sup> Bentham prescribed one "word--publicity, for conveying the like conception of the remedy:--the only remedy (it will be seen) which, without a change in the form of the government, the nature of the disease admits of."<sup>n354</sup>

Bentham regarded the public monitoring function as a constitutional structure, an organ of government that he referred to as the "Public Opinion Tribunal."<sup>n355</sup> Membership in the Public Opinion Tribunal consisted of the "whole number of the members of the political community in question as constituting the entire body, the functionaries of government, all ranks together . . . and all those by whom any cognizance is taken of public affairs may be considered as constituting the Tribunal of Public Opinion,"<sup>n356</sup> Bentham viewed newspaper editors as leaders of this body.<sup>n357</sup> Just as membership was afforded to all citizens, the Tribunal's authority ranged over the entirety of political life, and it "may be conceived as constituted by so many Sub-Committees as there are aggregates of individuals who on any occasion in any place take actual cognizance of this or that operation of a political nature, to whatsoever part of the field of government it appertains."<sup>n358</sup> The Tribunal's physical presence would be felt through audiences at legislative and judicial sittings, public meetings, and also via those who explicitly took up political issues in speeches and writings.<sup>n359</sup>

Bentham imagined the Public Opinion Tribunal performing the following functions:

1. Receiving claims and accusations.
2. Receiving oppositions and defense.
3. Receiving, compelling, collecting and storing evidence.
4. Receiving and hearing or reading arguments of parties litigant or advocates.
5. Forming opinions or judgment on ditto: with correspondent will.
6. Giving expression to such judgment at will.
7. Giving impression to such expression.
8. Giving diffusion to such impression.
9. Giving execution and effect to such judgmentss and will.<sup>n360</sup>

In his Constitutional Code, Bentham also required the Tribunal to perform a "statistic or say evidence furnishing function." In this capacity, the Tribunal was to provide information that might serve as "grounds for judgment . . . in relation to any public institution, ordinance, arrangement, proceeding measure, past, present or supposed future contingent, or to any mode of conduct, on the part of any person, functionary or nonfunctionary, by which the interests of the public at large may be affected. . . ."<sup>n361</sup> The Public Opinion Tribunal, thus, would gather all the information relevant to governmental activities (the statistical function), review it, identify indiscretions (the censorial function), suggests changes (the meliorative-suggestive function), and publicly voice its opinions.<sup>n362</sup> The Tribunal was free to level any attack against governmental impropriety, and Bentham placed no restrictions on the intensity of its criticisms, for in his opinion the "military function gets paid for being shot at. The civil functionary is paid for being spoken and written at."<sup>n363</sup>

The Tribunal was indispensable to the operation of a utilitarian policy process:

Regarding then this political body in the character of a workman, operating on the minds of public functionaries, publicity may be stated as the characteristic and indispensable instrument of this workman: an instrument no less indispensable and characteristic than the turninglathe is of the sort of workmen called a turner. It is by publicity that the Public Opinion Tribunal does whatsoever it does: any further than employment is given to his instrument, the workman can not do any thing. <sup>n364</sup>

Because of its centrality to utilitarianism, Bentham took every measure to facilitate the Public Opinion Tribunal's performance of its responsibilities. <sup>n365</sup> Bentham demanded that governmental departments keep their books and records accurate, logically organized, and easily accessible to the public. <sup>n366</sup> Bentham believed any person obstructing the operations of the Public Opinion Tribunal should be "numbered among the enemies of the human species," and he stated:

Every act, whereby . . . a man seeks to weaken the effective power of the Public Opinion Tribunal, or by falsehood, or . . . by suppression of truth, to misdirect it, is evidence of hostility on his part to the greatest happiness of the greatest number: evidence of the worst intentions, generated by the worst motives. . . . Every act, whereby a man seeks to diminish the circulation of opinions opposite to those which he professes, is evidence of his consciousness of the rectitude of those which he is combating, and thereby of the insincerity, hypocrisy, tyrannicalness, and selfishness which have taken possession of his mind. <sup>n367</sup>

Bentham would not tolerate any interference with the Public Opinion Tribunal, nor could he imagine any reason to suspend publicity.

Along with democracy, legality, and discursive transparency, publicity is a fundamental feature of a utilitarian constitution. Together, these four "securities against misrule" fulfill the dual function of disciplining officials to gratify the public and reassuring the public that their servants are thus disciplined. Because they are procedural conditions for collective rationality, they are not just contingently useful instruments. They are constitutive of the public interest or the utility that utilitarianism promotes. By designing publicity into the structure of governing institutions and supporting it with additional institutional structures like a free press, Bentham's Constitutional Code would bring into being the constitutional organ of an informed and mobilized public: the Public Opinion Tribunal, which oversees all government activity and holds administrators accountable for betrayal of the public interest. Citizens ultimately "direct their rulers, through public opinion and the vote, to accept reforms and advance policies that can be justified in terms of the greatest happiness of the greatest number." <sup>n368</sup> Publicity is the indispensable condition for the emergence of a genuine popular sovereign. This popular sovereign is the ultimate audience for utilitarian discourse, and the existence of that audience is the condition for the meaningfulness of that discourse.

How would Bentham's commitment to publicity of government action apply to the case of an official like McCloskey's sheriff bent on framing an innocent person to pacify a bloodthirsty mob?

First, when we consider Bentham's insistence on strict adherence to formally promulgated laws and his antipathy toward judicial and administrative discretion, it seems unlikely that he would permit a petty police official to take matters into his own hands and disregard all of the procedural safeguards against misrule. Bentham constructed this entire procedural apparatus with the aim of checking legislators, administrators and judges, and he structured the making and implementation of law so as to allow these high-ranking officials no unscrutinized discretion whatsoever. Bentham believed no one should be allowed to act on behalf of the community without a full review of their actions by the Public Opinion Tribunal, and a sheriff would not be exempt from this safeguard. If Bentham could not trust an elected legislator to perform the utility calculus without publishing in the newspaper all of the evidence before her, her decision, and the reasons given for her choice, then surely a lone sheriff would not be afforded the opportunity to secretly decide the fate of her community. Similarly, if a judge was not even allowed to interpret a law without a jury

present because, in Bentham's words, justice is not possible "where the doors of the judicatory have been kept regularly closed," how could a sheriff secretly appropriate the functions of judge, jury, and executioner?

Second, Bentham's emphasis on transparent government and public evidence similarly deflates the claim that a sheriff could frame an innocent person. If we consider the actions that a sheriff would actually need to take to accomplish such a scheme, she would quite clearly need to violate several of her nation's procedural laws. In mounting the case to frame the innocent person, she would need to hide or destroy exculpatory evidence and fabricate inculpatory evidence, and Bentham clearly forbade such deception.<sup>n369</sup> Her official records would subsequently contain falsified and incomplete information. These transgressions would obstruct the proper review of her decision by the public, and she would thus be "numbered among the enemy of the species."<sup>n370</sup> In the end, it would be the sheriff who was punished both for disregarding the rule of law<sup>n371</sup> and for improperly punishing an innocent party.<sup>n372</sup>

## VII. Institutional Utilitarianism and Ethical Utilitarianism

### A. Utilitarian Penology as an Application of Institutional Utilitarianism

Utilitarian penology was not an outgrowth or application of utilitarian ethics. Utilitarians like Beccaria and Bentham were interested in reforming public institutions to better serve the public welfare. Since they thought that individuals were destined to pursue their own welfare they did not see ethical preachments as a particularly useful enterprise. They thought of public utility as a public criterion of judgment for settling political arguments, rather than as a motive for individual action. It was primarily a criterion for use in legislation.

For someone of a skeptical, positivist turn of mind like Bentham, a standard of judgment like utility had no meaning apart from some concrete institutional process of decisionmaking. Bentham endeavored to design institutions that would not so much maximize utility as they would realize utility by providing a process for identifying it that could be publicly accepted as legitimate. Bentham thought of public confidence that government was guided by the public welfare as the major portion of the public happiness sought.

This larger aim of public confidence or "security" in the utilitarian aims of government necessitated a number of procedural constraints on government action. Thus, all government action should be pursuant to legislation promulgated by democratically elected representatives. Legislation should take the form of clear formal rules, couched in language intelligible to the public, and justified by reasons of public welfare clearly intelligible to the public. It should be faithfully implemented and enforced by executive and judicial officials with little discretion, subject to public monitoring and sanctions for misbehavior. Governmental publicity, education, a free press, and a lucid language of policy analysis and critique were all necessary to enable the public to assess the performance of government. The entire utilitarian policy process depended upon the circulation of information: the ingathering by government of information about individual interests and social conditions; the outflow of information to the public about the nature, grounds and effects of government decisions; the exchange of information and opinions among members of the public about public needs and the performance of government. This circulation of information was crucial not only to enable government to serve the public interest, but to compel it to do so, and to reassure the public that government was so compelled.

These procedural requisites of utilitarian government combine with other utilitarian constraints to keep utilitarian punishment within narrow channels. Utilitarian penology begins with the idea that punishment is an evil that purposefully destroys welfare. It adds the observation that punishment is nevertheless useful in enforcing public will and deterring malevolence in so far as it can be seen to be precisely directed at wrongdoers. Yet, the weapon of punishment often cannot be aimed with great precision. Errors will be made, and in an interdependent society, the harmful effects of deserved punishment cannot be confined to the guilty. Utilitarian penology acknowledges that dutiful, law-abiding citizens cannot assure themselves they will not be punished undeservedly. The result is that the use of punishment not only inflicts costly suffering but inevitably threatens the very public security it is designed to serve.

The utilitarian responds in two ways. First, the utilitarian strives to use less destructive methods of social control

whenever possible: positive incentives, education, therapeutic treatment, moral persuasion, architecture, surveillance, publicity, and so on. The utilitarian would rely on legislative decriminalization rather than judicial, prosecutorial or police discretion to avoid unnecessary punishment. Second, the utilitarian hedges the imposition of punishment with procedural rules designed to assure the public it is as regular and accurate as possible. When conceived as public security, utility turns out to demand much of the familiar civil libertarian agenda in criminal justice. Punishment should be conditioned on offenses that are defined legislatively, prospectively, specifically and publicly. Offenses should be conditioned on voluntariness and culpability so that only deterrable wrongdoing is punished and citizens can be confident they have some control over whether they subject themselves to punishment. Prosecutions should meet exacting standards of proof, and evidentiary reliability. Punishments should be reversible and convictions subject to exhaustive review and appeal. Criminal justice decisionmaking at all levels should be publicly monitored and reviewed.

Utilitarian penology is not organized around the goal of maximizing deterrence or minimizing crime. It is organized around the goal of maximizing utility, which chiefly depends on creating a democratically controlled, procedurally regular, transparent, formalistic, bureaucratically rational process of governance. Public confidence that government can be publicly compelled to serve the public welfare is more important to utility than the particular consequences for the public welfare of any policy decision.

