

CLASSICAL
UTILITARIANISM
FROM HUME TO
MILL

Frederick Rosen

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CLASSICAL UTILITARIANISM FROM HUME TO MILL

This book presents a new and controversial analysis of the idea of utility, its role in the foundation of morality, and its connection with justice and liberty, from Hume's *Enquiry concerning the Principles of Morals* to J.S. Mill's *On Liberty* and *Utilitarianism*.

The book is situated within the philosophical context of the earlier Epicurean tradition with its emphasis on pleasure, pain and utility on which the main figures discussed in this book – Hume, Smith, Helvétius, Bentham, Paley, and J.S. Mill – drew. The author defines a classical utilitarian tradition, which in turn is defended as a coherent context for understanding important arguments in moral and political philosophy concerned with justice, rights, liberty, individuality, equality, and democracy.

Classical Utilitarianism from Hume to Mill utilizes a number of disciplines, such as moral and political philosophy, political and social theory, intellectual history, the history of philosophy, and the history of economic thought to present a unique study in two parts. Part I includes chapters on such topics as the major figures in the Scottish and French Enlightenments, Smith and Bentham on the entrepreneur, the religious utilitarianism of Paley, and Mill's critique of Carlyle and the defence of Bentham. Part II defends classical utilitarianism against a number of common contemporary criticisms concerned with the punishment of the innocent, the sacrifice of some for the happiness of others, democratic despotism or majority tyranny, and the impoverished state of negative liberty.

Frederick Rosen is Professor of the History of Political Thought at University College London. He has served as General Editor of *The Collected Works of Jeremy Bentham*, Director of the Bentham Project, and Director of the Centre for Politics, Law and Society at UCL. Among his books are *Jeremy Bentham and Representative Democracy* (1983) and *Bentham, Byron and Greece: Constitutionalism, Nationalism, and Early Liberal Political Thought* (1992). He has co-edited several books, was the founding editor of *Utilitas*, and has contributed numerous articles to various learned journals.

ROUTLEDGE STUDIES IN ETHICS AND
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THE CONTRADICTIONS OF MODERN MORAL SOCIETY

Ethics after Wittgenstein

Paul Johnston

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TO THE MEMORY OF
H.L.A. HART (1907–1992) AND
JOHN M. ROBSON (1927–1995)

CONTENTS

<i>Preface</i>	<i>x</i>
<i>Abbreviations</i>	<i>xiii</i>

1 Introduction	1
<i>The aims of the book</i>	<i>1</i>
<i>Some notes for moral philosophers</i>	<i>3</i>
<i>A briefer note for political and legal theorists</i>	<i>9</i>

PART I

2 Utility and justice: Epicurus and the Epicurean tradition	15
<i>Epicurus and ancient Epicureanism</i>	<i>16</i>
<i>Gassendi and modern Epicureanism</i>	<i>19</i>
<i>Gassendi's influence</i>	<i>23</i>
<i>Epicureanism in Grotius and Pufendorf</i>	<i>25</i>
3 Reading Hume backwards: Utility as the foundation of morals	29
<i>Utility in the Enquiry and Treatise</i>	<i>31</i>
<i>The foundational role of utility</i>	<i>33</i>
<i>Benevolence, justice and utility</i>	<i>39</i>
<i>Utility and morality</i>	<i>45</i>
<i>Enquiry versus Treatise</i>	<i>47</i>
<i>Hume and Bentham</i>	<i>48</i>

4	The idea of utility in Smith's <i>The Theory of Moral Sentiments</i>	58
	<i>Utility and justice</i>	60
	<i>Smith and Hume on justice</i>	65
	<i>Smith on utility: illusion and reality</i>	67
	<i>Smith, Hume, and philosophical systems</i>	76
	<i>Smith and Bentham</i>	80
5	Helvétius, the Scottish Enlightenment, and Bentham's idea of utility	82
	<i>Hume, Smith, and Helvétius</i>	83
	<i>The role of the legislator</i>	86
	<i>Utility and virtue</i>	88
	<i>Helvétius and Bentham</i>	92
	<i>De l'homme</i>	93
	<i>Conclusion</i>	95
6	The idea of utility in Smith's <i>Wealth of Nations</i>	97
	<i>The 'invisible hand'</i>	99
	<i>Unintended consequences and the division of labour</i>	104
	<i>Liberty</i>	106
	<i>Labour, liberty, and the progressive state</i>	110
7	Bentham and Smith on liberty	114
	<i>The opposition to Bentham</i>	116
	<i>Defence of Usury and Bentham's other writings</i>	118
	<i>Bentham's critique of Smith</i>	121
	<i>Bentham's title</i>	129
8	William Paley as a utilitarian	131
	<i>Utility</i>	134
	<i>Liberty</i>	137
	<i>Conclusion</i>	142
9	Liberty, utility, and the reform of the criminal law	144
	<i>Liberty and the criminal law</i>	144
	<i>Crime and punishment in Beccaria</i>	147
	<i>Bentham's theory of proportion</i>	152
	<i>The debate over the death penalty</i>	157
	<i>Transportation and imprisonment</i>	160
	<i>Enlightenment and reform</i>	162

10 J.S. Mill's hedonism	166
<i>Mill and Carlyle</i>	169
<i>The Epicurean tradition</i>	172
<i>Quantity and quality</i>	174
<i>Socrates dissatisfied</i>	180
11 J.S. Mill on justice and liberty	185
<i>Justice and utility</i>	186
<i>Justice and liberty</i>	193
<i>Liberty and the fragility of truth</i>	200
PART II	
12 Punishment of the innocent	209
<i>The idealist background</i>	211
<i>The post-utilitarian paradigm</i>	214
<i>The rejection of utilitarianism</i>	219
13 Individual sacrifice and the greatest happiness	220
<i>Bentham's ultimate principle</i>	221
<i>The status of pleasure and pain</i>	223
<i>Secondary principles and rights</i>	225
<i>Maximize and minimize</i>	226
<i>Equality and rights in Bentham and Mill</i>	228
14 The tyranny of the majority	232
<i>Majorities and minorities in practice</i>	232
<i>Interests, security, and equality</i>	234
<i>Popular sovereignty and majority rule</i>	237
<i>Democratic despotism</i>	238
<i>Tyranny of the majority</i>	241
15 Negative liberty	245
<i>Negative liberty in Hobbes and Bentham</i>	246
<i>Bentham and Berlin on civil and political liberty</i>	249
<i>Liberty and democracy</i>	251
<i>Negative liberty worth fighting for</i>	254
<i>Notes</i>	256
<i>Bibliography</i>	264
<i>Index</i>	280

PREFACE

This book attempts to correct a number of misleading views of classical utilitarianism common among philosophers, legal and political theorists, historians of economic thought, and intellectual historians. It does so by restating the arguments first developed by the major thinkers in this tradition, such as Hume, Smith, Helvétius, Paley, Bentham, and J.S. Mill. Although the book does not attempt a formal defence of utilitarianism, it will provide some of the ingredients for such a defence. These will be found particularly in the numerous discussions of pleasure and pain, taken initially from the Epicurean tradition, and in the account of the connections between utility, justice, and liberty, as developed by these thinkers. In addition, some commonly-held beliefs about defects in this tradition will be shown to be without foundation. It is assumed throughout the book that classical utilitarianism embodies a very rich tradition of philosophical reflection, particularly in ethics and politics, which has tended to be overlooked or simply dismissed by contemporary philosophers.

