Session 17   Bentham, selections from _An Introduction to the Principles of Morals and Legislation (1789)_

I.   Some background on Bentham

- Early and influential proponent of utilitarianism

- Defended economic liberalization, freedom of expression, separation of church and state, women's rights, animal rights, right to divorce, abolition of slavery, abolition of capital punishment, abolition of corporal punishment, decriminalization of homosexual acts

- Prison reformer; helped create England's first preventative police force

II.   The Principle of Utility

"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: or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action a private individual, but of every measure of government." (p. 674)

- Bentham claims, in support of his principle, that pain and pleasure (avoiding the former, promoting the latter) are the only sources of _motivating_ and _justifying_ reasons: that is, the only considerations that contribute to the _rightness or wrongness_ of an action, as well as the only considerations that drive our actions.
    - _Is this right?_
        - What else might motivate us?
        - Are there any other considerations that _should_ motivate us? (Distributive justice; desert; rights; goods other than happiness)

- Bentham has in mind a version of _subjective_ utilitarianism, according to which we ought to perform the act that _appears_ to result in the greatest net happiness.

- Are Bentham's recommendations for our system of punishment better motivated by _act‑_ or _rule‑utilitarianism_?
    - That is, does he favor adopting the _rules for punishment_ that, if adopted, are likely to promote the maximization of happiness more than any other set of rules (even if they might, in a particular case, tell us to punish in a way that doesn't maximize happiness)?
    - Or does he want us to apply the principle of utility directly to every case (so that the rules he gives us are best thought of as _rules of thumb_)?

- The utilitarian view of punishment: Punishment is justified if, only if, and because punishing someone will lead to at least as much welfare as not punishing. The severity of the punishment should be determined by what level of punishment would have the best effects.

- o This is a *forward-looking* view of punishment: it asks us to look *forward* to the consequences of our punishment, rather than *backward* at the crimes committed.
  - o Kinds of considerations that are relevant to punishment on the utilitarian view:
    - Deterrence (specific and general)
    - Disablement
    - Giving the victim "satisfaction" (vindication)
    - Rehabilitation

- Even if we don't accept utilitarianism, we should still be interested in Bentham's account of punishment because:

  - o His principles may be relevant even if we plug a different conception of the good into the cost-benefit analysis he proposes

  - o Even retributivists tend to think cost considerations and considerations of deterrent effect are part of what justifies state punishment.

III.   When is punishment not justified on the utilitarian view?

- When punishment is *groundless*:
  - o Bentham says the utilitarian view cannot justify punishment of acts that did not produce any mischief – acts that are harmless.
    - Why not?
      - Because all punishment is, from the utilitarian perspective, an "evil" – it introduces more unhappiness/pain into the world, and so is to be avoided as much as possible.
      - There are no utilitarian grounds for *deterring* harmless acts or *defending ourselves* against harmless agents.
    - Examples:
      - Bentham says acts which are freely consented to are never harmful:
        - o Anti-sodomy laws
        - o Running the stop sign in the desert?
        - o What about drug-use prohibitions?
        - o Helmet laws?
    - Worries:
      - Is Bentham right that consent is a sure indication of the absence of harm?
      - Might there be acts that may not be mischievous so long as they *are* prohibited, but which would be mischievous if they *weren't* prohibited? (E.g., stop sign in desert, some laws protecting property… e.g. don't walk on the grass)
      - Is Bentham right that the principle of utility would never justify punishing someone who does not harm?

- It seems like we can imagine cases where punishing an innocent person might prevent future harms by others – even harms exceeding the harm of punishing the innocent... (e.g. acts *thought* harmful)
- Cannot justify punishment in cases of harmful actions where the harm was outweighed by the beneficial consequences
    - Why not? Because such acts are to be encouraged from a utilitarian perspective
    - Examples: preventing instant calamity
        - *Vincent v. Lake Erie?*
        - Stealing a loaf of bread to feed one's starving children?
        - What about any theft where the benefits to the thief outweigh the cost to the victim?
    - Worries:
        - Again, it seems there might be worries that acts that aren't harmful given that they're forbidden by laws back by punishment *would* be harmful if the threat of punishment didn't exist.
            - E.g., laws punishing theft provide the system of secure property *in the context of which* occasional theft may be more beneficial than harmful...
- Cannot justify punishment in cases where harms can be entirely and certainly cured by compensation instead.