On this interpretation, utilitarian penology cannot be charged with condoning or demanding punishment of the innocent (except in the limited sense that all efforts to punish the guilty entail risks of inadvertently punishing the innocent and unfairly harming innocent associates of the guilty). Since utilitarian penology does not rest on any ethical theory, it does not entail an ethical obligation on the part of individuals to act so as to maximize utility. Hence, it entails no ethical obligation to bear false witness or frame the innocent or otherwise subvert legal process, even if an individual could know that such an act would maximize utility on a particular occasion. Utilitarian penology could not recommend a government policy of publicly and deliberately punishing innocent people because this would impose needless suffering, create perverse incentives, and destroy public security. Utilitarian penology could not recommend a government policy of secretly framing the innocent, because a system of criminal justice could only advance its primary aim of public security if it was sufficiently transparent in design to guarantee the public that such acts would be discovered and punished.

An illuminating modern example of this kind of utilitarian penology is Henry M. Hart's famous essay *The Aims of the Criminal Law*,<sup>n373</sup> which offers a consequentialist argument for restricting punishment to blameworthy conduct. Hart poses the question of the justifying purposes of punishment by imagining a concrete decisionmaker--a constitutional commission--charged with deciding whether to include punishment among the powers of government.<sup>n374</sup> He reasons that while deterrence is an important purpose of criminal law,<sup>n375</sup> it cannot suffice as a justification for punishment because onerous civil sanctions also deter.<sup>n376</sup> Hart argues that the feature distinguishing punishment from other onerous sanctions is that it also expresses blame and thereby inflicts humiliation.<sup>n377</sup> Yet Hart does not then proceed to argue, as might a retributivist, that officials are ethically obliged to blame only the blameworthy. Instead, he argues that the "utility"<sup>n378</sup> of official blaming lies in inculcating a sense of moral and social responsibility among citizens, and investing their social and self-esteem in obedience to law.<sup>n379</sup> Hart concludes that punishment should be constitutionally restricted by this educative function.<sup>n380</sup> Accordingly, legislatures should only be permitted to criminalize, and courts to punish, blameworthy conduct.<sup>n381</sup> Prosecutorial and police discretion should be curbed to the same end.<sup>n382</sup> These restrictions, Hart reasons, will conserve the moral authority, and hence the educational efficacy, of the criminal law.

Note that while Hart's overall question is how punishment can best serve the public welfare, he divides it into a series of questions about how particular institutional mechanisms should be used in a structured process of making and applying criminal law:

In the criminal law, as in all law, questions about the action to be taken do not present themselves for decision in an institutional vacuum. They arise rather in the context of some established and specific procedure of decision. . . . This means that each agency of decision must take account always of its own place in the institutional system and of

what is necessary to maintain the integrity and workability of the system as a whole. <sup>n383</sup>

Hart's conclusion that public welfare requires restricting punishment to the blameworthy depends heavily on his starting the analysis at the level of constitutional design, like Rawls and Bentham, rather than at the level of police discretion, like McCloskey. Once Hart's constitutional commission has exercised its discretion to define the public welfare, McCloskey's sheriff has little discretion to do the same.

Hart, of course, is not commonly described as a utilitarian: he is known as a major exponent of the postwar "Legal Process" school which emphasized the proper allocation of policy decisions to competent institutions. <sup>n384</sup> Yet, if we are right in characterizing utilitarianism as a design for a rational policy process, Hart's legal process analysis of punishment is a legitimate heir to Bentham's utilitarian penology. Indeed, we think much contemporary legal policy analysis is more closely related to Bentham's original project of legal reform than the "utilitarian" ethics debated by contemporary academic philosophers.

### B. The Invention of Ethical Utilitarianism

Utilitarian ethics is a simple and elegant theory, and as such very useful to philosophers who must teach undergraduate courses in ethics and advance the discipline in fifteen page increments in the pages of philosophy journals; if it did not exist it would have to be invented. Yet it is entirely unnecessary to the Benthamite project of designing a welfare maximizing policy process. The discontinuities between Bentham's concerns on the one hand, and those of, say, J.J.C. Smart on the other have, sometimes been noticed upon but, we think, usually mischaracterized. According to Alan Donagan, for example, the difference is that the original utilitarians were "rule utilitarians:"

The early utilitarians, Bentham and the Mills, did not treat it as the office of a moralist to calculate the consequences of individual acts, this murder or that lie, but only whether the consequences of classes of acts like murders or lies are better or worse than the consequences of the classes of alternative acts in which the agents refrain from murdering or lying. Not all utilitarians have followed Bentham and the Mills in this. Professor J.J.C. Smart, for example, has argued that to "restrict" utilitarianism as in practice Bentham and the Mills did leads to absurdities. . . .  
n385

According to this formulation, the chief difference between the original utilitarian reformers and their modern academic epigones is a disagreement about ethics. Whereas "act-utilitarians" like Smart believe we should each act so as to enhance utility, rule utilitarians believe we should act in conformity to rules that would enhance utility if followed universally. But to call Bentham and the Mills rule-utilitarians is to suggest that they were interested in identifying utility-maximizing policies to preach them as moral duties rather than to enact and enforce them as legislation.

Of course, on utilitarian premises, rule-utilitarian moralizing would not be very effectual in advancing the public welfare. Utilitarian psychology predicts that moral preaching will seldom motivate action, and rule-utilitarian norms only advance the public welfare if they are followed systematically (otherwise they are act-utilitarian norms). Those early utilitarians who did write about moral duties, like Hume and Paley, argued that they had to take the form of rules in order to be potentially enforceable by sanctions. In other words, even those early utilitarians who wrote about morality treated it as an institution, not just a set of ethical duties. But for the most part, the early utilitarians were practical reformers, not speculative philosophers. They were interested in rules primarily because they were trying to improve law.

Certainly Bentham, and his most immediate forebears Helvetius and Beccaria, had virtually no interest in ethics. Their views on law were not "restrictions" of any views about ethical duties. John Stuart Mill, like Hume, is a more complicated case. Mill was primarily a political theorist and reformer, famed for his advocacy of democracy <sup>n386</sup> and civil liberties. <sup>n387</sup> Yet his pamphlet *Utilitarianism* seems to set forth a conception of utilitarianism as an ethical standard for judging all acts: "The creed which accepts as the foundation of morals 'utility'. . . holds that actions are

right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness." <sup>n388</sup> Nevertheless, J.O. Urmson has made a convincing case that for Mill, utilitarianism has a far more restricted scope as an ethical standard. According to Urmson, Mill places us under no ethical obligation to maximize. Mill judges actions as morally wrong only if they violate a rule of conduct, the violation of which usually substantially harms the public welfare. <sup>n389</sup> These moral wrongs are of two types: violations of legal rules, which merit punishment, and violations of ethical rules, which merit the "moral sanction" of public disapproval. For Mill, it is not utilitarianism that is restricted, but ethics. Ethics concerns not the general question of what actions should be done, but the narrower question of what actions should be done out of a sense of ethical duty. <sup>n390</sup> "Ninety-nine hundredths of all our actions are done from other motives, and rightly so done if the rule of duty does not condemn them." <sup>n391</sup> Utility is best served if individuals pursue their own happiness most of the time; to act always or even very frequently out of a sense of duty spoils the enjoyment of life. Moreover, like Bentham, Mill thought law more important than morality as a definer and enforcer of duties:

Utility would enjoin, first, that laws and social arrangements should place the . . . interest of every individual as nearly as possible in harmony with the interest of the whole; and, secondly, that education and opinion, which have so vast a power over human character, should so use that power to establish in the mind of every individual an indissoluble association between his own happiness and . . . the practice of such modes of conduct . . . as regards for the universal happiness prescribes. <sup>n392</sup>

Mill was a utilitarian; and he adhered to a sort of Kantian ethics of universalizable rules, with utilitarian benefits. But his utilitarianism, which was chiefly a program of legal and political reform, far exceeded this "rule-utilitarian" ethics. As Russell Hardin comments:

Much of the mid-twentieth-century effort to read earlier utilitarians, such as Mill, as really rule-utilitarians largely misses the point of the earlier concern, which was with institutional arrangements that would help secure good consequences and not with individual rule following. To avoid such confusion we should speak not of ruleutilitarianism but of institutional utilitarianism. <sup>n393</sup>

Thus the early utilitarians cannot be placed on one side or the other of contemporary debates within utilitarian ethics. In so far as they were utilitarians, they were not ethicists, but political and legal theorists.

Ethical utilitarianism was invented by Henry Sidgwick in his 1874 treatise, *The Methods of Ethics*. <sup>n394</sup> Here he defined ethics as an academic discipline--the "ideal" or normative "science" or study of "conduct," <sup>n395</sup> by which he meant "the voluntary action of individuals." <sup>n396</sup> Ethics was therefore to be distinguished from jurisprudence and politics. <sup>n397</sup> Sidgwick's subject was "methods" of acquiring knowledge about what actions are right for individuals to do. <sup>n398</sup> He distinguished two general methodological approaches: inquiring into the consequences of an action for happiness, and inquiring into opinions or "intuitions" about the rightness of an action. Among consequentialist approaches, he distinguished utilitarianism, or "universalistic hedonism" from "egoistic hedonism." <sup>n399</sup> In thus comparing ethical methods, Sidgwick admitted that he was not studying them "historically, as methods that have actually been used or proposed for the regulation of practice; but rather as alternatives between which . . . the human mind seems necessarily forced to choose when it attempts to frame a complete synthesis of practical maxims and to act in a perfectly consistent manner." <sup>n400</sup> Thus in expounding "utilitarianism," Sidgwick made no claim to offer an accurate interpretation of the thought of Hume, Helvetius, Beccaria, Bentham, James Mill, John Stuart Mill, or any other actual figure in the history of utilitarianism. He was attempting to work out the implications for individual obligation of an ethical theory built on a foundation of universal hedonism. In so doing, he distinguished his enterprise, "the scientific study of right conduct," from that of previous writers, who, he opined, were drawn into confusion and inconsistency by the exigencies of "practical reason." <sup>n401</sup>

While Sidgwick developed a utilitarian ethics in *The Methods of Ethics*, he apparently did not regard utilitarianism as exclusively or fundamentally an ethical doctrine. Rather, he saw utilitarianism as a conception of the good with

implications for jurisprudence and political theory as well as ethics. Moreover, he saw these jurisprudential and political implications as more centrally important from a utilitarian standpoint.<sup>n402</sup> Nevertheless, he saw some moral obligations flowing from the great utility of laws in advancing the general welfare. Thus, order being preferable to chaos, even non-optimal laws should generally be obeyed and defended; citizens should endeavor to increase the utility of the laws when they could do so without threatening social order.<sup>n403</sup> Sidgwick devoted two chapters to critiquing intuitionist views on law and justice,<sup>n404</sup> but his aim was to refute claims that law should be ruled by deontological morality, and that legal burdens and benefits should be distributed on the basis of desert without regard to behavioral incentives.<sup>n405</sup> Thus he was chiefly concerned with freeing law and policy from ethics.

Sidgwick succeeded in laying out the boundaries of ethics as an academic discipline, with the result that utilitarianism was afterwards understood as an ethical doctrine primarily. Professors of ethics forgot that utilitarianism was a program of legal reform before it was an ethical theory, and came to see the legislative agenda as a restricted application of utilitarian ethics.