The main account of classical utilitarianism appears in Part I below. Nearly all of the chapters have been written especially for this book, and those that have been presented as seminar papers and/or articles have been revised. I am grateful to Imprint Academic for permission to use material for chapter 2, which appeared in ‘Utility and Justice: Epicurus and the Epicurean Tradition’, *Polis*, 19 (2002): 93–107; and to Elsevier Science Ltd. for material for chapter 4, which appeared as ‘The Idea of Utility in Adam Smith’s *Theory of Moral Sentiments*’, *History of European Ideas*, 26 (2000): 79–103.

Part II contains four essays, exploring common criticisms of the classical utilitarian tradition, all of which have been published before, but have been revised for this book. Chapter 12 considers the criticism of utilitarianism that it allows for or even requires the punishment of the innocent, and chapter 13 takes up the theme of the sacrifice of some people to achieve the greater happiness of others or of the whole community. These appeared in *Utilitas* as ‘Utilitarianism and the Punishment of the Innocent’, 9 (1997): 23–37, and ‘Individual Sacrifice and the Greatest Happiness: Bentham on Utility and Rights’, 10 (1998): 129–43. My thanks to the editor and to Edinburgh University Press for permission to use this material. Chapter 14 considers the view that some forms of utilitarianism lead to

a tyranny of the majority, and was originally published in NOMOS XXXIII on *Majorities and Minorities*, ed. J.W. Chapman and Alan Werthheimer, by New York University Press in 1990. This material also appears here with the kind permission of the editors and publisher. The final chapter on ‘Negative Liberty’ first appeared as my Inaugural Lecture at University College London in 1990 entitled *Thinking About Liberty*. The essay explores the idea of liberty in utilitarianism through a consideration of Isaiah Berlin’s own inaugural lecture, *Two Concepts of Liberty*. Professor Berlin very kindly read the published version of the original lecture and sent me numerous comments on its arguments.

In writing this book I have been fortunate to receive much assistance and wish to thank: Brian Barry, J.H. Burns, Stephen Conway, the late Maurice Cranston, James Crimmins, Roger Crisp, Kyriakos Demetriou, Tony Draper, Robert Faulkner, Knud Haakonssen, Frits van Holthoon, Ted Honderich, Paul Kelly, David Lieberman, Douglas Long, Harvey Mansfield, James Moore, Peter Nicholson, Kevin O’Rourke, D.D. Raphael, Jonathan Riley, Isobel Rivers, Alex Rosen, Philip Schofield, Geoffrey Thomas, William Twining, Georgios Varouxakis, David Weinstein, Donald Winch, and David Wootton. I am particularly indebted to Roger Crisp for comments on a number of chapters, including those on Mill; to James Moore for opening the door to the modern Epicurean tradition and, especially, in relation to Hume; to Kevin O’Rourke for much assistance with Mill; to David Raphael for advice and assistance on Hume and Smith; and to Philip Schofield for listening to, reading, and discussing a number of chapters regarding Bentham. Nevertheless, I am solely responsible for the arguments that appear here.

A number of scholars have facilitated the initial presentation of my ideas. I am indebted to members of the Japanese Society for Utilitarian Studies and the Anglo-Japanese Research Committee, and, in particular, to Yoshio Nagai, Naobumi Hijikata, Michihiro Otonashi, Yasunori Fukagai, Daisuke Arie, and Kayoko Kondo for hospitality and the opportunity to present some of the materials included here in the form of seminar papers. Thanks are also due to Jose de Brito y Sousa, Oren Ben Dor, Manuel Escamilla, Esperanza Guisan, Ross Harrison, and Gary McDowell for other opportunities to discuss my ideas. I am grateful to Mrs. Kate Barber for her kindness and considerable expertise in assisting with the presentation of the text, and to members of the Bentham Project for their assistance and encouragement. I wish to thank my family (Maria, Greg, and Alex) for yet again providing me with the space and time to work on such a large project. Much of this book, like several others, was written while residing in the little Dartmoor village of Peter Tavy. I am grateful to my neighbours in the Coombe, including the Collins, Hacker, Walker, and White families and to the Dodd and Ball families in the village for innumerable acts of kindness. In London a good deal of the research was carried out at the new British Library, where I received courteous assistance and efficient service.

Finally, I wish to dedicate this book to the memory of two scholars who have had a great influence on my work in this field: Professor H.L.A. Hart first taught

PREFACE

me to take Bentham seriously as a philosopher, though he emphasized Bentham the jurist rather than Bentham the utilitarian. Professor John M. Robson taught me that detailed editorial work can be the basis of important scholarly insight. The great Toronto edition of Mill's works has been of immense value in numerous chapters of this book, and has served as a model of scholarship at the highest level.

Frederick Rosen
University College London
December 2002

ABBREVIATIONS

<i>DU</i>	Jeremy Bentham, <i>Defence of Usury</i>
<i>Enquiry</i>	David Hume, <i>An Enquiry concerning the Principles of Morals</i>
<i>IPML</i>	Jeremy Bentham, <i>An Introduction to the Principles of Morals and Legislation</i>
<i>TMS</i>	Adam Smith, <i>The Theory of Moral Sentiments</i>
<i>Treatise</i>	David Hume, <i>A Treatise of Human Nature</i>
<i>UC</i>	Bentham Manuscripts, University College London
<i>WN</i>	Adam Smith, <i>An Inquiry into the Nature and Causes of the Wealth of Nations</i>

INTRODUCTION

The aims of the book

The object of this book is to present an account of the idea of utility roughly from Hume's *Enquiry concerning the Principles of Morals* to J.S. Mill's *Utilitarianism* that is historically accurate and philosophically significant. Its starting point is the counter-intuitive idea that utility can somehow stand as the foundation of morality and particularly of justice, an idea adopted by all the thinkers considered here and taken by them from earlier writers within the Epicurean tradition. It was initially counter-intuitive in that what had appeared to be an absolute idea like justice with universal application, particularly in the form of natural justice, was placed on what seemed to be a less firm foundation of utility, which had been regarded as subject to change according to circumstances and over time. That utility could play this foundational role in morals and legislation and, furthermore, that human happiness, based on pleasure and the absence of pain, could underpin such a notion, was the doctrine on which classical utilitarianism is based. My objects in this book are both to show how this extraordinary doctrine became a philosophical commonplace and to examine its distinctive features in a series of writers, such as Hume, Smith, Helvétius, Paley, Bentham, and J.S. Mill.

The most important argument running throughout the book concerns the connection between justice and liberty. Once freed from its traditional philosophical foundations, justice in the modern Epicurean tradition gave way to liberty, first to ideas of civil liberty and free markets, and then to the rejection of paternalism and the cultivation of individuality, culminating in Mill's *On Liberty*. The task of justice ceased to be one that ordered and directed the other virtues in private and public life and became a system of rules in which liberty could flourish and happiness could be realized.

