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«The first steps rightly directed in the track of legislation»: Jeremy Bentham on Cesare Beccaria's *Essay on Crimes and Punishments*

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Abstract. Scholars have long recognized the debt owed by the English philosopher Jeremy Bentham (1748-1832) to Cesare Beccaria (1738-94). Ignoring Beccaria's appeals to the social contract and natural law, Bentham took the more practical positions that he had found in Beccaria's *Crimes and Punishments* and, by adopting a consistently utilitarian approach, produced a more systematic and coherent theory of punishment. Scholars have also pointed out that, by his own admission, Bentham owed a vital aspect of his conception of the principle of utility, namely the elements of value of pains and pleasures, to Beccaria, while it is generally accepted that he found the phrase with which his name is closely associated, namely 'the greatest happiness of the greatest number', in the English translation of Beccaria's treatise. This overall interpretation is accepted here, but I suggest that Bentham's debt to Beccaria was even more profound and extensive than has generally been recognized. Bentham read Beccaria closely and critically, working out the extent to which the positions he found there made practical sense, and might be incorporated within his own framework of penal law and legal theory more generally. The reason that Bentham was able to accept certain positions taken from Beccaria and reject others was related to the philosophical foundations of his thought in a materialist ontology and subjectivist epistemology which did not owe anything to Beccaria. Moreover, later in life, Bentham came to the view that his own work had superseded that of Beccaria. This was not to belittle the achievement of Beccaria, but rather reflected his view that he had incorporated Beccaria's insights into his own categorization of the main ends of punishment, namely deterrence, reformation, incapacitation, and compensation, just as he had incorporated Beccaria's insights into moral calculation into his own principle of utility.

KEYWORDS. Utility, Punishment, Penal Law, Happiness, Logic.

I.

In an unpublished manuscript written in the mid-to-late 1770s Jeremy Bentham expressed his opinion that, «The best treatise by far the world has seen hitherto on the subject [of legislation] is that of the Marquis of Beccaria

on Crimes and Punishments»¹. The general consensus amongst scholars is that Bentham developed a systematic and coherent utilitarian theory of punishment based on the inchoate ideas that he found in Cesare Beccaria's *Essay on Crimes and Punishments*². In short, Bentham rejected the contractarian and natural law elements of Beccaria's work, while accepting the general utilitarian thrust of Beccaria's more practical arguments. Scholars have, moreover, drawn attention to Bentham's admission that he took the elements into which the value of pains and pleasures were to be analysed from Beccaria, and are in general agreement that he discovered the phrase «the greatest happiness of the greatest number» in Beccaria's work. None of this will be challenged here. I will, however, argue that, at the beginning of his career, Bentham's debt to Beccaria was profound and extensive, but that, as he established a reputation as a major jurist in his own right, he believed that his own work had superseded that of the Italian jurist. Moreover, the reason that Bentham was able to assimilate and systematize certain positions advanced by Beccaria and reject others was because of a deeper philosophical commitment to an ontology that underlay his utilitarianism. Nevertheless, having integrated aspects of Beccaria's thought into his own utilitarianism in general and penal theory in particular, Bentham's legacy to the nineteenth-century owed a substantial, albeit covert, debt to Beccaria³.

II.

Beccaria's *Crimes and Punishments* was first published in the original Italian in 1764, in Morellet's French translation in 1766, and in English translation in 1767⁴. Bentham seems to have had access to all three versions. In the single reference to Beccaria's work in *An Introduction to the Principles of Morals and Legislation*, Bentham cites the relevant section in both the

original Italian work and in Morellet's French translation⁵. Given Bentham's fluency in French, one would have expected him to have read Morellet's translation, but since he is not known to have studied Italian, at first glance it seems doubtful that he would have read *Crimes and Punishments* in its original language. However, in an essay on «Pæderasty» written about 1785, Bentham quoted in full, and in Italian, Beccaria's paragraph beginning with the words «L'Attica Venere» on the punishment of male same-sex relationships⁶. Furthermore, in an essay of August 1817 in which Bentham provided a précis of the contents of a projected essay that became the third volume of *Not Paul, but Jesus* (of which only the first volume was published pseudonymously in 1823), Bentham noted: «The mode of sexuality, termed by Beccaria *the Attic*, the most prominent – why: – absurdity of the epithet *unnatural* as applied in this case». There is no equivalent phrase in either Morellet's French translation of 1766 or the English translation of 1767⁷. There seems little doubt, then, that Bentham read the work in the original Italian.

The question whether he read the English translation is linked to the origin of the phrase that is commonly associated with Bentham, namely «the greatest happiness of the greatest number». The answer is not straightforward in that, in later life, Bentham was apt to state that he had discovered the phrase in a pamphlet by Joseph Priestley⁸, although on an earlier occasion, in a remark which Bentham's literary executor John Bowring claimed to have extracted from «Bentham's *Commonplace Book*» of 1781-85 (now lost), he had written: «Priestley was the first (unless it was Beccaria) who taught my lips to pronounce this sacred truth: – That the greatest happiness of the greatest number is the foundation of morals and legislation»⁹. In the most detailed study of the subject, Richard Shackleton comes to the

¹ University College London Library, Bentham Papers, Box xxvii, fo. 111 [hereafter UC xxvii. 111].