### C. The Revival of Institutional Utilitarianism

A number of contemporary philosophers have begun to revive the institutional utilitarianism of Beccaria, Bentham and Mill. Yet, even they find it difficult to separate this earlier tradition from the ethical utilitarianism of Sidgwick. In *Morality within the Limits of Reason*, Russell Hardin writes:

Utilitarianism provides both an individual and a social moral theory because the one is inherently incomplete without the other. To a large and sad extent, this view was lost in much of twentieth-century utilitarianism, which, in the spirit of most twentieth-century moral theory of all philosophical varieties, has typically focused on essentially personal problems of choice in small-number interactions such as personal promising and face-to-face charity.<sup>n406</sup>

Hardin concludes that utilitarian policy analysis depends upon and "completes" utilitarian ethics. Assuming that ethics have always been integral to utilitarianism, Hardin reasons that utilitarians were driven to pursue utility by institutional means because of the incompetence of individual moral actors to identify and pursue the public welfare on an ad hoc basis.<sup>n407</sup> And he reasons that utilitarians will usually proceed by means of rules rather than calculation because of the high cost of information. Hardin rejects all criticisms of utilitarianism based on hypothetical examples involving an individual with perfect knowledge of causal relationships at odds with common experience.<sup>n408</sup> Accordingly, he rejects Carritt's and McCloskey's charge of punishing the innocent, on reasoning similar to that offered by Rawls:

If utilitarianism recommends an institution for punishment of properly convicted persons, then that is the kind of institution a utilitarian would want. We must create institutions to achieve utilitarian ends because individual actions unconstrained and unguided by institutional structures will not achieve them as well. There is perhaps no more grievous limit to individual human reason than this. It is precisely the point of such an institution as . . . criminal justice to override individual reason for the social good.<sup>n409</sup>

For Hardin, institutional utilitarianism and rule-utilitarianism are simply versions of act-utilitarian ethics that recognize the "limits of reason."

Another proponent of institutional utilitarianism is James Wood Bailey. Bailey also moves from act-utilitarian premises to institutional utilitarianism by noting the disabilities of individual moral actors as utilitarian decisionmakers. Like Hardin, Bailey adverts to cognitive disabilities: individuals are much more competent to identify their own interests than to identify those of other people. The pooling of information necessary for utilitarian social planning requires democratic or bureaucratic institutions, or pricing mechanisms policed by judicial institutions. But mostly, Bailey is interested in the motivational disabilities emphasized by Helvetius and Bentham: individual actors cannot be trusted to sacrifice their own interests to the general welfare, or to honestly reveal their preferences, unless constrained

to do so by sanctions. <sup>n410</sup> For Helvetius and Bentham this just meant that there was little to be gained by preaching benevolence. But Bailey argues that it is actually immoral to demand that committed utilitarians subject themselves to exploitation by engaging in unreciprocated benevolence. This demand imposes too great a burden and makes utilitarianism an unappealing creed. The likely result is to discourage belief in utilitarianism <sup>n411</sup> and so to reduce support for the utilitarian institutions and policies that can do far more than individuals to advance the public good. An excessively burdensome morality is selfdefeating, and hence, not useful. <sup>n412</sup>

Like Hardin, Bailey believes that his institutional utilitarianism avoids the problem of framing the innocent. Bailey treats this problem as part of two more general objections: that utilitarianism might require "imposed sacrifices" <sup>n413</sup> and that it might require "some form of undemocratic and systematic deception of the people. This is what Bernard Williams derisively calls 'Government House Utilitarianism.'" <sup>n414</sup> Bailey responds by arguing that these dangers are both precluded by his principle that utilitarians must protect themselves against exploitation by those whose motives are non-utilitarian. As Rawls argued, utility is not served by creating dangerous institutions checked only by the benevolent impulses of those administering them. Institutional power must be checked by individual rights, and by regular and public public procedures. In an imperfect world,

Open political procedures are an institutional requirement of utilitarian political theory. The omnipresent possibility of exploitation through manipulation of the process makes any kind of Government House untenable. No sane citizenry would ever tolerate the existence of an elite, which makes choices about what morality the rest of us are to believe, for the excellent institutionalist reason that would-be exploiters would find their way into Government House like ants into a picnic basket. And that invasion would lead to an outcome that would be disastrous in utilitarian terms. <sup>n415</sup>

Bailey's non-exploitation principle is functionally identical to Bentham's aim of security. Bailey derives not only a requirement of publicity, but also a requirement of democracy, <sup>n416</sup> and a scheme of individual civil and welfare rights <sup>n417</sup> from this concern. The resulting theory has every claim to the label "utilitarian" since it is barely distinguishable from Bentham's. Whether it retains much relationship to its supposedly act-utilitarian premises is open to question, however.

A third advocate of institutional utilitarianism, Robert Goodin, offers a much simpler proposal in *Utilitarianism as a Public Philosophy*. Like Hardin, Goodin assimilates the original utilitarians to Sidgwick and so treats them as both ethical and institutional utilitarians. But he considers institutional utilitarianism to have been much more central to their enterprise: "Jeremy Bentham was famous in his own day primarily as a reformer of legal systems; James Mill as an essayist on government; John Stuart Mill as an essayist, social reformer, and parliamentarian; John Austin as a jurispude." <sup>n418</sup> Like Hardin, Goodin laments the virtual disappearance of institutional utilitarianism in the twentieth century:

There was an important shift among utilitarian writers that came somewhere between Sidgwick's 1874 *Methods of Ethics* (where public affairs loomed large) and G.E. Moore's 1903 *Principia Ethica* (where the greatest good is defined in terms of more private ideals, such as friendship and aesthetic appreciation). Whatever the cause of that shift, its consequences could not have been more deleterious to the proper defense of the utilitarian cause. . . .

. . . .

Throughout the twentieth century, defenders of utilitarianism have been primarily concerned to defend it in its least plausible form, as a code of personal conduct. <sup>n419</sup>

Goodin argues that utilitarians can defend their doctrine against its strongest criticisms and rid it of its greatest flaws, by simply abandoning ethical utilitarianism. As Goodin explains,

Advocating utilitarianism as a public philosophy spares us the burdens associated with maximizing at the margins in each and every case. It involves instead adopting institutions and practices and policies, on a utilitarian basis; and those must, by their nature, be publicly accessible and relatively long lasting. That in turn means that in choosing institutions and practices and policies we cannot maximize at the margins, adapting our choices to peculiarities of utility mixes in particular cases. We must instead adapt our choices to standard situations recurring across protracted periods, and do so in full knowledge that the nature of our choices will sooner or later become common knowledge.<sup>n420</sup>

Goodin reasons that this public and political conception of the role of utilitarian reasoning precludes framing of the innocent, killing people to harvest their organs for transplants, and other such practices. The supposed benefits are overwhelmed by the costs to the general security and confidence if these practices become public.<sup>n421</sup> Goodin identifies his "public utilitarianism" as a discursive enterprise much like the one we attributed to Bentham. Goodin reasons that utilitarian policy analysis requires interpersonal comparisons of utility and that while such comparisons can be made, they cannot be made precisely. Because of this and other "limits of reason" utilitarian calculations can never be precise and are always subject to rational argument.

That is not necessarily a telling criticism of utilitarianism, though. It merely amounts to saying that utilitarianism leaves some room for public debate and deliberation--in other words for politics as it is ordinarily conceived. We would, I think worry about any political theory that did not do that. . . .

. . . .

Furthermore, even where utilitarianism proves indeterminate, it sets the terms of that public debate. It tells us what sorts of considerations ought to weigh with us, often while allowing that how heavily each of them actually weighs is legitimately open to dispute.<sup>n422</sup>

This conception of utilitarian reasoning as a democratically structured discursive process may sound fashionably post-modern, but it is true to the origins of utilitarianism in an era of expanding political participation. At the dawn of democracy, political theorists and reformers confronted the questions of how to fit the people to the responsibilities of rule, and how to peacefully subject them to the rule of their equals. The utilitarians offered the same solution to both problems: a rational discourse of public policy, a discipline that would compel the people to debate the public interest, thereby ennobling, legitimizing, and ultimately settling disagreement. From the beginning, utility's proponents were inspired by its promise to civilize democracy by transforming political conflict into rational debate. The function of the utility standard was to guide public discussion, not individual action. Institutional utilitarianism addresses the public in its political capacity, not the individual in her ethical capacity. Hence it cannot direct the individual to pervert public discourse by bearing false witness.

The traditional charge against utilitarian penology, that it requires framing the innocent, is false. That charge may apply against ethical utilitarianism, but utilitarian penology did not arise from and does not depend upon ethical utilitarianism. It arose from and depends upon the venerable tradition of institutional utilitarianism. And institutional utilitarianism does not require, entail, or presuppose any views on ethics whatsoever.

#### D. The Boundaries of Institutional Utilitarianism

In reframing utilitarian penology as an application of institutional rather than ethical utilitarianism, we have exonerated it of the traditional charge of framing the innocent. But we have not necessarily immunized it against all forms of the charge of punishing the innocent. Indeed, institutional utilitarianism may be more vulnerable to the charge of collective punishment than is ethical utilitarianism. This potential vulnerability to the charge of collective punishment arises from the positivism of institutional utilitarianism. Recall that Bentham's positivism encouraged him to prioritize realizing utility ahead of maximizing utility. From this positivist perspective, the value of "utility" cannot be maximized until it has been given concrete meaning by a reliably representative policy process. If it is more important to realize

utility in institutions than to maximize it, difficult normative questions will arise at the boundaries of utilitarian institutions. What are the responsibilities of a utilitarian polity toward populations that are not represented in its policy process? What normative principles govern a utilitarian polity faced with external threats? The early utilitarians were highly skeptical of claims that states had international obligations because they were not convinced that international relations were governed by an effective legal system.<sup>n423</sup>

Should a utilitarian polity simply ignore the welfare of foreign populations, except in so far as those populations engage the sympathy of its own population?<sup>n424</sup> Should it rely on foreign governments to identify and represent the interests of foreign populations? What should a utilitarian polity do when the interests of its population conflict with the interests of a foreign population? What should it do when its political independence and survival are threatened by a foreign government? Should a utilitarian polity encourage or even force foreign governments to adopt utilitarian institutions? Should it seek to establish a global utilitarian policy process?