In setting forth this theme, concerned with the connections between utility, justice, and liberty, a number of related themes have been developed. Some of these are mainly historical and others are philosophical. The historical themes are focused on the establishment of an eighteenth-century context for classical utilitarianism, and this task proved to be more difficult than I anticipated. Most

Hume and Smith scholars have denied that any significant link exists between the use of the idea of utility in Hume and Smith on the one hand and what became ‘utilitarianism’ in Bentham and Mill on the other. A good deal of attention has been given in the early chapters to challenge this widespread, though mistaken, view. In the process I have tried to liberate Hume and Smith from their fairly recent historical imprisonment within the so-called ‘Scottish Enlightenment’. Furthermore, few writers on Hume and Smith see much continuity even between the two philosophers regarding their adoption of the idea of utility. To establish a view of classical utilitarianism connecting eighteenth- and nineteenth-century philosophers, it was also necessary to establish a common interest in and account of utility in Hume and Smith.

The importance of utility was not, however, a discovery of the eighteenth century, but emerged out of an earlier Epicurean tradition which developed in antiquity but flourished in a peculiarly modern form in philosophical and scientific circles in the seventeenth and early eighteenth centuries. Early modern Epicureanism is briefly discussed in the next chapter, where I attempt to show the distinctive role given to utility by Gassendi and numerous British followers. This material is important for showing how utility entered modern philosophical thought and, additionally, for providing an explanation of how substantial variations within the classical utilitarian tradition emerged in the eighteenth century. That Hume, Smith, Helvétius, and Paley could use utility to develop different arguments is explained in terms of their drawing on this older Epicurean tradition in different ways.

The hitherto missing link in this account of classical utilitarianism is provided here by giving a new interpretation of Bentham’s utilitarianism. It differs substantially from the caricature of classical utilitarianism found in contemporary moral and political philosophy, that is to say, a philistine act utilitarianism that allows for punishing the innocent, the sacrifice of some for the happiness of others, and leads to the tyranny of the majority. My interpretation also enables one to see clear links with Hume and Smith regarding utility, justice and liberty on the one hand and great continuity between Bentham and Mill regarding similar themes on the other. The commonplace view that Mill superseded Bentham’s highly limited doctrine is challenged and shown to be false in two substantial chapters on Mill. The view that Bentham did not share with Hume and Smith a common eighteenth-century context regarding pleasure and pain and utility is also rejected.

Throughout this book reference is often made to the ‘Enlightenment’, which forms another context for the writers considered here. This is particularly the case in the chapter on Helvétius, where an emphasis is placed on the French Enlightenment, and in those chapters on Hume and Smith where commentators evoke the Scottish Enlightenment. I have no strong objection to the use of this context to interpret the writers discussed in this volume, as in practice a reference to the Enlightenment is a reference to eighteenth-century European thought. It becomes unhelpful when it refers to some exclusive linguistic or

cultural markers, as if there could be an Enlightenment that is either wholly or solely French or Scottish. On the contrary, I have been struck by the speed and tenacity which writers have exhibited in making contact with their counterparts in other countries and in developing and communicating new ideas. In this sense there is no French or Scottish Enlightenment. Another point worth noting is that while many scholars stress the ‘rationalist’ character of the Enlightenment, the writers in the Epicurean tradition considered here stress the primacy of feeling, particularly feelings of pleasure and pain, as the basis of morality and politics, and place an equal emphasis on the passions as the basis of motivation and action. The idea of an enlightenment based wholly or mainly on reason is foreign to these writers.

There are numerous thinkers within the utilitarian tradition who have been omitted from this book, mainly because space and time did not allow me to go further. The Epicurean tradition in the seventeenth and early eighteenth centuries is covered in a highly compressed manner with numerous writers, like Gassendi, Bayle, Hobbes, Locke, and others, receiving very brief attention or none at all. The so-called theological utilitarians, except for Paley, are merely mentioned, and numerous important writers, such as Hartley, Hutcheson, Priestley, Godwin, and James Mill, are virtually ignored. In addition, different disciplines tend to place their emphases on different writers and themes. Those scholars within the discipline of English literature are perhaps more concerned with the on-going tension between Stoicism and Epicureanism than other scholars. Moral philosophers tend to emphasize Hume and Mill rather than Smith, and historians of economic thought are concerned with Smith rather than Hume. Jurists consider Blackstone, Bentham, and Austin, but seldom Hume or Mill. In moving from one discipline to another one encounters different disputes about ideas, relevant texts, and particularly about contexts. I have tried to draw on as many of these disciplines as possible, as they represent the most important and vibrant approaches to the modern Epicurean and utilitarian tradition. Historians of economic thought will find most to interest them in the chapters on Smith and Bentham; moral philosophers might find most in the two chapters on Mill, while intellectual historians might be most interested in the material on Hume and Smith. Nevertheless, the book as a whole has a single theme in connecting utility, justice, and liberty, and this theme is developed in all of the chapters.

Some notes for moral philosophers

Among the major obstacles to understanding classical utilitarianism are a number of misleading assumptions common in contemporary discussions. These assumptions are not necessarily false in their own contexts, but they serve to prevent one from grasping important features of the classical doctrine. We shall examine some of them here, without any intention to criticize the ideas, but to point out how much classical utilitarianism differs from its more recent offspring.

(1) A recent preoccupation among moral philosophers (less so now than thirty to fifty years ago) has been concern with the extent to which the ultimate principles of a given system are amenable to some sort of proof. So strong was this concern that the subject of ethics developed a separate branch, called 'meta-ethics', where these questions were discussed. The importance of these concerns, however quaint some of them may seem nowadays, cannot be denied. If ethics is not amenable to proof, how does one prefer one system to another. If all that remains is subjective intuition, philosophical argument in ethics must be severely constrained and reduced to the more limited task of the analysis of language and argument and to the consideration of theories in some sort of ideological context (e.g. liberal theory, rights theory, Marxism, republicanism, etc.).

Classical utilitarianism was among the earliest modern doctrines that insisted that ultimate principles (in this case the principle of utility) could not be subject to proof (see, for example, Bentham 1996: 13). In developing this position it was argued that those ethical systems that relied on divine revelation, natural law, the state of nature, reason, understanding, etc., as forms of *proof*, were mistaken and were simply different ways of referring to the ultimate preferences of the various authors who employed such terminology. Nevertheless, the classical utilitarians did not abandon the principles of ethics and politics to gut reaction, rhetoric, and prejudice, as they insisted on the *objectivity* of their theories as opposed to the *subjectivity* they ascribed to their opponents. Such an insistence is at the heart of the empiricism and the analytical rigour that is often found in utilitarian philosophy.

In the concern with proof in meta-ethics the issue of objectivity has tended to be overlooked. The starting point in classical utilitarianism is that everyone (arguably all sentient creatures) experiences pleasure and pain, and while this experience is inevitably a subjective one, it forms the basis of the empirical orientation of the theory. There is no need to look to nature or to God to determine whether or not an action or law is right or wrong. The reference should be to the feelings of those people who are affected by the action or law, and these feelings can be determined by asking those who are affected to express their feelings via the electoral system or through public opinion. The empirical side of ethics thus has its foundation in responses to pleasure and pain, and not, as is often assumed today, particularly among rational choice and social contract theorists, in a presumed common rationality that few in fact share. Utility enters into the equation primarily by its association with pleasure and pain, and it enables members of a community to assess the practical value of objects, practices, laws, institutions, theories, etc., to their lives in an objective fashion. Is it useful? Does it make us happy, or, at least, less unhappy? These questions may be answered with greater or lesser precision.