² See E. Halévy, *The Growth of Philosophic Radicalism*, transl. M. Morris, Faber & Faber, London 1952, pp. 21, 33, 58-60, 64, 71-72; H.L.A. Hart, «Bentham and Beccaria», in Id., *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Oxford University Press, Oxford 1982, pp. 40-52; A.J. Draper, *Cesare Beccaria's influence on English discussions of punishment, 1764-1789*, «History of European Ideas», 26, 2000, pp. 177-199; and F. Rosen, *Classical Utilitarianism from Hume to Mill*, Routledge, London 2003, p. 164.

³ The point is also made in E. de Champs, *Bentham et l'héritage de Beccaria: du Project d'un corps complet de législation (1783-88) aux Traités de législation civile et pénale (1802)*, in E. Salvi and M. Porret (eds.), *L'héritage de Beccaria*, Presses universitaires de Rennes, Rennes 2014, pp. 99-110.

⁴ Unless otherwise noted, quotations in the present essay are taken from the English translation of 1767.

⁵ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by J.H. Burns and H.L.A. Hart, Athlone Press, London 1970, p. 166 n.

⁶ See UC lxxii. 200. For further discussion of this passage see below.

⁷ See J. Bentham, *Of Sexual Irregularities, and other writings on Sexual Morality*, ed. by P. Schofield, C. Pease-Watkin, and M. Quinn, Clarendon Press, Oxford 2014, p. 132 & n.

⁸ See, for instance, J. Bentham, *Deontology together with A Table of the Springs of Action and Article on Utilitarianism*, ed. by A. Goldworth, Clarendon Press, Oxford 1983, pp. 291-292, and *Official Aptitude Maximized; Expense Minimized*, ed. by P. Schofield, Clarendon Press, Oxford 1993, pp. 349-350. Bentham might have had in mind a passage in Priestley's *An Essay on the First Principles of Government; and on the nature of Political, Civil, and Religious Liberty*, London 1768, p. 17: «the good and happiness of the members, that is the majority of the members of any state, is the great standard by which every thing relating to that state must finally be determined».

⁹ *The Works of Jeremy Bentham*, ed. by J. Bowring, 11 vols., William Tait, Edinburgh 1838-43, vol. X, p. 142.

conclusion, now generally accepted, that Bentham had in fact found the phrase in the English translation of Beccaria, where – possibly for the first time – the exact words «the greatest happiness of the greatest number» had appeared¹⁰. The original Italian phrase «la massima felicità divisa nel maggior numero» is more literally translated, as it is in modern English editions, as «the greatest happiness shared among the greatest number». Hence, if Bentham did derive the phrase from Beccaria's work, it was, to be accurate, from the unknown English translator, who perhaps had difficulty in conceiving how the greatest happiness could be shared, since this seemed to imply a confusing mixture of aggregation and distribution. Passages elsewhere in the English translation of *Crimes and Punishments* similarly express the notion of promoting the greatest happiness of the greatest number, of which the most striking is the following:

*It is better to prevent crimes, than to punish them. This is the fundamental principle of good legislation, which is the art of conducting men to the maximum of happiness, and to the minimum of misery, if we may apply this mathematical expression to the good and evil of life*¹¹.

The sentiments expressed here would have been fully endorsed by Bentham¹².

As well as deriving the phrase «the greatest happiness of the greatest number» from Beccaria, Bentham stated that he had derived from him a further major ingredient of his philosophy. In an unpublished manuscript headed «Critical Jurisprudence Criminal», written in the mid-to-late 1770s¹³, he noted: «Mem^m. Dimensions of Happiness [...] collected from Beccaria»¹⁴. He explained the point in more detail in another unpublished manuscript in a passage headed «Pleasures and Pains – how measured» and written around the same time:

*The idea of considering happiness as resolvable into a number of individual pleasures, I took from Helvetius: before whose time it can scarcely be said to have had a meaning. [...] The idea of æstimating the value of each sensation by analysing it into these four ingredients I took from M. Beccaria: gleanng up those several articles from different places in which I saw them made use of in æstimating the force and utility of punishments. Considering that punishment is but pain applied to a certain purpose, that the value of a pleasure is composed of the same articles, and that pains and pleasures, and actions in as far as they had a tendency to produce or prevent the one and the other were all that morals and politics, or so much as was of any use or meaning in those sciences, had in view, it seemed to me that such an analysis was the very thing that was wanted as the foundation for a compleat system of moral science*¹⁵.

Much later, in a manuscript dated 16 October 1814, in a section headed «Elements or dimensions of value in regard to pleasures and pains», part of a chapter provisionally entitled «J.B.'s new ideas derived from Logic» and destined for a work on «Logic», Bentham again acknowledged his debt to Beccaria:

*It was from Beccaria's little treatise on crimes and punishments that I drew, as I well remember, the first hints of a principle by which the precision, clearness and incontestableness of mathematical calculation is introduced for the first time into the field of morals – a field to which, in its own nature, it is applicable with a propriety no less incontestable, and when once brought to view manifest, than to that of physics, including its most elevated quarter, the field of mathematics*¹⁶.