Because institutional utilitarianism does not have obvious answers to these difficult questions, it is vulnerable to the charge that it permits utilitarian polities to exploit and mistreat foreign populations. One form this charge could take would be to point to the danger that "raison d'etat" could justify collective punishment of foreign populations in the context of international conflict.<sup>n425</sup> An obvious answer to this type of charge is that absent effective institutions of global governance, the subject of international justice, like that of individual ethics, is simply outside the domain of utilitarian analysis. Yet this answer invites the rejoinder that if institutional utilitarianism is to remain a practical guide to policy, it must address the policy dilemmas confronting contemporary governments in an interdependent global environment in which the effects of governance are never strictly local.<sup>n426</sup>

The charge that utilitarianism mandates framing the innocent became prevalent in mid-twentieth century England and America, and reflected that era's anxiety about foreign totalitarian states. Yet, this anxiety was misapplied to utilitarianism, which, as we have seen, presupposes the institutional protections of a liberal democratic state. Today, the real dangers of utilitarianism lie not in the threat it poses to our liberal democracy, but in the threat our liberal democracy may pose to those beyond its bounds.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure  
 Defenses  
 General Overview  
 Civil Procedure  
 Sanctions  
 Contempt  
 Civil Contempt  
 Criminal Law & Procedure  
 Sentencing  
 Cruel & Unusual Punishment

### **FOOTNOTES:**

n1 Michael Moore, Causation and the Excuses, *73 Cal. L. Rev.* 1091 (1985).

n2 Stephen J. Morse, The Twilight of Welfare Criminology: A Reply to Judge Bazelon, *49 S. Cal. L. Rev.* 1247 (1976).

n3 Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (1981); Richard Singer, *Just Deserts: Sentencing Based on Equality and Desert* (1979); The Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (1976); Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (1976).

n4 *Gregg v. Georgia*, 428 U.S. 153 (1976).

n5 Markus Dirk Dubber, Recidivist Statutes as Arational Punishment, 43 *Buff. L. Rev.* 689 (1995); Markus Dirk Dubber, Note, The Unprincipled Punishment of Repeat Offenders; "A Critique of California's Habitual Criminal Statute," 43 *Stan. L. Rev.* 193 (1990).

n6 Francis A. Allen, Criminal Justice, Legal Values, and the Rehabilitative Ideal, in *Justice, Punishment, Treatment: The Correctional Process 193-96* (Leonard Orland ed., 1973).

n7 Michael S. Moore, Law and Psychiatry 233-43 (1984).

n8 See Bernard Williams, A Critique of Utilitarianism, in *Utilitarianism, For and Against* 138-40 (J.J.C. Smart & Bernard Williams, eds.); Robert E. Goodin, Government House Utilitarianism, in *The Utilitarian Response* 140-60 (Lincoln Allison ed., 1970).

n9 See James Wood Bailey, *Utilitarianism, Institutions and Justice* (1997); Robert E. Goodin, *Utilitarianism as a Public Philosophy* (1995); Russell Hardin, *Morality Within the Limits of Reason* (1988); Donald H. Regan, *Utilitarianism and Cooperation* (1980).

n10 For a very useful meditation on this problem, see William Twining, Maccabean Lecture in Jurisprudence: Reading Bentham, 75 *Proc. Brit. Ac.* 97 (1989).

n11 On the distinction between foundationalist and pragmatic or contextualist approaches to normative justification see Don Herzog, *Without Foundations: Justification in Political Theory* (1985) and Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, in *Wittgenstein and Legal Theory* (Dennis M. Patterson ed., 1992). Examples of works in ethics and political theory proceeding by contextualist argument include James Gouinlock, *Rediscovering the Moral Life: Philosophy and Human Practice* 110 (1993); Edmund L. Pincoffs, *Quandaries and Virtues: Against Reductivism in Ethics* (1986); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983).

n12 Robert E. Goodin, *Utilitarianism as a Public Philosophy* (1995).

n13 See Bailey, *supra* note 9; Hardin, *supra* note 9, at 11-12.

n14 See G.E.M. Anscombe, *Modern Moral Philosophy*, in *Ethics* 206-07 (Judith J. Thomson and Gerald Dworkin, eds. 1968); Philip Bean, *Punishment* 34 (1981); E.F. Carritt, *Ethical and Political Thinking* 65 (1947); Alan Donagan, *Is There a Credible Form of Utilitarianism?*, in *Contemporary Utilitarianism* 187-202 (Michael D. Bayles ed., 1968); Charles Fried, *Right and Wrong* 59-64 (1978); Alan H. Goldman, *Beyond Deterrence Theory: Comments on Van Den Haag's Punishment as a Device for Controlling the Crime Rate*, 33 *Rutgers L. Rev.* 721, 722 (1981); L.H. Goodman, *On Justice: An Essay on Jewish Philosophy* 50 (1991); D.H. Hodgson, *Consequences of Utilitarianism* (1967); D.K. Lewis, *Utilitarianism and Truthfulness*, 50 *Australasian J. Phil.* 17 (1972); Steven Lukes, *Five Fables About Human Rights: What It Would Be Like If*, 40 *Dissent* 427 (Fall 1993); J.D. Mabbott, *Punishment*, 48 *Mind* 152 (1939); H.J. McCloskey, *A NonUtilitarian Approach to Punishment*, 9 *Inquiry* 249 (1965); H.J. McCloskey, *An Examination of Restricted Utilitarianism*, 66 *Phil. Rev.* 466 (1957); Richard A. McCormick, *Ambiguity in Moral Choice*, in *Doing Evil to Achieve Good* 7, 33 (Richard A. McCormick & Paul Ramsey eds., 1978), Edmund Pincoffs, *The Rationale of Legal Punishment* 33-35 (1966); Jeffrey Reiman & Ernest Van Den Haag, *On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con*, in *Crime, Culpability and Remedy* 23435 (Ellen Frankel Paul, Fred Miller Jr., & Jeffrey Paul eds., 1990); George Schedler, *Behavior Modification and "Punishment" of the Innocent: Towards a Justification of the Institution of Legal Punishment* 11-20, 73-99 (1977); C.L. Ten, *Crime, Guilt and Punishment*, A *Philosophical Introduction* 13-14 (1987); Ernest van Den Haag, *Punishing Criminals: Concerning a Very Old and Painful Question*, 27-29 (1975); Ernest van Den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 *Rutgers L. Rev.* 706 (1981).

n15 See Donald L. Beschle, *What's Guilt (Or Deterrence) Got To Do With It?: The Death Penalty, Ritual, and Mimetic Violence*, 38 *Wm. & Mary L. Rev.* 487, 507 n.119 (1997); Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 *J. Crim. L. & Criminology* 778, 781 (1996); David De Gregorio, *People v. Marrero and Mistake of Law*, 54 *Brook. L. Rev.* 229, 279 n.220 (1988); Anthony Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 *Nw. U. L. Rev.* 1015, 1026 (1997) ("utilitarianism would recommend such counter-intuitive practices as . . . convicting those known to be innocent if sufficient deterrence was achieved."); James Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" With Their Verdict?*, 22 *Am. J. Crim. L.* 565, 603 n.121 (1995) (asserting that punishing the innocent is a "perennial problem for the utilitarian model of punishment"); David J. Fried, *Rationalizing Criminal Forfeiture*, 79 *J. Crim. L. & Criminology* 328, 386 n.269 (1988) ("From a utilitarian point of view, punishment of innocent persons is perfectly justified for its deterrent effect, at least if the suffering prevented by the deterrence of future crime outweighs the suffering inflicted by present punishment."); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 *Fla. St. U. L. Rev.* 67 (1992); Kent Greenawalt, *Punishment*, in 4 *Encyclopedia of Crime and Justice* 1336, 1337-38 (1983) ("utilitarianism admits the possibility of justified punishment of the innocent"); Kent Greenawalt, *See Prescriptive Equality: Two Steps Forward*, 110 *Harv. L. Rev.* 1265, 1288 n.62 (1997) (asserting that utilitarians need to qualify their position by imposing deontological restraints if they are to avoid condoning the punishment of the innocent); Helene Greenwald, *Capital Punishment for Minors: An Eight Amendment Analysis*, 74 *J. Crim. L. & Criminology* 1471, 1508 n.200 (1983) (under "utilitarian rationale, a man whom the authorities knew to be innocent could be punished, if members of the community believed him guilty and threatened to seek personal revenge unless he were punished."); John L. Hill, *Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism*, 80 *Marq. L. Rev.* 289, 314 n.94 (1997); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 *U. Pa. L. Rev.* 1567, 1586 (1993) ("utilitarian account of punishment . . . would permit the punishment of mere innocents for the sake of some utilitarian goal."); Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 *N. D. J. L. Ethics & Pub. Pol'y* 389, 392 (1996); Leo Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 *Va. Tax Rev.* 535, 573 n.160 (1991); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 *Mich. L. Rev.* 1880, 1896 n. 80 (1991); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 *Yale L.J.* 2031, 2042 (1996) ("Bentham (although perhaps not Mill) would have considered the punishment of the innocent person to be a morally right act if ultimately it resulted in more total happiness than would have existed if the person had not been punished. Under Bentham's form of consequentialism, the end of more total happiness justifies the means of punishing innocent persons."); Tamara R. Piety, *Scorched Earth: How the Expansion of the Civil Forfeiture Act Has Laid Waste to Due Process*, 45 *U. Miami L. Rev.* 911, 973 (1991); Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1878 n.105 (1987) (claiming utilitarians need "fancy footwork" to avoid endorsing punishment of innocent people); Nancy Rhoden, *The Judge In the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 *Cal. L. Rev.* 1951, 1995 (1986); David A.J. Richards, *The Moral Criticism of Law* 232-33 (1977); Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 *Tul. L. Rev.* 299, 324 n.93 (1990) ("If a judge were actually to follow a utilitarian theory of punishment, the judge might actually be required to punish a defendant who was widely believed to be guilty, even if the judge knew the defendant to be innocent."); Louis M. Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *Yale L.J.* 315, 320-21 n.11 (1984); Kenneth Simons, *Rethinking Mental States*, 72 *B.U. L. Rev.* 463, 504 n.141 (1992). R.J. Spuigt, *The Relevance of Culpability to the Punishment and Prevention of Crime*, 19 *Akron L. Rev.* 197, 199 (1985).

n16 E.F. Carritt, *Ethical and Political Thinking* 65 (1947).

n17 McCloskey, *A Non-utilitarian Approach to Punishment*, supra note 14, at 253.

n18 McCloskey, *An Examination of Restricted Utilitarianism*, supra note 14, at 468-69.

n19 McCloskey, *A Non-utilitarian Approach to Punishment*, supra note 14, at 256.

n20 McCloskey's two influential articles do not cite Bentham, Beccaria or Mill at all.

n21 See Igor Primoratz, *Justifying Legal Punishment* 2426, 30-31, 42 (1990) for the one notable exception.

n22 Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, supra note 15, at 2041.

n23 Leo P. Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, *10 Va. Tax Rev.* 535, 573 (1991) (citing Jeremy Bentham, *Rationale of Punishment* 28-29 (1830)).

n24 A notable exception is John Rawls, *Two Concepts of Rules*, *44 Phil. Rev.* 3, 8, n.10 (1955).

n25 J.J.C. Smart, *The Methods of Ethics and the Methods of Science*, *62 J. Phil.* 344, 347-48 (1965); see also J.J.C. Smart, *An Outline of a System of Utilitarian Ethics* (1961).

n26 A recent example of this strategy in legal scholarship is provided by Louis Kaplow and Steven Shavell, *Principles of Fairness versus Human Welfare: On the Evaluation of Legal Policy*, Olin Center for Law, Economics, and Business Discussion Paper no. 277, 344-45 (Harvard Law School, 2000). Fortunately, Kaplow and Shavell place little reliance on this strategy for the excellent reason that they are exclusively concerned with the relative merits of utilitarian and retributivist analyses of legal policy. Since, as they point out, the utility of a systematic policy of framing the innocent (as opposed to an isolated act) is most unlikely, it is not clear that there is any conflict between utility and desert here. The strategy of acceptance is unnecessary if one treats punishment of the innocent as a policy question, and views policy questions as the only kind of question utilitarianism is designed to address.