What is important is that they can be discussed by everyone and discussed in a way that allows for argument and empirical investigation. Debate does not end, as it would with the invocation of God's will or natural law. Answers to questions may well change over time, and, indeed, so might the questions. The answers to

most moral and political questions are highly complex. For example, is death the appropriate punishment for murder? For most classical utilitarians this question was an important one to which different answers were given by different authors and by the same authors at different times in their lives. But the answers were presented in an objective fashion with due concern for a wide variety of factors. The definition of offences, such as murder, and the consideration of distinctions between it and other offences, the consideration of alternative punishments or the possibility of reform and rehabilitation, the widespread popularity of the death penalty, the question of deterrence, and numerous other issues can be raised. But the discussion has an objective character in terms of an assessment of its utility in relation to human happiness. In what sense does the death penalty bring happiness to a particular community by adding to its pleasures or by reducing its pains? Although the ultimate principles may not be amenable to proof, the question of the utility of a law or practice is subject to objective discussion and resolution. The capacity for objectivity is different from a capacity for rationality and may be ascribed to most people without regard to intelligence and philosophical skill.

(2) A second misleading assumption is concerned with the distinction between hedonistic and non-hedonistic utilitarianism often employed to distinguish between the ethical theories of Bentham and G.E. Moore with J.S. Mill reckoned to occupy some intermediate position between the two. This distinction is foreign to the classical utilitarians, all of whom were hedonists who would consider the links between utility, pleasure and pain as providing the coherent foundations to their systems. Although problems within hedonism have been recognized since Cicero's critique of Epicureanism in *de Finibus*, if not earlier in various Platonic dialogues and in Aristotle's writings (e.g. the comparability between the reduction of pain as a pleasurable experience and the positive enhancement of pleasure, or the distinction between good and bad pleasures), the doctrine has by no means been discredited. But in admitting non-hedonistic utilitarianism as a category, one inevitably shifts the focus away from hedonism. What has replaced hedonism in the process is consequentialism, and a commonplace among utilitarians is the assertion that the rightness of acts is to be judged mainly by their consequences.

A concern for the consequences of actions, of course, plays a role in all approaches to ethics, including that of the classical utilitarians. The latter emphasize consequences, because the consequences of rules and actions are often open to objective assessment as to their usefulness. But classical utilitarians have never confined themselves to assessing consequences and take numerous other aspects of the human condition into consideration, such as motives, intentions, dispositions, virtues, circumstances, the will, passions, feelings, and habits. To focus on consequences alone, as the essence of utilitarianism, not only deprives the doctrine of its most important elements, but also seems to raise more questions than can be resolved, particularly if one is involved in assessing consequences for all mankind, sentient creatures, future generations, the

universe, and imagined universes running in parallel with our own, tracing out all possible consequences of each action. Not only is much discussion at this level pointless, but it also represents an unwarranted and unsubstantiated shift of focus away from hedonism.

(3) Much of the debate over hedonism within contemporary utilitarianism is usually based on a distinction between qualities and quantities of pleasure. This distinction is derived from a mistaken view (see chapter 10 below) of the utilitarianism of Mill and Bentham respectively. The distinction has been considered so important that it has led to the development of different kinds of utilitarianism (qualitative versus quantitative). Among opponents of utilitarianism generally the distinction has been used to discredit Bentham (for philistinism), Mill (for inconsistency), and hedonism generally. But pleasure and pain are at the heart of classical utilitarianism. The use of both quantitative and qualitative distinctions in the estimation of pleasures and pains has also been part of the Epicurean tradition since antiquity. The only difference between various advocates of utility as the foundation of morals is the extent to which they acknowledge a liberty in individuals to evaluate and estimate their own experiences of pleasure and pain. Hume, Smith, Bentham, and Mill are the strongest advocates of this liberty. By incorporating liberty into their hedonism, many of the problems developed within contemporary utilitarianism regarding quantities and qualities of pleasure simply disappear. So long as each person counts for no more than any other, it is up to each to choose which pleasures to value most and which pains to avoid. Such personal evaluations of pleasure and pain may be studied empirically by those concerned and by others.

Some recent writers on utilitarianism have expressed fears over the possible use of machines to deliver electronically based sensual pleasure to the brain on demand that would reduce humans to utter passivity and in the process maximize pleasure and happiness. It has been feared that even the human race might die out, leading ultimately to a great reduction in happiness (see Smart 1973: 19ff). Alternatively, one can distinguish between the mere contentment felt by a creature of few capacities and a great creative genius whose pleasures are obtained at great personal cost and through considerable pain (see Crisp 1997: 23–5). These examples are believed to pose serious problems for a hedonistic approach to ethics.

None of this is particularly relevant to classical utilitarianism. In arguing that each adult person should be free to experience and evaluate pain and pleasure for him- or herself, the classical utilitarians placed great emphasis on individual liberty in numerous spheres from freedom of thought and expression to freedom of action (so long as one did not cause pain to others). Once accustomed to live without paternalism, this emphasis on individual liberty itself becomes a great source of pleasure. Despite the concern of contemporary utilitarians, one suspects that individuals would soon become bored with electronic pleasure machines. Far more important are the pleasures associated with being treated as an adult individual and possessing the freedom to choose one's own pleasures

and pains. Classical utilitarianism culminates in Mill's *On Liberty*, and one important object of this book is to explain why this is so. Recent writers on utilitarianism often miss the point either by their concern with different kinds of pleasure and satisfaction or by assuming that there is some sort of inevitable conflict between liberty and hedonism within a utilitarian system.

(4) Another misleading assumption is based on the distinction between act and rule utilitarianism and their treatment as contrasting doctrines. Some argue that rule utilitarianism ultimately collapses into act utilitarianism or leads to rule worship, while others see rule utilitarianism as providing a reprieve for an otherwise incoherent utilitarianism. In classical utilitarianism, however, no such contrast is emphasized and utility may be applied to acts, rules, conventions, laws, customs, etc. without discrimination. The importance of utility within the Epicurean tradition emerges first, however, as will be spelled out in chapter 2, in connection with rules of justice. Despite their production of pain to some, we learn to accept the rules of justice, because they create great happiness in society. Criminals are punished, property is secure, rights to life and liberty are respected – equally – throughout society. To speak of justice in this context requires one to deal with acts as well as rules. We consider the act of taking money from a miser, without consent, and giving it to an entrepreneur who will use it for the greater benefit of mankind, though of some utility, ultimately of less utility than maintaining the rules of justice that secure property to its owners. The confiscation of property generates an enormous amount of pain so that few benefits would arise in society to compensate one for its confiscation following a violation of the rules of justice. To dwell on the distinction between act and rule utilitarianism simply obscures the important connection between utility and justice established by the classical utilitarians.