The dimensions of happiness in question were «the elements or dimensions of value in pleasure or pain» famously outlined in the fourth Chapter of *An Introduction to the Principles of Morals and Legislation*¹⁷, consisting of intensity, duration, certainty, and propinquity. Beccaria did not give a systematic list of these elements, but they did appear at various points, as Bentham claimed, as features of punishment. Beccaria noted, for instance, that «It is not the intensesness

¹⁰ R. Shackleton, *The Greatest Happiness of the Greatest Number: The History of Bentham's Phrase*, «Studies on Voltaire and the Eighteenth Century», 90, 1972, pp. 1461-1482. For a recent endorsement of Shackleton's account see J.H. Burns, *Happiness and Utility: Jeremy Bentham's Equation*, «Utilitas», 17, 2005, pp. 46-61.

¹¹ Beccaria, *Crimes and Punishments*, cit., ch. LXI, p. 164.

¹² For the 'economic' approach to psychology and ethics that characterized the Milanese intellectual circle to which Beccaria belonged, and which Bentham found so congenial, see Beccaria, *On Crimes and Punishments and Other Writings*, ed. by R. Bellamy, Cambridge University Press, Cambridge 1995, Introduction, pp. ix-xv.

¹³ «Critical Jurisprudence Criminal» originally consisted of nearly 400 pages, though nearly a quarter of them appear now to be missing. It consists of a series of short discussions, from a few words to a few pages in length, not composed in any systematic order, but added to as occasion arose, and from which Bentham drew when writing his more formal works.

¹⁴ UC clxix. 137.

¹⁵ UC xxvii. 34.

¹⁶ British Library Bentham Papers [hereafter BL], Add. MS 33,550, fo. 8, reproduced in Bowring, vol. III, pp 286-287. E. de Champs, *Réforme juridique, réforme politique: le jury populaire chez Beccaria, Condorcet et Bentham*, in P. Audegean and L. Delia (eds.), *Le moment Beccaria, Naissance du droit pénal moderne (1764-1810)*, Voltaire Foundation, Oxford 2018, argues that Beccaria, Condorcet, and Bentham shared a probabilistic approach to the role of the jury based on a methodology which they might have derived from Helvétius.

¹⁷ Bentham, *An Introduction to the Principles of Morals and Legislation*, cit., pp. 38-41. There were in fact seven such dimensions, the three others being fecundity, purity, and extent, but these latter three were not strictly elements of the particular pleasure or pain itself.

of the pain that has the greatest effect on the mind, but its continuance»¹⁸, thereby suggesting the elements of intensity and duration; he referred to the «uncertainty of crimes», and stated that «moral certainty is only probability», that the more immediately inflicted, the more just and useful the punishment, thereby avoiding «the criminal and cruel and superfluous torment of uncertainty», and that «Crimes are more effectually prevented by the *certainty*, than the *severity* of punishment»¹⁹, thereby suggesting the element of certainty; and referred to the promptitude of punishment as «one of the most powerful means of preventing crimes»²⁰, thereby suggesting the element of propinquity.

III.

When, in addition to the idea of maximizing happiness and minimizing suffering, the connection had been made between happiness and suffering on the one hand and pleasure and pain on the other, the essential structure of Bentham's utilitarian system was in place. Bentham found this essential structure in Beccaria, for as well as calling for the maximization of happiness, Beccaria also made the connection between happiness and pleasure. Recognizing this, Bentham identified Beccaria as an adherent of the principle of utility:

*Before it [the principle of utility] was mine it was M. Beccaria's. Before it was his, it was Helvétius's: before it was Helvétius's, it was in some sort everybody's. Though Helvétius for placing it in full light was persecuted. The light shone in the darkness but the darkness comprehended it not*²¹.

Again, in «Critical Jurisprudence Criminal», Bentham claimed that Helvétius had been the first philosopher to adopt the principle of utility as the sole basis for morality in general, and that Beccaria had then applied it. Bentham speculated Beccaria's failure openly to acknowledge his debt to Helvétius was borne of prudence, given that *De l'esprit* had been censured by the «ruling powers» in France²². Another adherent of the principle of utility was Voltaire, «but this authority, however forcible with some, would contribute very little to

give it currency with the bulk of moralizers, who had rather be wrong with any one else than right with M^r Voltaire»²³.

In another passage in «Critical Jurisprudence Criminal», Bentham again linked Beccaria to Helvétius, but with a particular emphasis on Beccaria's contribution to legal theory. Beccaria had followed Helvétius in employing the principle of utility as the sole standard of right and wrong, but while Helvétius had applied it to morality in general, Beccaria had applied it to censorial jurisprudence, that is to law as it ought to be (which Bentham opposed to expository jurisprudence, that is the description of law as it is). Beccaria's achievement had been to reduce censorial jurisprudence to a single, master principle, and thereby had «advanced» the science near «to its perfection»²⁴. This is reminiscent of the passage in which Bentham mentioned Beccaria in *A Fragment on Government* (1776), his first major published work. Having distinguished expository and censorial jurisprudence, and having complained about the general conservatism of the age, Bentham observed that the rarity of the «disposition» to subject «rude establishments to the test of polished reason» was indisputable:

*The truth of it may be seen in the multitude of Expositors which the Jurisprudence of every nation furnished, ere it afforded a single Censor. When Beccaria came, he was received by the intelligent as an Angel from heaven would be by the faithful. He may be styled the father of Censorial Jurisprudence*²⁵.