n27 McCloskey, A Non-utilitarian Approach to Punishment, *supra* note 14, at 254.

n28 S.I. Benn, An Approach to the Problems of Punishment, 33 *Phil.* 331-32 (1958).

n29 " But so punishment be on account of some act that has been done, it matters not by whom the act was done. The most common case is for the act to have been done by the same person by whom the evil is suffered. But the evil may light upon a different person, and still bear the name of punishment." Jeremy Bentham, *Principles of Penal Law Book I, Ch. 1, I Works* 391 (John Bowring ed., 1962).

n30 *Id.* at 476-77.

n31 *Id.* at 477.

n32 See generally William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland* (1990) (detailing the processing of bloodfueds in medieval Iceland); George B. Wall, *Cultural Perspectives on Punishment of the Innocent*, in 11 *Phil. F.* 492-93 (1971).

n33 See generally Miller, *supra* note 32 (group liability rendered feud a more effective instrument of social control than if only the wrongdoer suffered the consequence of his actions).

n34 See Bentham, *supra* note 29, at 476-77.

n35 See, e.g., George P. Fletcher, *A Crime of SelfDefense: Bernhard Goetz and the Law on Trial* 20-21 (1988) (discussing the blurred line between legitimate defensive force and illegitimate preemptive force).

n36 Rawls, *supra* note 24, at 11-12.

n37 Igor Primoratz, *Justifying Legal Punishment* 127 (1989).

n38 *Id.*

n39 See *id.* at 127-28.

n40 *Id.* at 127.

n41 See *id.* at 128.

n42 T.L.S. Sprigge, *A Utilitarian Reply to Dr. McCloskey*, 8 *Inquiry* 254, 275-78 (1965).

n43 David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. Rev.* 1623, 1632 (1992).

n44 See Kaplow and Shavell, *supra* note 26, at 330-31.

n45 For definition of these terms see R.B. Brandt, *Ethical Theory* 380 (1959).

n46 See Igor Primorac, *Utilitarianism and Punishment of the Innocent*, 57 *Revista Internazionale di Filosofia del Diritto* 582, 598 (1980).

n47 See *id.* at 608; John Jamieson Carswell Smart, *Extreme and Restricted Utilitarianism*, 25 *Phil. Q.* 344 (1956).

n48 See Primorac, *supra* note 46, at 600-01.

n49 Primoratz, *supra* note 37, at 24; see also Bentham, *supra* note 29 at 391.

n50 Primoratz, *supra* note 37, at 24.

n51 *Id.*

n52 *Id.* at 24-25.

n53 *Id.* at 31.

n54 Bentham, *supra* note 29, at 475-76.

n55 *Id.*

n56 *Id.*

n57 *Id.*

n58 *Id.*

n59 *Id.*

n60 Primoratz, *supra* note 37, at 26.

n61 Bentham, *supra* note 29, at 483.

n62 *Id.*

n63 *Id.*

n64 *Id.* at 484.

n65 *Id.*

n66 *Id.* at 475-90.

n67 *Id.* at 479.

n68 *Id.* at 481.

n69 *Id.* at 482-83.

n70 *Id.* at 482.

n71 *Id.* at 485-89.

n72 *Id.* at 489-90.

n73 See G.J.Postema, *The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication*, in 3 *Jeremy Bentham: Critical Assessments* 308, 328 (Bhikhu Parekh ed., 1993); Wiliam Twining, *Theories of Evidence: Bentham & Wigmore* 99 (1985).

n74 Twining, *supra* note 73, at 96.

n75 Jeremy Bentham, *A Treatise on Judicial Evidence* 197 (1825).

n76 Bentham, *supra* note 29, at 398.

n77 *Id.*

n78 *Id.*

n79 *Id.* at 398-99.

n80 Primoratz *supra* note 37, at 42-43.

n81 See Bentham, *supra* note 29, at 399.

n82 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 205, (J.H. Burns and H.L.A. Hart eds., 1996).

n83 See Fried, *Right and Wrong*, *supra* note 14, at 59-60.

n84 Henry Sidgwick, *Methods of Ethics* 292-93 (1874).

n85 Jeremy Bentham, *supra* note 82, at 205; see also Fried, Right and Wrong, *supra* note 14, at 59-60; Ernest Van den Haag, Punishment as a Device for Controlling the Crime Rate, 33 *Rutgers L. Rev.* 706, 709 (1981).

n86 Bentham, *supra* note 82, at 205.

n87 Twining, *supra* note 73, at 89.

n88 Sissela Bok, Lying 50 (1978).

n89 Nancy L.L. Rosenblum, Bentham's Theory of the Modern State 40-41 (1978).

n90 1 Bentham, Principles of Morals and Legislation, in 1 *The Works of Jeremy Bentham* 78 (John Bowring, ed., 1962).

n91 Jeremy Bentham, The Elements of the Art of Packing as Applied to Special Juries, Particularly in the Cases of Libel Laws, in 5 *The Works of Jeremy Bentham* 92 (John Bowring ed., 1962).

n92 Jeremy Bentham, The Rationale of Reward, in 2 *The Works of Jeremy Bentham* 210 (John Bowring ed., 1962).

n93 John Dinwiddy, Bentham 57 (1989).

n94 L.J. Hume, Bentham as a Social and Political Theorist, in 3 *Jeremy Bentham: Critical Assessments* 482, 487 (Bhikhu Parekh ed., 1993) (citing Jeremy Bentham, Manuscripts at University College, London, Box clviii, folio 68).

n95 See John Rawls, Two Concepts of Rules, in *Philosophical Perspectives on Punishment* 82, 90-91 (E. Ezorsky ed., 1973); Bok, *supra* note 88, at 61.

n96 Bok, *supra* note 88, at 52.

n97 Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice*, in 6 *The Works of Jeremy Bentham* 267 (John Bowring ed., 1962) [hereinafter *Rationale of Judicial Evidence*].

n98 Robert E. Goodin, *Utilitarianism as a Public Philosophy* 76 (1995).

n99 Goodin explains further:

My point is instead that public officials cannot systematically violate people's rights, as a matter of policy, and expect that policy to continue yielding the same utility payoffs time and again. Take the case of punishing criminal offenders, for example. The criminal sanction deters crime only insofar as it is imposed on the guilty and only the guilty. Introducing any probability that the innocent will be punished along with the guilty narrows the expected utility gap between criminal and noncriminal conduct, and increases the temptation for everyone to commit a crime. Thus, if we are as a matter of policy to punish people whether or not they were guilty, just according to some utilitarian calculation of public convenience on a case-by-case basis, then the utilitarian advantages of punishing the occasional innocent person would quickly diminish, and probably soon vanish altogether.

The reason utilitarian policy makers are precluded from violating the rights of the innocent, as a matter of policy, is that policies soon become public knowledge. If nothing else, they are easily inferred from past experience. Once news of such a policy gets out, people revise their expectations in the light of it--in the case of criminal punishment, their expectations of being punished even if not guilty. There are major utilitarian payoffs to be had from sustaining certain sorts of expectations and from avoiding others. Settled policies of one sort or another are characteristically required to produce socially optimal effects in both directions. That is one reason for utilitarian policymakers to abide by settled policies, even when greater utilitarian gains might be achieved in any given instance by deviating from them.

*Id.* at 70-71.

n100 Bentham, *supra* note 82, at 11-12.

n101 Frederick Rosen, *Introduction to Jeremy Bentham*, *supra* note 82, at li. For a detailed consideration of Beccaria's influence on Bentham, see H.L.A. Hart, *Essays on Bentham* 40-52 (1982).

n102 John Plamenatz, *The English Utilitarians* 50 (1958).

n103 *Id.* at 48-49.

n104 Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*, 440-41 (J.H. Burns & H.L.A. Hart eds., 1977).

n105 Frederick Whelan, *Order and Artifice in Hume's Political Philosophy* 203-04 (1985).

n106 David Hume, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* 174 (1975) [hereinafter *Enquiries*].

n107 *Id.* at 172, 180, 183, 192, 231.

n108 David Hume, *A Treatise of Human Nature* 581-82 (1978) [hereinafter *Treatise*]. See also *Enquiries*, supra note 104, at 22829.

n109 *Treatise*, supra note 108, at 582.

n110 *Enquiries*, supra note 106, at 272-73.

n111 *Treatise*, supra note 108, at 581-83.

n112 *Enquiries*, supra note 106, at 173-74.

n113 Whelan, supra note 105, at 220-21.

n114 *Id.* at 227-28.

n115 *Treatise*, supra note 108 at 482, 497; see also *Enquiries*, supra note 106, at 210; Whelan, supra note 105, at 227.

n116 Treatise, supra note 108 at 474-84.

n117 Enquiries, supra note 106, at 193-95; see also Jonathan Harrison, *Hume's Theory of Justice* 28-29 (1981).

N118 Treatise, supra note 108, at 484-89, 494-95.

n119 Whelan, supra note 105, at 233.

n120 Enquiries, supra note 106, at 202; Treatise, supra note 108, at 491-97.

n121 Enquiries, supra note 106, at 199.

n122 Harrison, supra note 117, at 31-33.

n123 *Id.* at 27-28, 33.

n124 Enquiries, supra note 106, at 273.

n125 *Id.* at 174, 231.

n126 Hume obviously employed a foundationalist approach to justification in epistemology. See Richard Rorty, *Philosophy and the Mirror of Nature* 160 (1979). For an argument that Hume's overall approach to normative justification was nonfoundationalist, however, see Herzog, supra note 11, at 161-202.

n127 C.A. Helvetius, *De L'Esprit, or Essays on the Mind and its Several Faculties* 7 (1970).

n128 Id.

n129 Id. at 10, 39.

n130 Id. at 29.

n131 Id. at 92, 102-03.

n132 As noted below, the utilitarian William Paley shared the view that talk of obligation was meaningless without an enforcement sanction. Unlike Helvetius, however, Paley reasoned that individuals were obliged to perform ethical duties by the sanction of divine judgment. William Paley, *Moral and Political Philosophy in Works of William Paley* 37-39 (1831).

n133 See C.A. Helvetius, *supra* note 127, at 123-124.

n134 Id. at xix (emphasis added).

n135 Id. at 60.

n136 Id. at 63.

n137 Id.

n138 Id. at 120.

n139 *Id.* at 124-25.

n140 *Id.* at 178.

n141 See David Young, Introduction to Cesare Beccaria, *On Crimes and Punishments* xiii (David Young trans., 1986).

n142 See Cesare Beccaria, *On Crimes and Punishments* 5, 7-8 (David Young trans., 1986).

n143 *Id.* at 5, 38.

n144 *Id.* at 5.

n145 *Id.* at 3.

n146 *Id.* at 9.

n147 *Id.* at 8.

n148 *Id.* at 16.

n149 *Id.* at 22.

n150 *Id.* at 14, 75.

n151 Id. at 16, 41.

n152 Id. at 28, 81.

n153 Id. at 81.

n154 Id. at 46.

n155 Id. at 75.

n156 Id. at 51-52.

n157 Id. at 10, 53.

n158 Id. at 80.

n159 Id. at 76.

n160 Id. at 5.

n161 Id. at 9.

n162 Id. at 54.

n163 *Id.* at 22.

n164 *Id.* at 12.

n165 *Id.* at 74-75.

n166 *Id.* at 55.

n167 *Id.* at 78.

n168 See Plamenatz, *supra* note 102, at 47-48.