- When punishment is *inefficacious*:
    - For example, when the penal provision comes too late
        - *Ex-post-facto* legislation
        - Extra-legal sentencing by a judge.
        - Why?
            - Such punishments can't deter the criminal from commiting the crime
        - Worries:
            - They can deter future similar crimes (although this might be more *cheaply* achieved by new legislation)
            - They can prevent future similarly harmful acts by the same criminal (although the *may* be more cheaply achieved by new legislation)
    - When the prohibition is not made known/sufficiently promulgated
        - Bentham's restriction here is pretty strong: "such is the case when the law has omitted to employ any of the expedients which are necessary, to make sure that every person whatsoever, who is within the reach of the law, be apprized of all the cases whatsoever, in which … he can be subjected to the penalties of law." (p. 675)
        - Examples: laws that aren't made public.

- Worries: the standard he give is *very* strong – doubtful that any legal system could live up to it (ours certainly does not). When should ignorance of the law excuse?
- o Where deterrence is impossible:
  - Examples:
    - Infancy
    - Insanity
    - Intoxication
    - *What about*: crimes of passion; do-or-die crimes (e.g. suicide bombings)
  - Worries:
    - Should intoxication be a defense? We can avoid intoxication, but not insanity (unless we choose to go off meds)
    - Perhaps Bentham thinks the punishable crime in the case of the person who acts harmfully while intoxicated isn't *that* harmful action, but rather the act of deciding to drink while knowing it might lead to your acting harmfully?
    - Also, might punishment in such cases by justified on ground of *general* deterrence or of specific defense?
- o Bentham also thinks certain kinds of specific ignorance can excuse.
  - E.g. Ignorance of illegality, unintentionality of action, ignorance of harmful effects.
  - Do you agree? What about the case of ignorance that is itself blameworthy?
- o Finally, Bentham thinks punishment is not justified in cases where the harmful act is compelled either physically or by the influence of a superior force, e.g., by threat of danger.
  - Does following orders always excuse?
  - What about physical compulsion, which was itself preventable (e.g., a car accident caused by a driver who knew he was prone to seizures)

- When punishment is *unprofitable*:
  - o E.g., when the punishment would produce more evil than the offense
    - Examples?
      - Perhaps anti-adultery laws
      - Most relatively harmless acts
    - Ways in which punishment can produce harms
      - Coercion or restraint – by keeping/deterring people from doing what they'd like to do (e.g., anti-sodomy laws)
      - Apprehension – the unpleasantness of the *fear* of punishment
      - Sufferance – the unpleasantness of the *actual punishment* for the criminal who is caught
      - Sympathy – the unpleasantness for, e.g., the families and friends of the sufferers of punishment
      - Cost to the state of enforcement (e.g. building prisons, police force, invasion of privacy…)

- The greater the harm that punishment or threat of punishment will impose, the better a reason we'll need to justify punishment.
- Since the harms imposed by punishment will vary dramatically from case to case, does this suggest that we'll need an incredibly piece-meal system of punishment?
  - That makes it hard to avoid *ex-post-facto* or *judge-made* law
  - That opens to the door to bias and corruption in the system
  - It's impractical and hard to understand
  - May require punishing some very important people (e.g. the president?) less that less essential citizens, or people to whom many are sympathetic less….
- We have to wonder here, again, whether Bentham is looking for the best set of general rules for punishing, or for the the best punishment in *individual cases*. (Rawls!)