It is impossible to say whether Bentham derived the distinction between expository and censorial jurisprudence through reading Beccaria, but it is difficult to discern any other candidate. It is worth remembering that Bentham's clear statement of this distinction represents a pivotal moment in the history of the general philosophy of law, and not merely the theory of punishment, since the distinction between law as it is and law as it ought to be gave rise to what became the dominant strand of legal philosophy in the Anglo-American tradition in the second half of the twentieth century, namely legal positivism²⁶.

Bentham was not, however, an uncritical admirer of Beccaria. He would, for instance, have found much

¹⁸ Beccaria, *Crimes and Punishments*, cit., ch. XXVIII, p. 105.

¹⁹ *Ibidem*, ch. XI, p. 41; ch. XIV, p. 49; ch. XIX, pp. 74-75; ch. XXVII, p. 98.

²⁰ *Ibidem*, ch. XXX, pp. 120-121.

²¹ UC xxvii. 100. The allusion is to John 1:5.

²² For the condemnation of *De l'esprit* by the Parlement of Paris see R. Birn, *Royal Censorship of Books in Eighteenth-Century France*, Stanford University Press, Stanford, 2012, pp. 25-32.

²³ UC clix. 270.

²⁴ UC lxix. 17.

²⁵ J. Bentham, *A Comment on the Commentaries and A Fragment on Government*, ed. by J.H. Burns and H.L.A. Hart, Athlone Press, London 1977, p. 403 & n.

²⁶ For a critical assessment of the view that Bentham was himself a «legal positivist» as understood by twentieth-century legal philosophers see P. Schofield, *Jeremy Bentham and H.L.A. Hart's Utilitarian Tradition in Jurisprudence*, «Jurisprudence», 1, 2010, pp. 147-167.

to object to in Chapter II «Of the Right to punish» of *Crimes and Punishments*. Beccaria began by generalizing a proposition found in Montesquieu: «Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical». It followed, claimed Beccaria, that the sovereign's right to inflict punishment was «founded [...] upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable»²⁷. Bentham would have disagreed with this account on several grounds, but his main point, perhaps, would have been that the legislator was right (in contrast to «possessed a right») to impose sanctions not merely in cases of «absolute necessity», or where there was «a necessity of defending the public liberty», but wherever it was beneficial to the community to do so²⁸. In the fifth paragraph of Chapter II, Beccaria stated:

*Thus it was necessity, that forced men to give up a part of their liberty; it is certain then, that every individual would chuse to put into the public stock the smallest portion possible, as much only as was sufficient to engage others to defend it. The aggregate of these, the smallest portions possible, forms the right of punishing: all that extends beyond this is abuse, not justice*²⁹.

Beccaria was, of course, drawing upon the notion of a social contract, whereby society was founded when subjects entered into an agreement with rulers, and rulers' actions were legitimate insofar as they did not violate the terms of the contract. Bentham rejected what he described as the «fiction» of the original contract on three grounds. First, since such a contract had never actually been entered into, it could have no binding force. Second, a contract, like any promise or set of promises, was binding only insofar as it conformed to the principle of utility, and hence any appeal to a contract in order to justify opposition to government was otiose, since one might simply appeal directly to the principle of utility. Third, contracts were the product of law, and hence of government, and so government could not be the product of a contract³⁰. Beccaria claimed that men entered society, and hence agreed to the social con-

tract, in order to protect their liberty. Bentham would have agreed with this up to a point. For Bentham, liberty was a negative idea, that is the term «liberty» described a situation in which an individual was not subject to coercion, whether in the form of restraint or constraint. While liberty was, from the point of view of any one individual, desirable, in that it implied the ability to do precisely what one wanted to do, it was not an unalloyed good when considered from the perspective of the community as a whole, since an individual who was free to do what he wanted might act in such a way as to produce evil overall, as much as to produce good overall. Indeed, government, insofar as it created law, restricted liberty, since every law imposed some degree of coercion, in order to create security, which consisted in legal rights protecting person, property, reputation, and condition in life³¹. Bentham would have been perplexed as to how adding up small portions of liberty could constitute the right of punishing, since it made no sense to talk about liberty being divided up into portions or added up into a mass. From Bentham's point of view, Chapter II contained a good deal of confusion. Having said that, Bentham would have agreed with Beccaria's remark in Chapter XLII, that «Men of enlightened understanding [...] compare, with the highest satisfaction, the inconsiderable portion of liberty of which they are deprived, with the sum total sacrificed by others for their security; observing that they have only given up the liberty of injuring their fellow creatures»³². Beccaria seems to have assumed that the social contract would have necessarily achieved the requisite sacrifice of liberty in order to produce security, whereas for Bentham, it was an object to be aimed at by the legislator through a utilitarian code of laws.

IV.

Bentham drew explicitly on Beccaria in some instances, and yet rejected other elements in his thought. That Bentham had read *Crimes and Punishments* very closely is confirmed by a detailed consideration of «Critical Jurisprudence Criminal», which indicates that significant portions of it consist in a response to ideas found in Beccaria's work, even though Beccaria himself is mentioned by name on only a handful of occasions. Bentham appears to have been critically assessing the implications

²⁷ Beccaria, *Crimes and Punishments*, cit., ch. II, p. 7.

²⁸ See, for instance, Bentham, *An Introduction to the Principles of Morals and Legislation*, cit., p. 74.

²⁹ Beccaria, *Crimes and Punishments*, cit., ch. II, p. 9.