(5) Much writing by moral philosophers in recent decades has been focused on a perceived conflict between the utilitarian goal of increasing or maximizing happiness and issues of distribution and, particularly, distributive justice. It is often assumed that utilitarianism (in advocating the maximization of total happiness) lacks a distributive principle. But often overlooked is the fact that classical utilitarianism emerged in the seventeenth century precisely to provide a distributive principle within Epicureanism. To refer to utility did not reflect the total amount of happiness in society, but how that happiness was distributed throughout society. The answer provided in classical utilitarianism (and discussed in numerous chapters in this book) is that the best distribution is one that aims at equality, so long as that can be achieved without the destruction of individual civil liberty (also based on a form of equality, that is to say, equal security under law). A good deal of the confusion has been generated by interpretations of the idea of maximization in utilitarianism, as though this notion was meant to refer to total increase without any regard to distribution. In chapter 13 below we shall explore Bentham's invention of the verbs 'to maximize' and 'to minimize' and the importance given to them as distributive principles. Although some ambiguity remains concerning the meaning of the terms, it is clear that they were

created to combine the ideas of increase and the extension or distribution of that increase throughout society.

The idea commonly held by contemporary utilitarians or ascribed to utilitarianism by moral philosophers is simply that the best action is one that provides more happiness among the whole of mankind than an alternative action. This simple and apparently straight-forward idea has nevertheless been subject to much criticism, partly because such calculations are virtually impossible to make, and the idea seems to lead to a self-denying asceticism and a cosmopolitanism that few could accept. If in all of my actions I must consider the happiness of all mankind, I could enjoy few pleasures unless everyone could enjoy similar pleasures, and any excess wealth would have to be devoted to assisting the poor and infirm rather than to the enjoyment of even modest pleasures, such as good food, wine, the theatre, concerts, etc.

Classical utilitarianism never adopted so simple a formulation of the utility principle. It is often forgotten that historically the utility principle and the doctrine of the social contract emerged together with utility providing the distributive principle and the contract defining the persons to be affected by laws, policies, actions, etc., that is to say, those who are deemed to constitute a given civil society. Even where the doctrine of the social contract was rejected by Hume and Bentham, its rejection did not compromise the limitations on who was to count in any calculation regarding the distribution of happiness. The imaginary contract was simply replaced by more empirical evidence of laws and conventions forming civil society. There are universal elements in classical utilitarianism besides the fact that all humanity, indeed, all sentient creatures, whatever their capacity for rationality, feel pleasure and pain. This universal hedonism is connected to a universal moral principle that it is morally wrong to inflict harm or cause pain to others. Not harming others does not mean acting always to increase everyone's happiness. It is far less demanding on individuals in requiring simply that people do not act rather than that they do.

Within civil society acting to increase happiness is part of living a happy and civilized life, and morality and legislation should be concerned with increasing happiness to this more limited extent. Nevertheless, an important distinction between the spheres of ethics and legislation, employed within classical utilitarianism, limits further this concern with the happiness of others. For the average individual an ethical principle to act always to make humankind happier is so arduous and demanding that few would be able or willing to live by it. Furthermore, how does the average individual know what increases the happiness of the whole of mankind? It would be expecting a good deal from individuals simply to know what actions actually make each of them happy and how the cultivation of virtues contributes to their happiness.

Furthermore, our understanding of the virtues and vices varies from individual to individual and society to society. Conceptions of virtue change over time in the same society, or different conceptions of virtue and vice can co-exist at the same time. We can admonish the miser to be more generous and the prof-

ligate to be more prudent, but at the same time admire the frugality and prudence of the so-called miser and the generosity and benevolence of the so-called profligate. Classical utilitarianism tended to assume that the ethical life should not be too arduous and not be limited to a few individuals who practised an ascetic way of life that possessed the aura of virtue. For classical utilitarianism, the cultivation of virtue was a matter best left to free individuals, with philosophy attempting mainly to clarify the confusing ideas that surround common morality. Individuals, on the whole, know that morality requires that one does not harm others and that one cares for and is concerned for the welfare of one's family and friends. Beyond these aspects of morality, classical utilitarianism stresses the importance of toleration and liberty in society.

Legislation, on the other hand, directs its attentions to the welfare of those who live in particular societies. It seldom directs its attentions towards all mankind, because its laws cannot be enforced where there is no consent and no sanctions are applicable. It steers clear of the realm of private ethics, because legislators possess little competence to determine private morality beyond its obviously social manifestations. The sphere of legislation is that part of life which requires common action and responsibilities shared throughout society. For example, physical survival (military forces to repel invasion, police and courts to apprehend and punish criminals, food, clothing, and housing where there is catastrophe or sudden widespread or great poverty), the opportunity to ensure survival and prosperity through the creation of wealth and the establishment of the security of property, the creation of a level playing field for competition and the enforcements of contracts, etc., the liberty to live one's life without interference so long as one does not harm others, and to be treated as an adult member of society. These tasks for legislation are those that provide the foundation of a modern and complex society. However, they do not demand that individuals should act always to make mankind happier. Living without causing harm to others is about all that can be hoped for in this world, and, in itself, would constitute a great improvement in the moral life of mankind.

A briefer note for political and legal theorists

Among many scholars in the disciplines of political and legal theory the idea of utility is often invoked but usually to be criticized. Its prominence seems to be sustained mainly by 'the philosopher's penchant for keeping half-dead horses just barely alive so that he can continue to beat them with a moderately clear conscience' (Scheffler 1982: 4). These criticisms are seldom based on direct references to classical utilitarian texts and their related critical literature, because they are mainly designed to distinguish the author's own particular theory. In this process utilitarianism becomes whatever a given writer says it is, and leads to a peculiar condition, which one can only depict as a condition of intellectual uprootedness where an idea ceases to have much meaning apart from its immediate employment in a particular book or article.

Classical utilitarianism is a doctrine, which has found favour with philosophers and has never been widely popular except briefly with the publication of J.S. Mill's *Utilitarianism*. In its uprooted state in the Marxist tradition, for example, it has become the basis of bourgeois thought itself. For others it has become identified with 'liberal theory', and often associated with the whole of modern Western political thought, and used and criticized in so far as contemporary writers wish to display their own inventiveness. Such contemporary moves among scholars and intellectuals have enlarged the idea of utility but at the same time have rendered it virtually meaningless. For example, in the Marxist tradition utilitarianism has a highly inflated meaning in terms of self-interest, calculation, materialism, cash nexus, and images conjured up by Dickens's *Hard Times* and Foucault's 'Panopticism'. In 'liberal theory' it has become the rejected but loyal opposition to Rawls's theory of justice and arguments based on the primacy of rights. Liberalism is often ascribed to Western thought from Locke and Montesquieu (see Raz 1986: 1) without much regard to what these various thinkers actually wrote and even though the term 'liberal' was not introduced into politics until nearly a century later.

None of these considerations seems to worry most contemporary political and legal theorists. They have created a web site of virtual truth – real so long as people believe it is real. But in the process of uprooting ideas from their past use, problems are somewhat arbitrarily created out of solutions and solutions out of problems. For example, it is often argued that utilitarianism is a doctrine that allows or even requires the sacrifice of innocent people in order to maximize happiness. Most of us are familiar with Jim and the Indians. This is considered a problem within utilitarianism, and the solution is to abandon utility as the foundation of justice. Yet, even the early discussions of utility, mentioned above, reveal that utility emerged as a distributive concept and one concerned with equal distribution among all members of society which would preclude the sacrifice of some to increase happiness. Few recent writers have seen that what is now taken as the problem (utility principle) was in fact the solution to that problem (of sacrifice). But even worse, what is now taken to be the solution, the abandonment of utility as the foundation of morals, represents a return to the original problem (subjective judgement or intuition as the basis of morals and politics presented under various guises) that the utility principle was designed to overcome.