- When punishment is *needless*:
  - Where deterrence and defense can be achieved more cheaply (e.g. through instruction rather than punishment)
    - Bentham suggests that this is the case in most cases of *harmful speech*…

IV.   Punishment and Proportionality

- Four objects of punishment:

  - To prevent all offenses

  - To induce those set on offending to commit the less bad offense rather than the worse one

  - To induce those set on offending to do as little harm as possible

  - To secure these goals for as little punishment as possible

- The rule of proportionality of punishment are designed to further these goals

- Rule 1: Punishment must outweigh the profit of the offense.
  - Otherwise it won't deter (inefficacious).
    - But it needs to outweigh it significantly, in order to make up for the fact that the profit is more certain than the punishment (i.e. many crimes go uncaught) – Bentham accommodates this in Rules 7 and 8.
      - Does this mean that crimes that are more profitable to the criminal justify harsher punishments?
      - What about crimes that are less likely to be detected?
      - It seems like some crimes that meet both those conditions are nonetheless much less deserving of punishment then other crimes which are less profitable or hard to catch:
        - E.g., compare tax evasion and murder

- o Bentham considers the worry that the strength of the *temptation*, which also correlates with the *profit* should be taken as an exonerating circumstance, not a reason to *increase* the punishment.
    - But he says without the punishment's at least outweighing the profit, it would be totally ineffectual.
    - Remember also that according to Bentham, crimes that do more good than harm don't deserve punishment in the first place.
    - *What about a related issue*: cases where criminals are made more likely to commit a crime by environmental factors, which are also often seen as partially exonerating circumstances (e.g., victims of child abuse who go on to abuse…) – Would Bentham say such victims ought also to be punished more severely, since it may take more to deter them from their crimes?
  - o Bentham suggests that we treat a criminal cruelly if we punish him when that punishment serves no purpose. But Kant had the opposite instinct – we fail to respect him if we punish him solely to deter others, and thus use him as a "mere means."

- Rule 2: Punishment for greater offenses should be greater than punishment for lesser offenses.
  - o This is because the greater the mischief caused by a crime, the greater the punishment *it's worth* using to deter it. (But it may not be *necessary* to use full punishment…)
  - o This rule could, it seems to me, conflict with Rule 1 – which gives a very different rule of proportionality.
    - This rule looks at the cost to society of a crime, Rule 1 looked at the profit to the criminal of the crime; different verdicts: (e.g., consider a crime that costs society 5 but gains the criminal 4. Rule 1 says the punishment should be 5. Compare a crime that costs society 8 but gains the criminal just 1; Rule 1 says the punishment should be 2 (<5, although the offense is greater).

- Rule 3: Where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the lesser (e.g. robbery v. armed robbery)

- Rule 4: Punish for each particle of the mischief (to provide additional incentive to minimize harm at each step) – examples of the 5-10 blows…
  - o Consider: should rape ever be punishable by death? Or would that encourage rapists to kill their victims?
- Rule 9: Bentham suggests that punishment should be increased for the habitual wrongdoer, to cover those crimes we may suppose were committed by weren't caught –
  - o Given the provision in Rule 7 for the lack of certainty of catching a criminal, is this double-punishing?
  - o Does this violate "innocent until proven guilty"?

- Bentham adds a number of further rules designed to allow for particular responses to particular criminal acts (where punishing might not, e.g., secure it's goals) – but that leeway also opens the door to the possibility of bias and corruption.

- Bentham ends by saying that in the interests of having a useable, knowable, public system of punishment, the rules of proportionality need not be adhered to perfectly.

Some cases to think about:

- *Should rape ever be punishable by death?*
- *Should tax evasion ever be punished more severely than e.g. murder?*
- *Should there be legal luck?*
- *When might ignorance of the law excuse? How about insanity? Intoxication?*
- *When might consent protect against punishment?*
- *What kinds of harmful acts should we punish? Consider:*
    - *All of the costs of punishing (coercion, apprehension, enforcement costs, invasion of privacy, how "expensive" it is to bring about deterrence)…*
    - *Whether other forces (social pressures) are as effective but less costly…*

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