³⁰ Bentham, *Comment/Fragment*, pp. 439-448, and *Rights, Representation, and Reform: Nonsense upon Stilts and other writings on the French Revolution*, ed. by P. Schofield, C. Pease-Watkin, and C. Blamires, Clarendon Press, Oxford 2002, p. 332.

³¹ Bentham, *An Introduction to the Principles of Morals and Legislation*, cit., p. 148; *Of the Limits of the Penal Branch of Jurisprudence*, ed. by P. Schofield, Clarendon Press, Oxford, 2010, pp. 75-76, 129-130, 288-289; and Bowring, *The Works of Jeremy Bentham*, cit., vol. I, p. 302.

³² Beccaria, *Crimes and Punishments*, cit., ch. XLII, pp. 167-168.

of positions he had found in *Crimes and Punishments*, in order to decide which, from his own point of view, made sense and which did not. Take, for example, Beccaria's statement in Chapter XIX «Of the Advantage of immediate Punishment» that, «The more immediately, after the commission of a crime, a punishment is inflicted, the more just and useful it will be». It was more just, in that the offender would suffer for a shorter length of time both the «torment of uncertainty» and the loss of liberty, while it was more useful «because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of *Crime* and *Punishment*», such that the former would be seen as the cause and the latter as the effect³³. In «Critical Jurisprudence Criminal», Bentham noted that, «Promptitude in the execution of a punishment has been said to be advantageous on two accounts: to the delinquent, and to the public», but did not acknowledge that it was Beccaria who had said it. Bentham went on to explain that promptitude was beneficial to the delinquent in that it shortened the period during which he would suffer «a pain of apprehension», which was itself «an additional punishment» that had not been «denounced by the Law». Such additional punishment was so much pointless evil, since it contributed nothing to the «apparent magnitude» of the punishment, «which is all the good of it». He pointed out that the rule of promptitude was not universal, since it only applied in the instance of corporal punishment, and not in the instances of pecuniary or infamous punishment. In relation to pecuniary punishment, he noted that, where a fixed sum was to be paid, «to pay later is to pay less», but qualified this statement by admitting that, where the sum was not fixed, it was likely that the offender would fear that he would be made to pay a greater sum than he would in fact be made to pay, and his greater anxiety would outweigh the pleasure he gained from any use he could make of the money during the delay. Bentham then attempted an involved calculation, whereby he tried to offset the uncertainty suffered by an offender liable to pay a fine against the interest he might accrue on the sum that he might eventually have to pay, but concluded: «These speculations might be carried to a further nicety: but it would hardly be worth the while, for any use that could be made of them in practise». The point was that where the pecuniary penalty had been settled by the law, delay was beneficial to the offender; where not settled, there was no general rule that could be adopted in all cases. In relation to infamy, it was obvious that delay benefited the offender. In relation to corporal punish-

ment, where there were no permanent effects, promptitude was advantageous to the offender: the sooner the punishment was inflicted the better. If it were objected that where some permanent effect would result, such as the loss of a hand, the greater the delay, the better, it would probably still be the case that it would be more beneficial to the offender to avoid delay, since the apprehension suffered in the meantime would be great. It was because the idea of corporal punishment would be «more formidable on account of its intensity» than either pecuniary or infamous punishment that «promptitude in the execution will be advantageous to the delinquent»³⁴. Here Bentham took a position advanced by Beccaria, albeit without explicitly acknowledging his source, and subjected it to a more detailed and rigorous analysis than that provided by Beccaria, in order to tease out the extent to which it made practical sense.

Having discussed the effects of the promptitude of punishment from the perspective of the offender, Bentham scrutinized the question of promptitude from the point of view of its general utility. Beccaria had argued that promptitude was useful in that it established an association of ideas between the crime and the punishment. Bentham did now mention Beccaria by name:

Beccaria seems to lay great stress on it [promptitude]. He seems to think that the disposition in men to associate in their minds the idea of the punishment with that of the offence, to look upon the former as the consequence of the latter, is, in a great measure, dependent upon this circumstance. [...] Men would expect the former as a consequence from the latter, with the same assurance that, from natural causes, they expect natural effects. He would no more think of venturing upon a crime than he does of holding his finger in the candle.

In contrast, Bentham argued that «the efficacy which M. Beccaria seems to attribute to the promptitude of a punishment, seems with better reason, I think, to be referable to the certainty of it». Bentham suggested that Beccaria's confusion arose from the fact that the certainty of the punishment would depend to some extent upon its promptitude, since the longer the time between the commission of the offence and the execution of the punishment, the more the opportunities which would arise for the punishment to be evaded. Bentham's point was that obedience to the law would be greater in a situation in which punishment was invariably inflicted, albeit delayed, than in a situation in which it often failed to be inflicted, even though, when it was inflicted, it was done so promptly³⁵.

³³ Beccaria, *Crimes and Punishments*, cit., ch. XIX, pp. 74-77.

³⁴ UC cxl. 7-8.

³⁵ UC cxl. 8.