To begin this study of the idea of utility with Epicurus also suggests that the rich traditions of philosophical thought associated with utilitarianism have an authentic ancient, even Socratic, pedigree. The Epicurean belief that justice consists in not harming others reveals not simply an emphasis on self-interest (and to some minds, narrow self-interest), but, more accurately, stands as a distant reflection of Socrates's firmly-held belief that he knew nothing, and that the philosophic life consisted of testing that belief in conversations with others. The Epicurean sage, cultivating his inner garden, living simply with friends, avoiding pains as much as possible, and seeking tranquillity, knew that he had no

INTRODUCTION

great truth to impart to mankind and no doctrine that would easily solve their moral and political problems. In certain respects his was a grim vision of the human condition, pervaded by deep pessimism, and relieved, in modern thought, mainly by the belief that if we do not expect too much of mankind, and confine our attentions to the relief of pain in its numerous manifestations – ill health, poverty, crime, disaster, war – through the employment of utility, we could bring justice to mankind and an appreciation of individuality and difference. The Epicurean legacy, more sceptical than dogmatic, less dutiful perhaps than that of the earnest Stoics, and certainly more intelligible, casts a long shadow over contemporary moral and political philosophy. Many of my colleagues, however, seeking bright sunshine, are unable to catch a glimpse of what might be discovered in the shady garden, and go about their business as if Epicurus, and, indeed, Socrates, had never lived.

Part I

UTILITY AND JUSTICE

Epicurus and the Epicurean tradition

In 1829 when Jeremy Bentham wrote on the origin of utilitarianism as a contribution to the debate between the *Edinburgh* and *Westminster* reviews concerning the principle of utility, he ascribed the first reference to the principle to a passage in Horace's *Satires*: '*utilitas, iusti prope mater et aequi*' ('utility, the mother of justice and equity') (Bentham 1983b: 299, 321; Horace 1993: 40, 123). The choice of Horace for the first formulation of the utility principle may seem odd, when Bentham might have referred more directly to the Epicurean tradition.¹ Helvétius, for example, included a reference to the great Epicurean poem by Lucretius, *De Rerum Natura*, on the title page of *De l'esprit* (Helvétius 1988: 7). Alternatively, Bentham might have mentioned, as John Stuart Mill did a generation later, the discussion of pleasure and pain in Plato's *Protagoras* or in other Platonic dialogues (Mill 1978: 61, 391, 418–20). Nevertheless, the choice of the line from Horace was not as arbitrary as might first appear. In using a passage that linked the utility principle with justice, Bentham was pointing to an important aspect of utility which placed it in the midst of discussions of virtue and particularly the virtue of justice. In the line from Horace, it was the connection between utility and justice that was being emphasized and not a connection between utility and hedonism, as one might expect, for example, from the opening lines of *IPML* (Bentham 1996: 11). Furthermore, utility was emphasized as being logically prior to and a foundation or source for our ideas of justice and equity, and Horace seemed to deny that justice was based on any other foundation.

Bentham was by no means the first philosopher to use the line from Horace. Although Bentham would not have seen the reference, David Hume employed the passage in an important letter to Francis Hutcheson, written in 1739, where he dissented from Hutcheson's approach to virtue:

I cannot agree to your Sense of *Natural*. Tis founded on final Causes; which is a Consideration, that appears to me pretty uncertain & unphilosophical. For pray, what is the End of Man? Is he created for

Happiness or for Virtue? For this Life or for the next? For himself or for his Maker? Your Definition of *Natural* depends upon solving these Questions, which are endless, & quite wide of my Purpose. I have never call'd Justice unnatural, but only artificial. *Atque ipsa utilitas justi prope mater et aequi.* Says one of the best Moralists of Antiquity. *Grotius & Puffendorf*, to be consistent, must assert the same.²

In order to understand why Bentham and Hume invoked the passage from Horace and why Hume seemed to associate both Grotius and Pufendorf with it, it will be useful to examine the role of utility firstly in ancient Epicurean writings and secondly in various works which accompanied the revival of Epicureanism in the seventeenth century.

Epicurus and ancient Epicureanism

As one reads the surviving writings of Epicurus (341 BC–271 BC), who established his school in Athens in 306 BC, one finds little of direct relevance to the connection between utility and justice.³ Virtue (including justice) was not intended to limit pleasure. According to Bailey (1928: 526), Epicureanism was ‘a system of uncompromising egoistic hedonism’ and a self-regulating one at that. As Scarre (1994: 222) put it, ‘just as the Epicurean community practiced economic self-sufficiency within the walls of its garden, the Epicurean man cultivates an inner self-sufficiency, a contentment in his own physical and mental states and a suppression of unnecessary desires’. The only perfect pleasure was a condition of *ataraxia* where one lived quietly and serenely in bodily health and with little physical and psychological distress. DeWitt (1954: 226) has written:

The word *ataraxy* implies a metaphor derived from the sea and the weather. One of the original synonyms is ‘calm’, *galenismos*, of which the proper application is to the sea, *tranquillitas* in Latin. The turmoils of the soul are specifically compared by Epicurus to storms and squalls at sea. The chief causes of the soul’s turmoils are unreasonable fears concerning the gods and death and ignorance of the natural limits of pleasure and pain. If a man has attained to true knowledge of these things and keeps his emotions within their natural limits, the reward is comparable to the peace ‘which passeth all understanding’.

Although no pleasure was bad or evil, some were purer (involving less pain) than others, with static pleasures being purer than active ones. DeWitt (1954: 217) emphasizes the connection made by Epicurus between pleasure and health and pain and disease, which enabled him to overcome discussions found in Plato and Aristotle regarding good and bad pleasures. All pleasures were good in the sense that health was good, even though some pleasures were mixed in incorporating or leading to pain. As health was good, it followed that life itself became

the greatest good, with disease (of body or soul) the greatest evil. This link led to the distinction between static and kinetic pleasures which DeWitt (1954: 233) has depicted as follows:

let it be granted that the escape from a violent death is the greatest of joys and the inference must follow that the possession of life at other times cannot rank greatly lower. Similarly, if the recovery from a dangerous illness be a cause for joy, manifestly the possession of health ought to be a joy at other times. Nevertheless the two pleasures differ from one another and it was in recognition of the difference that Epicurus instituted the distinction between kinetic and static pleasures. The difference is one of intensity or, as Epicurus would have said, of condensation. At one time the pleasure is condensed, at another, extended. In other words the same pleasure may be either kinetic or static. If condensed, it is kinetic; if extended, it is static.

The greatest pleasure was defined by the removal of all pain (see Long 1986: 61–2; Cicero I.xvi, 1999: 40–1), and hence the Epicurean lived quietly and peacefully in the real or metaphorical Garden. The most important virtue for Epicurus was prudence (see DeWitt 1954: 222), and while a considerable emphasis was placed on the egoistic pleasures connected with friendship, little attention was given to social values and instincts.⁴

Justice entered into the system of Epicurus as a means to achieve security from the attacks of other people. In a few scattered remarks Epicurus set forth a conception of justice which he depicted as ‘a pledge of mutual advantage [*sumbolon tou sumpherontos*] to restrain men from harming one another and save them from being harmed’ (Epicurus KD, Sect. xxxi, 1926: 102–3; see also Sect. xxxvi, 1926: 102–3). The verb, ‘*sumphero*’, may be translated in some of its forms as ‘mutual advantage’, ‘useful’, ‘profitable’. At another point Epicurus wrote of justice in terms of its being of ‘advantage in the requirements of men’s dealings with one another’ and used the Greek phrase, ‘*sumpherei en tais chreiais*’, for ‘advantage in the requirements’ (Epicurus KD, Sect. xxxvii, 1926: 102–5). The Greek noun, ‘*chreia*’, also possessed a range of meanings and might be translated as ‘need’, ‘use’, or ‘utility’.