Other utilitarians preceded Bentham but did not influence him as substantially. Bentham occasionally claimed to have derived his formulation of utility as the greatest good of the greatest number from Joseph Priestley's *Essay on the First Principles of Government* (1771), which proposed this only as the proper end of government, not of all human action. Frederick Rosen, *Introduction to Bentham*, *supra* note 82, at 205; Joseph Priestley, *Political Writings* 14, 31, 46 (1993).

Three other eighteenth century utilitarians--John Gay, David Hartley, and William Paley--did offer utility as an ethical principle. See John Gay, *Dissertation Concerning the Fundamental Principle of Virtue or Morality* (1731) in *English Philosophers from Bacon to Mill* 76985 (Edwin A. Burt ed., 1939); David Hartley, *Observations on Man, His Frame, His Duty, And His Expectations* (scholars' facsimiles & Reprints 1966 (1749)); Paley, *supra* note 130 at 37-39. Their theories shared the psychological assumptions of the theories discussed in the text: all three authors assumed that ideas were formed by associating together sense-impressions, and that human action was motivated first by selfinterest and second by sympathy. They joined Hume, Helvetius, Bentham, and Beccaria in the worry that this hedonistic account of human motivation left public-regarding action unexplained. As we have seen, Hume, Helvetius, Beccaria, and Bentham offered institutions like law as the solution to this problem and rational discourse as the means by which selfinterested creatures could agree to form such institutions. Gay, Paley, and Hartley all adopted a very different response to this problem: human beings were bound to serve the general welfare by divine will. For Gay, that God wished his creatures to be happy sufficed to explain why all were obliged to serve the general welfare; they were motivated to do so by habits developed in the pursuit of affection and esteem. For Hartley and Paley, however, the compelling motivation to serve utility was the sanction of divine judgment in the hereafter. Hartley, *supra*, at 364-65, 395-97. For Paley, divine judgment was necessary to explain not only the motivation but also the obligation to pursue utility. Although a cleric, he was shockingly positivistic about morals and scoffed at the notion that there could be obligations not enforced by sanctions. In this sense, his utilitarian ethics were nothing more than a utilitarian theory of law, with divine sanctions substituted for human ones. Paley, *supra* note 132, at 37-39. Like Hume, Helvetius, Beccaria, and Bentham, Paley thought that utility must be pursued by enforcement of generally beneficial rules, rather than case by case. Paley's reasoning was based on deterrence theory: he argued that governance of individual behavior required clear standards of behavior tied to certain enforcement sanctions. Since persons could only be obliged to fulfill standards of behavior that were enforced, they could in principle only be obliged to fulfill standards of behavior that were enforceable. And these must be clear and easily monitored rules. *Id.* at 39-40. Thus for Paley, as for Hume, Helvetius, Beccaria, and Bentham, utility was more a feature of institutions than of acts. The utility of a norm depended upon its form as well as its content. Paley expressed this idea by distinguishing between the particular consequence of an act, and its more important general consequence (not its consequence if regularly repeated, but its compatibility with beneficial rules of conduct). *Id.* at 39. Thus the utility of an act depended more on its formal than on its substantive effect.

n169 Bentham, *supra* note 82 at 1, in *An Introduction to the Principles of Morals and Legislation* 1 (J. H. Burns & H.L.A. Hart, eds., 1996).

n170 *Id.* at 3.

n171 *Id.*

n172 *Id.* at 6.

n173 *Id.* at 11.

n174 *Id.* at 13.

n175 Hart, Bentham's Principle of Utility, in Bentham, *supra* note 82 at xc.

n176 Bentham, *supra* note 82, at 293.

n177 *Id.* at 12-13.

n178 John Bowring, *II Deontology; or, the Science of Morality* 44-46 (1834) [hereinafter *II Deontology*].

n179 Bentham, *supra* note 82, at 32, 100.

n180 *Id.* at 284.

n181 *Id.* at 34-35.

n182 II Deontology, supra note 178, at 2-3.

n183 II Deontology, supra note 178, at 10-12.

n184 Id. at 7, 133.

n185 John Bowring, I Deontology; or, the Science of Morality 21-22 (1834) [hereinafter I Deontology].

n186 II Deontology, supra note 178, at 130-31.

n187 Id. at 10.

n188 I Deontology, supra note 185, at 10.

n189 II Deontology, supra note 178, at 28.

n190 Id. at 39-41, 165-66.

n191 Id. at 288-89.

n192 I Deontology, supra note 185, at 132-39, II Deontology, supra note 178, at 314.

n193 I Deontology, supra note 185, at 10.

n194 II Deontology, supra note 178, at 73-76.

n195 Id. at 10-11.

n196 Id. at 17, 306.

n197 II Deontology, supra note 178, at 66-67, 145-46; I Deontology at 239-41. Bentham especially urges the sharing of tangible information with the public; it is less important, and sometimes even spiteful or cruel, to publicize one's opinions. I Deontology at 280.

n198 I Deontology, supra note 185, at 100.

n199 Id.

n200 See Shelly Kagan, *The Limits of Morality* 1-2 (1989); Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 *Phil. & Pub. Aff.* 134 (1984); Bailey, supra note 9, at 2224; John Rawls, *A Theory of Justice* 500-01 (1971).

n201 II Deontology, supra note 178, at 75.

n202 Jeremy Bentham, *Constitutional Code*, in 9 *The Works of Jeremy Bentham* 98 (John Bowring ed., 1962) [hereinafter *Constitutional Code*].

n203 Jeremy Bentham, *Manuscripts at University College, London*, cxxvii 2 (cited in Ross Harrison, *Bentham* 209 (1983)). Similarly, Bentham writes: "Whether it be possible for every man to be made a lawyer by a book is what I shall not be positive about: but that I know, that if it be, it must be by a book of the Legislature's writing." Jeremy Bentham, *Manuscripts at University College, London*, lxxa, 105 (quoted in D. Lieberman, *Bentham's Digest*, in 3 *Jeremy Bentham: Critical Assessments* 339 (Bhikhu Parekh ed., 1993)) [hereinafter *Manuscripts at University College, London*].

n204 I Deontology, *supra* note 185, at 27-28.

n205 I Deontology, *supra* note 185, at 2-4.

n206 Bentham clearly fashions the utility standard for use in a context in which no one can simply impose their views by force or authority. Even though laws are to be framed by expert legislators, they still must convince the lay public of the utility of their proposals. Thus the utility standard presupposes a context of discursive equality. For Bentham, equality was a substantive as well as a procedural ideal: "Like security, though placed in an inferior position, equality served as one of the ends of legislation and hence was also a necessary condition for achieving the greatest happiness . . . . Bentham argued that the greatest happiness principle meant an 'equal quantity of happiness' for every member of the community in question . . . . Bentham justified this emphasis on equality by introducing the idea of diminishing marginal utility." Rosen, *supra* note 101 at xxxvii.

n207 See Jeremy Bentham, *Principles of the Civil Code*, in 1 *Collected Works* 308 (John Bowring ed., 1962).

n208 Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* 211-20 (1983).

n209 Rosen, *supra* note 99, at xxxvi; see generally P. J. Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (1990).

n210 Bentham, *supra* note 82, at 13.

n211 Hart, *supra* note 175, at vxxxvii.

n212 *Id.*

n213 Bentham, *supra* note 82, at 11.

n214 Bentham, Manuscripts at University College, London, *supra* note 203, at xxvii.

n215 *Id.* at lxxix.

n216 Jeremy Bentham, *The Limits of Jurisprudence Defined* 193 (Charles Warren Everett ed., 1945).

n217 Jeremy Bentham, *Of Laws in General* 71 (H.L.A. Hart ed., 1970).

n218 Bentham, Manuscripts at University College, London, *supra* note 203, at lxxa.

n219 Bentham, *supra* note 217, at 71.

n220 Jeremy Bentham, *A Comment on the Commentaries* (J.H. Burns and H.L.A. Hart eds., 1977).

n221 Bentham, Manuscripts at University College, London, *supra* note 203, at lxxix.

n222 William Blackstone, *Commentaries of the Laws of England (1765-1769)* (1979).

n223 Bentham, *supra* note 220, at 349.

n224 Bentham, *supra* note 82, at 74-75.

n225 Jeremy Bentham, *A Fragment on Government*, in *I The Works of Jeremy Bentham* 235 (John Bowring ed., 1962).

n226 Quoted in C.K. Ogden, Introduction to Jeremy Bentham, *The Theory of Fictions* xviii (C.K. Ogden ed., 1959).

n227 Bentham, *supra* note 226, at 141.

n228 *Id.* at 148.

n229 " Legislator and people confirmed in the habit of bowing down to falsehood and absurdity, and recognizing them as being, what lawyers are continually proclaiming them to be, necessary instruments in the hands of justice . . . ." *Id.* at 148-49.

n230 *Id.* at 149.

n231 *Id.*

n232 *Id.* at 149-50.

n233 Bentham, *Constitutional Code*, *supra* note 202, at 77.

n234 *Id.*

n235 Bentham, *Manuscripts at University College, London*, *supra* note 203, at xxvii.

n236 Jeremy Bentham, *Nomography; or the Art of Inditing Laws*, in 3 *The Works of Jeremy Bentham* 241 (John Bowring ed., 1962).

n237 Bentham, *Manuscripts at University College, London*, *supra* note 203, at lxxa.

n238 Jeremy Bentham, *A Comment on the Commentaries* 340 (J.H. Burns and H.L.A. Hart eds., 1962).

n239 Jeremy Bentham, *Radical Reform Bill*, in 3 *The Works of Jeremy Bentham* 593 (John Bowring ed., 1962).

n240 Ogden, *supra* note 226, at xxvi (quoting Bentham).

n241 Bentham, *supra* note 226, at 118-22.

n242 Bentham, *Constitutional Code*, *supra* note 202, at 44.

n243 Bentham, *supra* note 82, at 26-27.

n244 *Id.* at 28.

n245 *Id.*

n246 See Dinwiddy, *supra* note 93, at 64.

n247 See G.J. Postema, *The Expositor, The Censor, and the Common Law*, in 3 *Jeremy Bentham: Critical Assessments* 227, 229 (Bikho Parekh ed., 1993).

n248 See Bentham, *Constitutional Code*, *supra* note 202, at 8-9, 25-26, 75; see also Jeremy Bentham, *Letters to Lord Greenville on the Proposed Reform in the Administration of Civil Justice in Scotland*, in 5 *The Works of Jeremy Bentham* 3, 5-8 (John Bowring ed., 1962) [hereinafter *Letters to Lord Greenville*]; Jeremy Bentham, *Principles of Judicial Procedure with the Outline of a Procedure Code*, in 2 *The Works of Jeremy Bentham* 1, 125-26 (John Bowring ed., 1962) [hereinafter *Principles of Judicial Procedure*]; Jeremy Bentham, *Rationale of Judicial Evidence*, in 7 *The Works of Jeremy Bentham* 1, 197-98 (John Bowring ed., 1962) [hereinafter *Rationale of Judicial Evidence*, vol. 7].