Bentham continued with a discussion of the respective intervals of time between the commission of the offence, the commencement of the prosecution, the conviction, the passing of the sentence, and the execution of the sentence. The interval between the commencement of the prosecution on the one hand and the conviction on the other, he noted, was «apt to be so long», that the length of the interval between the pronouncement of the sentence and the execution was «of no great consequence», and again between the commission of the offence on the one hand and the conviction, passing of sentence, and execution on the other, «it signifies little the being at any extraordinary pains to make the execution follow quick upon the conviction». For this to take place, the procedure would need to be summary, and «more so than the forms to which we are so much attached in this country [i.e. England] will permit»³⁶. The mischief of delay was more serious in civil than in criminal causes, in that delay in the former increased both the length of time that a person with a just claim was denied his right and the insecurity felt in the community as a whole. Where the punishment was «short of capital, any advantage that might be hoped for from the circumstance of promptitude in the way of adding to the terror of the punishment might be attained with much more certainty by adding to the magnitude of the punishment». Finally, in the case of capital punishment, which was «the only sort of punishment that is totally and in every shape absolutely irreparable», any advantage from promptitude was offset by «the danger of injustice. On this account, nothing could be more mischievous than to fix a time for execution in all cases by a general and standing Law». New evidence, Bentham pointed out, might come to light, and so the judge should be given time, should he think it necessary, to receive it³⁷. This passage, with its distinctions between the stages of procedure, appears obscure until it is compared with Chapter XXX «Of Prosecution and Prescription» of *Crimes and Punishments*, where Beccaria returned to the question of the promptitude of punishment, and laid down a number of principles concerning the relationship between the severity of the crime and the promptitude of the punishment in relation to the time required for investigation and trial. After a rather involved discussion, Beccaria concluded that, whatever the crime, the length of judicial procedure («the time

for inquiry and for justification») should be the same, and that time «should be fixed by the law, and not by the judge, who, in that case, would become legislator»³⁸. By shifting the focus from promptitude to certainty, Bentham avoided the difficulties and complexities that Beccaria had encountered in relation to the fairness of the trial procedure, and made room for the flexibility that characterized his own thinking on the subject³⁹.

The instances where Bentham's comments in «Critical Jurisprudence Criminal» appear to be a response to passages in *Of Crimes and Punishments* might be multiplied – there are passages which seem to relate, for instance, to Beccaria's view that the probability of an offence is inversely as the atrocity of it⁴⁰, that the legislator and not the judges should possess the authority to make penal laws⁴¹, that a scale of crimes and punishments be devised and that actions not found in the scale should not be punished⁴², that offences be classified according to whether they injure the sovereign, private security, or the general good⁴³, that punishment should be made analogous to the crime⁴⁴, that robbery be punished by pecuniary compensation⁴⁵, and that infamy be employed as a punishment in cases of injury to reputation⁴⁶ – but enough has been said to illustrate the point that Bentham read Beccaria closely and critically. He used Beccaria's ideas as a starting point for his own reflections and subjected the propositions that he found in Beccaria to the test of utility, in order to see to what extent they might be accepted, modified, or rejected. It might be objected that too much emphasis should not be laid on such an obscure set of manuscripts as «Critical Jurisprudence Criminal», on the grounds that it consisted of working notes that Bentham never intended to publish in the form in which it was written. «Critical Jurisprudence Criminal», nevertheless, represented Bentham's attempts to work out his foundational ideas, which were then presented more methodically in writings that were intended for publication (although they often never did get published). Given that «Critical Jurisprudence Criminal» was, to a significant extent, a response to and commentary on Beccaria, it reveals

³⁶ Bentham presumably had in mind the *nisi prius* system, where the trial and hence the conviction took place in a county town, usually at six monthly intervals, while sentencing took place at the beginning of the following law term, when the justices had returned to the central courts in London.

³⁷ UC cxl. 8-10.

³⁸ Beccaria, *Crimes and Punishments*, cit., ch. XXX, pp. 120-125. Having placed stress on promptitude in this passage, Beccaria elsewhere stressed certainty: see ch. XXVII, pp. 98-102; ch. XXXV, p. 147.

³⁹ W. Twining, *Theories of Evidence: Bentham and Wigmore*, Weidenfeld & Nicolson, London 1985, pp. 66-75.

⁴⁰ Beccaria, *Crimes and Punishments*, cit., ch. XXX, p. 122, compare with Bentham's commentary at UC cxl. 1.

⁴¹ *Ibidem*, chs. III-IV, pp. 10-17; ch. XXIX, pp. 117-118, cf. UC cxlix. 6

⁴² *Ibidem*, ch. VI, p. 23, cf. UC clxix. 23, 35.

⁴³ *Ibidem*, ch. VIII, p. 30, cf. UC cxl. 19-20.

⁴⁴ *Ibidem*, ch. XIX, p. 78, cf. UC cxl. 4-5.

⁴⁵ *Ibidem*, ch. XXII, p. 83, cf. UC cxl. 10.

⁴⁶ *Ibidem*, ch. XXIII, pp. 85-7, cf. UC cxl. 6-7.

the way in which Beccaria's ideas influenced Bentham's approach to penal theory, and hence to penal theory not only in England, but everywhere that Bentham's ideas were transmitted.