The key point is that justice was not regarded as a virtue in the sense that we can discover its unchanging and immutable properties in the human soul, as in Plato’s *Republic*. It was not desirable in and for itself, but was something devised by artifice for human convenience (see Cicero I.xvi, 1999: 56–7). Nevertheless, while justice was not desirable for itself, it contributed to the achievement for the individual of *ataraxia* or tranquillity (Annas 1993: 294). For those societies, indeed, for all living creatures which were unable to make compacts not to harm one another, nothing was either just or unjust (Epicurus KD, Sect. xxxii, 1926: 102–3). Although justice applied potentially to all in requiring, where compacts existed, that one should not harm others, such justice might be applied differ-

ently in different societies and under different circumstances (Epicurus KD, Sect. xxxvi, 1926: 102–3). Where a law, which was previously considered just, no longer had usefulness or secured advantage, it was no longer just (Epicurus KD, Sects. xxxvii and xxxviii, 1926: 104–5). Alberti (1995: 169) has written of this compact that ‘justice is the realization of utility by means of a contract’. The emphasis on utility, she believes, allows for the separation of law from justice (rejecting the view, found in Plato and Aristotle, that all law is just) and leads to a notion of justice which is different from *nomos* (seen as legal justice) and *physis* (or natural justice) (Alberti 1995: 162). She writes:

For utility is, in Epicureanism, a real state of the world. A particular action, such as abstaining from certain pleasures or from harming one’s own kind, really is useful, in particular circumstances, for the realization of the agent’s goals. That is, utility is, in those particular circumstances, a real property of that action.

(Alberti 1995: 171)

There was thus nothing arbitrary in linking law with utility. However relative utility might be, either to circumstances or to the peculiar condition of the individual, it could nonetheless provide an objective and rational foundation for law and a perspective from which to evaluate its worth (see Alberti 1995: 175, 178–9, 187–8).

Nevertheless, even this limited conception of justice was less universal than thus far indicated. Justice was an invention of the wise for their own good: ‘In short, as Epicurus summed up matters with almost brutal directness, “the laws exist for the sake of the wise, not that they may not do wrong, but that they may not suffer it”’ (Bailey 1928: 514). Law and justice were matters of convenience which the wise person devised and approved. Where inconvenient, the laws might just as easily be ignored or contravened (especially if detection might be avoided), as justice existed only for what could be obtained from the system. Epicurus had no reason to make justice a positive part of the human condition except as it enabled people to obtain ‘peace of soul’ (DeWitt 1954: 297). It represented a painful burden, and in its application as punishment justice could be extremely painful. All that could recommend it was its utility to the wise. Other members of society might have less invested in justice, as they were not cultivating their gardens (internal and external) as were the Epicureans, and might well gain less from rules concerning not harming others. However, so long as they accepted the compact, they would be assisting themselves, as well as not harming the wise in society.

Our knowledge of the doctrine of Epicurus concerning justice and utility is based on a slight body of surviving material, though it may be regarded as supplemented by the majestic poem of Lucretius (see Clay 1983: 13ff). Lucretius did not reject any of the Epicurean doctrines concerning justice and utility. He developed some of them and provided an important account of the pre-political

state and the formation of political society in the fifth book of that work. Furthermore, Lucretius also developed the atomism of Epicurus which was shared to an extent with that associated with Democritus (see Long 1986: 61–2; Taylor 2000: 125, 127), and which provided in the early modern period a serious challenge to Scholastic accounts of nature and the universe.

Gassendi and modern Epicureanism

The revival of Epicureanism in the seventeenth century was part of the challenge to conceptions of nature and morality in Scholastic philosophy, a challenge which was associated in France with René Descartes and Pierre Gassendi. In this revival Gassendi played a crucial role in restating the doctrines of Epicurus, especially his atomism, and in influencing numerous philosophers in France and Britain (see Vaughan 1982: 43; Spink 1960: 85–102). One scholar has noted that at least thirteen books were published in England between 1650 and 1700 dealing specifically with Epicurus or Lucretius and other ancient Epicureans (Vaughan 1982: 53, quoting Mayo 1934: xi). Others have commented on Gassendi's influence on both Hobbes and Locke. Hobbes knew Gassendi personally, and although Hobbes and Epicurus differed on numerous points, there was considerable affinity between Hobbes's asocial and apolitical individual, acting on the basis of self-interest and seeking to preserve oneself, and the portrait of humanity presented by Epicurus and especially by Lucretius in the fifth book of *De Rerum Natura* (see Sarasohn 1996: 142; Vaughan 1982: 69–70; cf. Nichols 1976: 183–90).

The influence on Locke has been considered equally important from the way Locke seemed to use Gassendi's restatement of Epicurean hedonism within a conception of divine providence in *An Essay concerning Human Understanding* to their similar views on the origin of ideas and to their empiricism (Sarasohn 1996: 202; Jones 1981: 7). Both were opposed to Descartes, and this may have drawn them together (see Wade 1971: 489ff). Nevertheless, Locke's criticism of the Epicurean account of utility as the foundation of justice in the early *Essays on the Law of Nature* appears to constitute a clear rejection of this crucial aspect of Epicurean thought (Locke 1954: 38). In Essay I, Locke stated bluntly that without natural law 'it seems that man would not be bound to do anything but what utility or pleasure [*aut utilitas aut voluptas*] might recommend, or what a blind and lawless impulse might happen perchance to fasten on' (Locke 1954: 121). To the question posed in Essay VII, 'Is the Binding Force of the Law of Nature Perpetual and Universal?', he answered affirmatively (Locke 1954: 191ff), and to that posed in Essay VIII, 'Is Every Man's Own Interest [*Utilitas*] the Basis of the Law of Nature?', he answered negatively (Locke 1954: 205ff). In elaborating the answer to the latter question, he wrote:

For what reason is there for the fulfillment of promises, what safeguard of society, what common life of man with man, when equity and justice

are one and the same as utility? What else indeed can human intercourse be than fraud, violence, hatred, robbery, murder, and such like, when every man not only may but must, snatch from another by any and every means what the other in his turn is obliged to keep safe.

(Locke 1954: 213)

This analysis eventually led Locke to conclude that ‘the rightness of an action does not depend on its utility; on the contrary, its utility is a result of its rightness’ (Locke 1954: 215). In spite of this fairly clear rejection of the Epicurean grounding of justice on utility, Locke nonetheless adopted even in these early essays an account of pleasure and pain as the basis of action, the belief that pain was felt more strongly than pleasure, and avoiding pain became more important than pursuing pleasure.⁵ These Epicurean doctrines were then linked in another respect with utility, when Locke argued that the useful (*utile*) was a means to procure agreeableness (Locke 1954: 268–9). Desire, for Locke, was deemed to be painful unless some good like *jocundum* or *utile* eased the pain. Thus, the useful did not disappear from his system, though he clearly rejected the Epicurean doctrine of making it the basis of justice. Locke’s analysis of pleasure and pain reappeared in the published *Essay concerning Human Understanding* which gave rise to its being considered an Epicurean work and influenced by Gassendi.