n249 Jeremy Bentham, General View of a Complete Code of Laws, in 3 *The Works of Jeremy Bentham* 155, 206 (John Bowring ed., 1962).

n250 Jeremy Bentham, *The Collected Works of Jeremy Bentham: Securities Against Misrule and Other Writings for Tripoli and Greece* 252 (Philip Schofield ed., 1990) [hereinafter *Securities Against Misrule*].

n251 See Postema, *supra* note 73, at 316.

n252 Bentham, *Securities Against Misrule*, *supra* note 250, at 252.

n253 Bentham, *Rationale of Judicial Evidence* vol. 7, *supra* note 248, at 122.

n254 See Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* 163-64 (1983); see also B.B. Schaffer, *The Idea of the Ministerial Department: Bentham, Mill and Bagehot*, in 3 *Jeremy Bentham: Critical Assessments* 836, 840 (Bhikhu Parekh ed., 1993).

n255 See Bentham, *Constitutional Code*, *supra* note 202, at 383417; see also Rosen, *supra* note 254, at 65, 86.

n256 Bentham gives explicit instructions:

Suppose for example by one such functionary or set of functionaries information of an act of oppression received and committed to writing: if their situation is that of a set of functionaries constituting a Judicatory of the highest order, then suppose a copy sent to every Judicatory in the dominion, and by the joint authority of them all made public at one and the same time: made public, by whatsoever means of publicity happen to be at their command. Here the security against vengeance from the oppressor is at its maximum: unless it should be deemed advisable that from this branch of the authority of the state communication be also made to the military.

Bentham, *Securities Against Misrule*, *supra* note 250, at 42.

n257 L.J. Hume, *Jeremy Bentham and the 19th Century Revolution in Government*, in 3 *Jeremy Bentham: Critical Assessments* 820, 825 (Bhikhu Parekh ed., 1993).

n258 *Id.*

n259 See Bentham, *Constitutional Code*, supra note 202, at 533.

n260 Hume, supra note 257, at 820, 825.

n261 Dinwiddy, supra note 93, at 68; see also Rosen, supra note 254, at 163-64.

n262 See G.J. Postema, *Bentham on the Public Character of Law*, in 3 *Jeremy Bentham: Critical Assessments* 163, 167-68 (Bhikhu Parekh ed., 1993) (quoting Bentham, *Manuscripts at University College, London*, supra note 203). But see Postema's earlier views in Chapter 12 of *G.J. Postema, Bentham and the Common Law Tradition* (1986). Here Postema argues that a judicial power to maximize utility by over-riding the law must follow from Bentham's supposed commitment to act-utilitarian ethics. Of course, this is hardly a satisfactory way of proving Bentham's commitment to act-utilitarian ethics, the very point in question. In fact, Bentham's explicit rejection of such a judicial power in his *Constitutional Code* tends to refute the assumption that he was an act-utilitarian. Postema's argument is criticized in John Dinwiddy, *Adjudication Under Bentham's Pannomion*, 1 *Util.* 283 (1989) and Paul Kelly, *Review: Bentham and the Common Law Tradition*, 1989 *Hist. Pol. Thought* 366 (1989).

n263 But see Bentham, *Constitutional Code*, supra note 202, at 160 (stating that "only by unalterable physical impotence, is the Supreme Legislature prevented from being its own executive, or from being the sole Legislature."); see also Hume, supra note 257, at 820, 831.

n264 Jeremy Bentham, *Constitutional Code* (1830) (reprinted in *Jeremy Bentham's Political Thought* 218 (Bhikhu Parekh ed., 1973)); see also Bentham, *Constitutional Code*, supra note 202, at 41-46.

n265 Jeremy Bentham, *A Fragment on Government*, in 1 *The Works of Jeremy Bentham* 230 (John Bowring ed., 1962).

n266 Bok, supra note 88, at 177.

n267 *Id.* at 180.

n268 Bentham, *Constitutional Code*, supra note 202, at 47.

n269 See Elie Halevy, *The Growth of Philosophic Radicalism* 254-56 (Mary Morris trans., 1966) (1955). For a careful discussion of Bentham's attitude toward the denial of his Panopticon program, see James Steintrager, *Bentham* 78-82 (1977).

n270 Rosen, *supra* note 101, at x1vi; see also M.H. James, *Bentham's Democratic Theory at the Time of the French Revolution*, 10 *The Bentham Newsletter* 5-16 (1986).

n271 See generally Hart, *supra* note 101.

n272 *Id.* at 56.

n273 Jeremy Bentham, *Collected Works: A Comment on the Commentaries and a Fragment on Government* 440 (1977).

n274 Rosen, *supra* note 101, at x1iv; see generally Rosen, *supra* note 254.

n275 See Steintrager, *supra* note 269, at 78.

n276 R.C. Pratt, *The Benthamite Theory of Democracy*, in 3 *Jeremy Bentham: Critical Assessments* 568 (Bhiku Parekh ed., 1993).

n277 *Id.* at 561.

n278 Rosen, *supra* note 101, at lviii.

n279 Bentham, *Constitutional Code*, *supra* note 202, at 51.

n280 See Nancy Rosenblum, *Bentham's Theory of the Modern State* 85 (1978) (arguing that "The Catechism" illustrates why it remains unclear whether and when Bentham became a committed democrat: his principal arguments for democratic institutions were either

speculative deductions from utility or preferences based on the estimate that popular elections appeared to be the least objectionable method of choosing governors). See also *id.* at 83-86.

n281 But see Jeremy Bentham, *Emancipate Your Colonies! Shewing the Uselessness and Mischievousness of Distant Dependencies to an European State*, in 4 *The Works of Jeremy Bentham* 408-18 (John Bowring ed., 1962) (urging emancipation of colonies based on strict principles of utility).

n282 Hart, *supra* note 101, at 53.

n283 John Lind, *Remarks on the Principle Acts of the Thirteenth Parliament of Great Britain by the Author of the Letters Concerning the Present State of Poland* 191 (1775).

n284 See Jeremy Bentham, *Principles of the Civil Code*, in 1 *The Works of Jeremy Bentham* 297, 308 (John Bowring ed., 1962).

n285 Lind, *supra* note 283, at 54-56.

n286 See Jeremy Bentham, *A Manual of Political Economy*, in 3 *The Works of Jeremy Bentham* 75-80 (John Bowring ed., 1962).

n287 See Jeremy Bentham, *Plan of Parliamentary Reform in the Form of a Catechism*, in 3 *The Works of Jeremy Bentham* 515 (John Bowring ed., 1962) ("imagination, with its favorite instrument, the word right") (emphasis added) [hereinafter *Plan of Parliamentary Reform*].

n288 Jeremy Bentham, *Supply Without Burthen*, in *Jeremy Bentham's Economic Writings* 283, 335 (W. Stark ed., 1952).

n289 Bentham, *Plan of Parliamentary Reform*, *supra* note 287, at 467.

n290 Jeremy Bentham, *Anarchical Fallacies*, in 2 *The Works of Jeremy Bentham* 494 (John Bowring ed., 1962).

n291 Bentham, Manuscripts at University College, London, *supra* note 203, clxx (cited in Hart, *supra* note 101, at 61).

n292 Jeremy Bentham, On the Influence of Time and Place in Matters of Legislation, in 1 *The Works of Jeremy Bentham* 171, 185 (John Bowring ed., 1962).

n293 Bentham, Plan of Parliamentary Reform, *supra* note 287, at 437.

n294 See Steintrager, *supra* note 269, at 84-86.

n295 In fairness, the 10,000 word document may have been too long for *The Times* to accept.

n296 Bentham, Manuscripts at University College, London, *supra* note 203, clxx 126.

n297 Steintrager, *supra* note 269, at 84-85.

n298 See T.P. Peardon, Bentham's Ideal Republic, in 3 *Jeremy Bentham: Critical Assessments* 624-25 (Bhiku Parekh ed., 1993).

n299 See *id.*

n300 Bentham, Plan of Parliamentary Reform, *supra* note 287, at 435.

n301 Steintrager, *supra* note 269, at 87.

n302 See *id.* at 83-85.

n303 Bentham, *supra* note 82, at 435.

n304 Bentham, *Plan of Parliamentary Reform*, *supra* note 287, at 472.

n305 See Hart, *supra* note 101, at 70-71.

n306 See Bentham, *Plan of Parliamentary Reform*, *supra* note 287, at 433, 447, 494; Jeremy Bentham, *The King Against Edmonds and Others: Set Down for a Trial at Warwick on the 29th of March 1820*, in 2 *The Collected Works of Jeremy Bentham* 239, 246 (John Bowring ed., 1962).

n307 Bentham, *supra* note 82, at 309.

n308 Bentham, *Plan of Parliamentary Reform*, *supra* note 287, at 472.

n309 Bentham, *Constitutional Code*, *supra* note 202, at 63.

n310 See Bentham, *supra* note 82, at 311.

n311 Jeremy Bentham, *Jeremy Bentham to His Fellow Citizens*, in 4 *The Works of Jeremy Bentham* 419, 448 (John Bowring, ed., 1962).

n312 See Hart *supra* note 101, at 63.

n313 See Pratt, *supra* note 276, at 562.

n314 Bentham, *Manuscripts at University College, London*, *supra* note 203, cxxvii 5 (cited in Hart, *supra* note 101 at 61).

n315 See Peardon, *supra* note 298, at 625.

n316 Bentham, *Constitutional Code*, *supra* note 202, at 6.

n317 *Id.* at 7.

n318 Bentham stressed the importance of elected representatives in his 1789 *Essay on Representation* intended for France. See Bentham, *Manuscripts at University College, London*, *supra* note 203, clxxx, 87-121.

n319 See Bentham, *Plan for Parliamentary Reform*, *supra* note 287, at 435.

n320 Bentham did have opinions on the qualities of a good law maker, which he divided into three characteristics: appropriate probity, appropriate intellectual aptitude, and appropriate active talent. On appropriate probity he wrote:

On each occasion, whether in speaking or delivering his vote,--on the part of a representative of the people, appropriate probity consists in pursuing that line of conduct, which, in his own sincere opinion, being not inconsistent with the rules or morality or the law of the land, is most conducive to the general good of the whole community for which he serves; that is to say, of the whole of the British empire:--forbearing, on each occasion, at the expense either of the general good, or of his duty in any shape, either to accept, or to seek to obtain, or preserve, in any shape whatsoever, for himself, or for any person or persons particularly connected with him, any advantage whatsoever, from whatsoever hands obtainable; and in particular for those hands in which, by the very frame of the constitution, the greatest mass of matter of temptation is necessarily and unavoidably lodged, viz. Those of the King, and other members of the executive branch of the government,--the King's Ministers.