A further striking example where Bentham expands on a hint in Beccaria is in relation to sexual morality. According to the précis of *Not Paul, but Jesus* mentioned above, Bentham proposed to discuss the attitudes displayed by Hume, Voltaire, and Beccaria to «irregular» sexual practices. Bentham had been struck by Beccaria's attitude to homosexuality, which, like that of Hume and Voltaire, appeared to be more forgiving than most of his contemporaries⁴⁷. In the passage beginning «L'Attica Venere» mentioned above, Beccaria suggested that sexual activity between males occurred in «those public seminaries, where ardent youth are carefully excluded from all commerce with the other sex», and it was, therefore, little wonder that «the vigour of nature» was «consumed in a manner [...] useless to mankind». Beccaria's point was that it would be unjust to punish such activity given that the young men in question had been placed in this situation by the laws themselves. Bentham went much further than Beccaria in advocating sexual freedom, calling for the removal of punishment, and indeed of moral condemnation, from all forms of consensual sexual activity. Nevertheless, he seems to have appreciated the liberal sentiments that informed Beccaria's position, compared to the traditional Christian view that sexual activity should be restricted to one male and one female within marriage, for the procreation of children, and the position under English law where «the crime against nature» was subjected to the death penalty, and William Blackstone had described it as a crime of «a still deeper malignity» than rape⁴⁸. It is also worth noting that Beccaria went on to sympathize with the plight of the unmarried mother, who, being faced with the choice between «her own infamy, or the death of a being who is incapable of feeling the loss of life», was tempted to commit infanticide⁴⁹. In material written around the same time as the third volume of *Not Paul, but Jesus*, Bentham noted that, given the present state of public opinion, it would be better for an illegitimate child to be killed than for the mother to be shunned by society, forced into prostitution, become diseased, and face an early death. Bentham made a point strikingly similar to that made by Beccaria: «Supposing the discovery made, the whole life of the woman will but too probably be a life of bitterness: by the being whose life is finished as

soon as begun, pain will not be felt in any shape, there not being a time in which it can be felt»⁵⁰.

V.

The title of the present essay is a partial quotation. The full quotation, which appears in a manuscript of 4 August 1819 written for a section entitled «French Philosophers» in *Book of Fallacies* is as follows:

*By the little work of Beccaria – though, unless succeeding labours in the same vinyard have been fruitless, much instruction would not at present be to be reaped from it, the first steps rightly-directed were made in the track of penal legislation. He too was of the number of the French Philosophers: he, as the last edition of his book shews, was invited by them to Paris from his native Italy, and received by the whole fraternity with open arms*⁵¹.

Two points are worth remarking upon. The first is Bentham's association of Beccaria with the French Enlightenment, with which he allied himself⁵². We have seen how Bentham linked himself with Helvétius and Beccaria in taking the principle of utility as the sole standard of right and wrong. The second was the fact that he thought that all that was worthwhile in Beccaria could now be found in his own work. He perhaps felt entitled to say this because he had worked through *Crimes and Punishments* in minute detail in his formative years and had assimilated all that he had considered valuable. In relation to this second point, in the first of his «Letters to Lord Pelham», written in 1802 with a view to highlighting the deficiencies of transportation to New South Wales as a mode of punishment when compared with his proposed panopticon prison scheme, Bentham identified five ends or objects of punishment: first, example (by which he meant deterrence); second, reformation; third, incapacitation; fourth, compensation; and fifth, economy. The first four (which were «direct» ends) he had taken «from Blackstone and from everybody»⁵³, while he himself had added the fifth

⁵⁰ Bentham, *Of Sexual Irregularities*, cit., pp. 7, 100.

⁵¹ J. Bentham, *The Book of Fallacies*, ed. by P. Schofield, Clarendon Press, Oxford 2015, p. 483. For Beccaria's visit to Paris in the autumn of 1766 see Beccaria, *Crimes and Punishments*, ed. Bellamy, cit., p. xxxii.

⁵² For Bentham's relationship to the general Enlightenment movement in favour of legal and in particular penal reform see E. de Champs, *Enlightenment and Utility: Bentham in French, Bentham in France*, Cambridge University Press, Cambridge 2015, pp. 55-91.

⁵³ Blackstone, *Commentaries on the Laws of England*, cit., IV, pp. 11-12, states that the end of punishment is to prevent future offences either by means of «amendment of the offender himself», or «by the dread of [...] example», or «by depriving the party injuring of the power to do future mischief»: in Bentham's terms, by reformation, or example, or incapacitation.

⁴⁷ Bentham, *Of Sexual Irregularities*, cit., p. 141 & n.

⁴⁸ W. Blackstone, *Commentaries on the Laws of England*, 4 vols., Clarendon Press, Oxford, 1765-1769, vol. 4, p. 215.

⁴⁹ Beccaria, *Crimes and Punishments*, cit., ch. XXXI, pp. 131-132.

(which was the «indirect» end)⁵⁴. He might have more properly said «from Beccaria», but perhaps he had his English readership in mind when mentioning Blackstone, in that the latter's name would have had more immediate resonance with them. In *Crimes and Punishments* Beccaria had stated:

*Crimes of less importance are commonly punished, either in the obscurity of a prison, or the criminal is transported, to give, by his slavery, an example to societies which he never offended; an example absolutely useless, because distant from the place where the crime was committed*⁵⁵.

Bentham's arguments in condemnation of transportation to New South Wales were in effect an elaboration of a basic point that had been made by Beccaria nearly forty years earlier. Nor should it be overlooked that there are hints in Beccaria about the need to improve prisons, a project to which Bentham devoted a decade of his life with his panopticon prison scheme. Nevertheless, in Bentham's estimation, all that was valuable in Beccaria had been incorporated into his own thought.

VI.

The way in which Bentham extracted the four elements of intensity, duration, certainty, and propinquity from Beccaria's work is a suggestive example of the keenly critical awareness with which Bentham read Beccaria, extracting what suited him in order to form a more coherent, complete, and consistent system of his own. It also implies that Bentham had an underlying methodology by which he was able to recognize those elements in Beccaria – and other writers – which he found it appropriate to adopt, and those which he needed to reject. This point is related to the fact that the principle of utility did not lie at the foundation of Bentham's thought, or at least was not its sole foundation, but was itself developed as part of a broader ontology, expounded most fully in his writings on logic and language in the mid-1810s, but present from at least the early 1770s. H.L.A. Hart speculated that Beccaria had anticipated Bentham's ideas in this respect in the following sentence in *Crimes and Punishments*: «We should be cautious how we associate with the word *justice*, an idea of any thing real, such as a physical power, or a being that actually exists»⁵⁶. Bentham argued that proposi-

tions only made sense insofar as they could ultimately be related to substances, that is to «real entities», existing in the physical world. Hence, for Bentham, the term «justice» designated a «fictitious entity», since there was no physical thing corresponding to justice. The notion of justice made sense when it appeared in a sentence which could be translated into another sentence that did bear reference to physical things or «real entities», a process that Bentham termed «paraphrasis». Bentham would have agreed with Beccaria about justice, but not with his statement that «a physical power» was a real thing, since «power» was as much a term that represented a fictitious entity as «justice». Although Beccaria's influence on Bentham in relation to both his utilitarianism and his theory of punishment was profound, it is implausible to think that such a short hint in Beccaria could have given rise to Bentham's most important philosophical discovery. In some of the passages in which Bentham acknowledged his debt to Helvétius and Beccaria, he also stated that he found the notions of real and fictitious entities in d'Alembert⁵⁷; where he found the notion of paraphrasis remains unknown, unless it was, as he claimed, his own invention⁵⁸. Rather than attribute Bentham's logic and language to a single sentence in Beccaria with which Bentham would only have partly agreed, it seems more plausible to suggest that the similarity resulted from the fact that both Bentham and Beccaria were drawing on John Locke's theory of language. Bentham was influenced by Locke, though he went beyond Locke with his notion of «paraphrasis». Hence, it was Bentham's ontology and epistemology that gave him the critical perspective that allowed him to decide which elements he wished to take from other writers, such as Beccaria, in order to build up his own system⁵⁹.

One final point is worth making. Henry Sidgwick, usually recognized, along with Bentham and John Stuart Mill, as the third of the triumvirate of great classical utilitarian philosophers, claimed that Bentham was the pre-eminent representative of the Enlightenment and that Benthamism was «the legacy left to the nineteenth century by the eighteenth», being the force against which the new «philosophy of Restoration and Reaction

Ogden in the 1930s, but is a misleading and inaccurate expression, since it confuses the notion of a fiction (a lie) with that of the name of a fictitious entity (an abstract term). This confusion has been repeated in much of the Bentham scholarship in the last fifty years.

⁵⁷ UC xxvii. 144, 148.

⁵⁸ See BL Add. MS 33,550, fo. 4-5, reproduced in Bowring, *The Works of Jeremy Bentham*, vol. III, p. 286.

⁵⁹ For Bentham's theory of real and fictitious entities see P. Schofield, *Utility and Democracy: the Political Thought of Jeremy Bentham*, Oxford University Press, Oxford 2006, pp. 1-27.

tation. Blackstone did not mention compensation in this context.

⁵⁴ Bowring, *The Works of Jeremy Bentham*, cit., vol. IV, p. 174.

⁵⁵ Beccaria, *Crimes and Punishments*, cit., ch. XIX, p. 78.

⁵⁶ *Ibidem*, ch. II, p. 9. Hart refers to Bentham's «theory of fictions», which was the name given to this aspect of Bentham's thought by C.K.

has had to struggle continually with varying success»⁶⁰. The eighteenth-century Bentham, influenced by the radical French Enlightenment, but then seeing on the one hand the emergence of stable democracy in America and on the other hand the rejection of his panopticon prison and other schemes by the British political establishment, was transformed into the politically radical Bentham of the nineteenth century, advocating at first «democratic ascendancy» within the British Constitution, and then a democratic republic, stripped of monarch, aristocracy, and established church⁶¹. As J.H. Burns expressed it, Bentham's career can be characterized as a move from «radical Enlightenment» to «democratic radicalism»⁶². The hopes of the Enlightenment for a rational basis for social organization, which seemed to have been dashed by the excesses of the French Revolution, were kept alive and given systematic form, appropriate for a democratic, liberal age, by Bentham's programme for political, legal, and ecclesiastical reform, which, at the same time that it aimed to promote the interest of the community as a whole, did not threaten, at least in the short to medium term, the existing distribution of property. If Bentham was indeed the main channel for this transmission, then a significant part of the content of that transmission was inspired by Beccaria.

⁶⁰ H. Sidgwick, *Bentham and Benthamism in Politics and Ethics*, in Id., *Miscellaneous Essays and Addresses*, Macmillan, London 1904, p. 136 ff.

⁶¹ See Schofield, *Utility and Democracy*, cit., pp. 109-170, 221-249.

⁶² J.H. Burns, *Jeremy Bentham: from Radical Enlightenment to Philosophical Radicalism*, «Bentham Newsletter», VIII, 1984, pp. 4-14.