*Id.* at 539.

n321 See Bentham, *Constitutional Code*, *supra* note 202, at 9899.

n322 Jeremy Bentham, *Catechism of Parliamentary Reform*, in 3 *The Works of Jeremy Bentham*, 540 (John Bowring ed., 1962).

n323 Bentham, *Constitutional Code*, *supra* note 202, at 23. See generally *supra* at 232-53.

n324 Jeremy Bentham, *Constitutional Code* Vol. 1 36 (F. Rosen & J.H. Burns eds., 1983).

n325 John Stuart Mill, *Autobiography* 106 (1873).

n326 According to R.C. Pratt, this explains why "Bentham and Mill came to make such simple assumptions about a democratic society. They did not turn to the political realm to discover a process that would resolve conflicts, conciliate interests . . . . They wished only for an assembly with the proper interest orientation which once properly understood, would introduce Utilitarian-inspired legislation." Pratt, *supra* note 276, at 565.

n327 See Steintrager, *supra* note 269, at 99.

n328 Bentham, *Securities Against Misrule*, *supra* note 250, at 351; see also Steintrager, *supra* note 269, at 111.

n329 Bentham, *Securities Against Misrule*, *supra* note 250, at 252.

n330 *Id.*

n331 Jeremy Bentham, *Draught of a Code for the Organization of the Judicial Establishment in France: With Critical Observations on the Draught Proposed by the National Assembly Committee, in the Form of a Perpetual Commentary*, in 4 *The Works of Jeremy Bentham* 285, 316 (John Bowring ed., 1962); see also Bentham, *Principles of Penal Law*, *supra* note 29, at 1, 145; Ross Harrison, *Bentham* 131 (1983).

n332 See Peardon, *supra* note 298, at 621, 634.

n333 See *id.*

n334 *Id.*

n335 Michel Foucault, *Discipline and Punish: The Birth of a Prison* 204 (Alan Sheridan trans., 1977).

n336 See generally Bentham, *Rationale of Judicial Evidence* vol. 7, supra note 248; see also Twining, supra note 73, at 27-28 (summarizing Bentham's theory of evidence); Dale Nance, *Best Evidence Principle*, 73 *Iowa L. Rev.* 227, 292 (1988) (Bentham saw no reason to distinguish between judge and jury regarding the appropriateness of the rules of evidence).

n337 Twining, supra note 73, at 89; see also M.A. Menlowe, *Bentham, Self-Incrimination, and the Law of Evidence*, in 3 *Jeremy Bentham: Critical Assessments* 252, 268 (Bhikhu Parekh ed., 1993) (explaining that for "utilitarians, the law of evidence is a judicial tool for maximizing utility. He thinks that the function of the law of evidence is to get at the truth because he believes that serves the fundamental utilitarian goal. Truth is most likely to be obtained when all evidence is prima facie admissible.").

n338 Bentham, *Rationale of Judicial Evidence* vol. 7, supra note 248, at 599. See also Dinwiddy, supra note 93, at 64.

n339 See Bentham, 5 *Rationale of Judicial Evidence* 32749 (1827); see also Twining, supra note 73, at 99.

n340 See Bentham, supra note 339, at 302-25; see also Twining, supra note 71, at 99.

n341 See Twining, supra note 73, at 99; see also L.J. Hume, *Bentham and Bureaucracy* 172-73 (1981).

n342 Bentham, *Securities Against Misrule*, supra note 250, at 11, 50.

n343 See Hume, supra note 341, at 99.

n344 Hume, supra note 341, at 100 (citing Bentham, *Manuscripts at University College, London*, supra note 203, lxxxvii). We could discuss at length Bentham's commitment to open communication as a corollary to his principles of evidence, and we refer the reader to Mack's discussion, where he states: "There is, finally, the principle of free communication. It would be nearly impossible to exaggerate its importance in the Utilitarian canon. From first to last Bentham demanded total freedom to assemble, speak, write, and publish; in open-air meetings, Parliament, the courts; in books, magazines, and newspapers. 'Let all things be known' was a vital commandment of the Utilitarian gospel. Unless communication is free there can be neither good government nor indirect legislation." M.P. Mack, *Jeremy Bentham: An Odyssey of Ideas* 315 (1963).

n345 Hume, *supra* note 341, at 99-100.

n346 Mack, *supra* note 344, at 320 (citing Bentham, *Manuscripts at University College, London*, *supra* note 203, lxxxvii, 114).

n347 See Steintrager, *supra* note 269, at 106.

n348 Jeremy Bentham, *Extracts from Bentham's Commonplace Book*, in 10 *The Works of Jeremy Bentham* 145 (John Bowring ed., 1962); see also Dinwiddy, *supra* note 93, at 83.

n349 Jeremy Bentham, *Civil Code*, in 1 *The Works of Jeremy Bentham* 324 (John Bowring ed., 1962); see also Ross Harrison, *The People is my Caesar*, in 3 *Jeremy Bentham: Critical Assessments* 900, 915 (Bhikhu Parekh ed., 1993).

n350 See Steintrager, *supra* note 269, at 107.

n351 See Dinwiddy, *supra* note 93, at 89.

n352 Bentham, *supra* note 339, at 524.

n353 Bentham, *Securities Against Misrule*, *supra* note 250, at 26.

n354 *Id.* at 25.

n355 *Id.* at 28.

n356 *Id.*

n357 *Id.* at 57.

n358 *Id.* at 59.

n359 See Rosen, *supra* note 208, at 27.

n360 Bentham, *Securities Against Misrule*, *supra* note 250, at 60-61.

n361 Bentham, *Constitutional Code*, *supra* note 202, at 41-46; see also Bentham, *supra* note 264, at 213.

n362 Peardon, *supra* note 298, at 621, 641; see also Rosen, *supra* note 208, at 27.

n363 Peardon, *supra* note 298, at 621, 641.

n364 Bentham, *Securities Against Misrule*, *supra* note 250, at 28.

n365 Dinwiddy, *supra* note 93, at 83.

n366 Peardon, *supra* note 298, at 621, 636, 642; see also Rosen, *supra* note 208, at 112.

n367 Bentham, *supra* note 264; see also *Constitutional Code*, *supra* note 202, at 41-46.

n368 See Rosen, *supra* note 208, at 40.

n369 See *Securities Against Misrule*, supra note 250, at 8586, where Bentham enumerates the offenses:

Liberty of communication by word of mouth, to as many as chosen, information in any shape in which it is regarded by the individual in question as contributory to greatest happiness.

Right recognized. Giving expression and publicity to all facts and observations of which, in the judgment of the individual in question, the conception promises to be contributory to the greatest happiness of the greatest number: whether the tendency of the correspondent information be to raise or lower this or that person in the scale of public opinion.

Correspondents acts of power prohibited as being violations of these rights include . . . 4. Seizing, detaining, destroying or deteriorating any paper or other substratum on which signs expressive of a discourse in question are marked. Issuing or contributing to the issuing of any order for such seizure, detention, destruction or deterioration. Giving or contributing to give execution to any such order. 5. Obstruction by force, intimidation or deceit the approach, entrance or continuation of persons in any number to, into or in any place in which they have separately any right to station themselves. Obstructing them while in the act of making reciprocal communication of such their information and the opinions and wishes suggested by it.

n370 Bentham, supra note 264, at 216; see Bentham, *Constitutional Code*, supra note 202, at 41-46.

n371 T.P. Schofield, 'Economy as Applied to Office' and the Development of Bentham's Democratic Thought, in 3 Jeremy Bentham: Critical Assessments 868, 875 (Bhikhu Parekh ed., 1993) (citing Bentham, *Manuscripts at University College, London*, supra note 203, cxiii, 30-33).

n372 See Bentham, *Securities Against Misrule*, supra note 250, at 88-89. Whensoever, on the alleged ground of justice, the person of any man is put under confinement, information thereof shall be given in the most public manner to the end that all persons taking an interest in his welfare may have it in their power to take lawful measures for securing him against injustice. 2. To this end, the name and situation of every habitation designed by authority to be used as [a place] of confinement, whether on the score of delinquency or insanity, shall be entered in an appropriate register, one exemplar whereof shall be kept in the metropolis in the Office of the Chief Judicatory; and of this exemplar a copy shall be kept at the Office of every other Judicatory. . . . 10. Every person who knowingly and willfully has been contributory to the injurious imprisonment of any person shall himself suffer imprisonment for a length of time equal to that during which the imprisonment had place: and shall moreover, to the extent of his means, be compelled to furnish, or contribute to the furnishing, compensation in a pecuniary shape for the injury.

Id.

n373 Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Prob.* 401 (1958).

n374 See *id.* at 402.

n375 See *id.* at 406-08.

n376 See *id.* at 403-04.

n377 See *id.* at 404-06.

n378 See *id.* at 406.

n379 See *id.* at 409-11, 413.

n380 See *id.* at 412.

n381 See *id.* at 431-35.

n382 See *id.* at 428-29.

n383 *Id.* at 402.

n384 See Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (mim. ed. 1957).

n385 See Donagan, *supra* note 13, at 187-88.

n386 See John Stuart Mill, *Considerations on Representative Government* (1958).

n387 See John Stuart Mill, *On Liberty*, in *Utilitarianism, Liberty and Representative Government* (1951) (discussing the liberty of thought, individuality, and the limits of society's authority over the individual).

n388 John Stuart Mill, *Utilitarianism: With Critical Essays* 18 (Samuel Gorovitz ed., 1971).

n389 J.O. Urmson, *The Interpretation of the Moral Philosophy of J.S. Mill*, in *Mill, Utilitarianism* 168, 170 (1970).

n390 See John Stuart Mill, *Utilitarianism* 25 (1971).

n391 *Id.*

n392 *Id.* at 24.

n393 Hardin, *supra* note 9, at 79.

n394 Henry Sidgwick, *The Methods of Ethics* (1874).

n395 *Id.* at 1.

n396 *Id.* at 4.

n397 See *id.* at 1, 4.

n398 *Id.* at 5-7.

n399 *Id.* at 64-66.

n400 *Id.* at 10.

n401 *Id.* at 10, 11.

n402 *See id.* at 14.

n403 *See id.* at 16, 412-13.

n404 *See id.* at 236-88.

n405 *See id.* at 415-18.

n406 Hardin, *supra* note 9, at 12-13.

n407 *See id.* at 13-14.

n408 *See id.* at 22-29.

n409 *See id.* at 102, 104, 105.

n410 Bailey, *supra* note 9, at 160.

n411 See id. at 56-58.

n412 See id. at 49, 54.

n413 Id. at 21-22.

n414 Id. at 152.

n415 Id. at 153.

n416 See id. at 108-14.

n417 See id. at 95-106.

n418 Robert Goodin, *Utilitarianism as a Public Philosophy* 12 (1995).

n419 Id. at 7.

n420 Id. at 22.

n421 See id.

n422 Id. at 21.

n423 See John Austin, I Lectures on Jurisprudence 187-88, 231-32, 264, 267 (1869).

n424 Similar problems arise with respect to the treatment of at least two other classes of unrepresented sentient beings: animals and future generations.

n425 A related danger is the exercise of extraterritorial criminal jurisdiction in ways that discount the costs of crime and the costs of punishment borne by foreigners. For exploration of some of these issues, see Pablo De Greiff, Drugs, National Sovereignty and Democratic Legitimacy, in *Drugs and the Limits of Liberalism* 156 (Pablo De Greiff ed., 1999).

n426 See generally David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995).