The examples of Hobbes and Locke, and additionally, Pierre Bayle (see Wade 1971: 577–8), show the wide influence of Gassendi’s version of Epicurean philosophy. As Bayle wrote concerning Epicurus:

What he taught concerning the Nature of God is most impious. As for his Doctrine relating to the Supream Good, or Happiness, it was very liable to be misinterpreted, and it had such ill Effects, as discredited his Sect: But at the bottom it was very reasonable; and it cannot be denied that, allowing the Word *Happiness* to Signify what he meant by it, Man’s Happiness consists in Pleasure.⁶

Gassendi not only restated the doctrines of Epicurus in a modern context but he made them more acceptable in several respects. He did not challenge the tenets of religious belief, but, at the same time, ‘by using Epicurus in place of Aristotle’, he advanced ‘a more human morality and a more experimental science’ (Wade 1971: 412). While he challenged the Thomist doctrine of natural law, he showed how one could reconcile nature with artifice by changing the way nature was conceived, and, in so doing, he eliminated one obstacle to a more flexible and realistic foundation for political society than had been conceived by Thomism. In Hobbes, Locke, Bayle, and numerous other thinkers, aspects of Epicureanism were reformulated with considerable effect.

But Epicureanism was also restated in its own terms in numerous books published in the late seventeenth and early eighteenth centuries. The most important of these works for moral and political philosophy was collected from

Gassendi's writings by Francois Bernier (see Spink 1960: 106–8). The influential English version of Gassendi's moral philosophy, *Three Discourses of Happiness, Virtue, and Liberty*, produced by Bernier, was published in 1699. In summarizing the doctrine of Epicurus, Gassendi wrote:

Therefore to speak properly Right or natural Equity is nothing else but what is mark'd out by Utility or Profit, or that Utility which, by common Agreement, hath been appointed that Men might not injure one another, nor receive any wrong, but live in security, which is a real Good, and therefore naturally desired of every one.

(Gassendi 1699: 315)

In Gassendi's account of the connection between utility and justice a number of important arguments were stated and developed. First, he dismissed the role of retaliation in any of the forms of justice. It had no place in distributive justice which was concerned with a person's worth, in corrective justice, where talionic punishments (an eye for an eye) were often unjust in their operation and consequences in bringing great pain into the system, and in matters of equity where the strict letter of the law was often unjust (Gassendi 1699: 308–10). Nevertheless, he did not assume that justice was in itself desirable (as its operations were painful), but it became desirable in so far as it secured the basic tie without which a society could not exist (Gassendi 1699: 312).

Second, Gassendi argued that for a law or practice to be just, it not only had to be useful but it also had to be 'prescribed and ordained by the common Consent of the Society' (Gassendi 1699: 315). Two important consequences followed from this position. The first was that because justice was based on utility, a given law or practice could be just in one society though not in another, or just and then unjust in the same society when circumstances changed. These changes would depend on whether or not the law or practice was and remained useful in a social sense. This qualification was important, as the question to be asked of a given law was whether or not it secured the lives, liberties, and goods of the members of a society and prevented some members from harming others. The question was not, was this particular law useful to me today in so far as it might enable me to profit from it, even though it would have to be rejected tomorrow because others were profiting and not me. The changes in laws and practices from society to society and from time to time hung on whether or not they were useful to society. Many laws and practices would not be just or unjust, either because they did not raise issues of justice or because they were not useful to society in this fundamental sense. But how could one determine whether a given fundamental practice concerning human lives and property was just? This takes us to the second consequence, that the basic principles were approved by the common consent of members of society, or, as Gassendi put it at another point:

In a word, a thing is and ought to be reputed Just, or to have the Qualities of Just in a Society, *if its Usefulness respects all the Individuals associated*; but if it be not so 'tis not properly to be called Just, nor deserves to be so esteemed.

(Gassendi 1699: 316, italics added)

For Gassendi, what made utility the basis of justice was not that 'the wise' or the rich or the poor found a law useful and had the power to adopt and enforce it, but that all members found it useful by common consent or that the utility was such that the law or practice 'respects all the individuals associated'. On this account, there was no opposition between utility and justice and no sacrifice of some for the sake of a greater overall utility.⁷ Utility itself was a distributive principle, involving compact or agreement and defined what counted as just and unjust. What made it distributive was that it was grounded in the common consent of the members of society, ultimately on their pleasures and pains, and applied equally to all members of society. Utility, then, became in Gassendi's account of Epicurean justice a technical term, referring to the nature and distribution of pains and pleasures and providing criteria to assess the justice of laws and practices.

Third, there could not be justice between human beings and animals and between human beings in different societies, because no mutual agreement existed to support that justice. Although there was no suggestion that animals should be maltreated, Gassendi stated bluntly: 'So that to secure our selves, there remains for us no other means than to make use of that Power that we have, either to kill them, or to force them to obey us' (Gassendi 1699: 321). As between humans in different societies, he denied that one could appeal to a law of nations (*jus gentium*) but at the same time he recognized a 'common precept' that '*Thou shalt not do to another, what thou wilt not that another shalt do to thee*'. He gave to this precept the status of the 'first natural Law'. He argued that, as nothing was more natural than society and as society was unable to exist without this precept, then the precept was rightly termed 'natural'.⁸ Thus, while people in different societies who did not live under a common agreement were not bound by justice, they could appeal to this common precept or first natural law not to harm others.

Fourth, as we have seen, following Epicurus, Gassendi introduced a new way of looking at nature both in his science and in his account of justice. Although he rejected the Stoic and Thomistic doctrines of natural law, and founded society on utility, he grafted the concept of nature on to the idea of common utility and found that these firm bonds warranted the term 'natural'. As Gassendi put it, 'as to what *Epicurus* says, *That a true Law supposeth a mutual Compact, or every Law is a kind of Agreement*, 'tis no more than what *Plato, Aristotle, Demosthenes, Aristides*, and several others assert' (Gassendi 1699: 325). In other words, Gassendi believed that Epicurus's view of the compact did not necessarily contradict the idea of natural justice found in Plato and Aristotle.

Finally, Gassendi attempted to deal with the satisfaction achieved by the unjust person who gained within society from his or her injustice. He rejected the view that the unjust person could be happy because he or she obtained what was desired, and called attention to the disordered *psyche* following injustice: ‘*full of Troubles, Jealousies and Fears, Gripings of Conscience and Anxiety of Mind*’ (Gassendi 1699: 333). Thus, the members of society resisted the temptation to be unjust, because of the anxieties concerning discovery and punishment which persisted even if there was no serious possibility of punishment.

Gassendi’s influence

Bernier’s compilation of Gassendi’s writings on Epicurus was widely read and similar ideas appeared in other writers. For example, Thomas Stanley’s *History of Philosophy* contained a substantial essay on Epicurus (Part XIII), which restated the important connection between utility and justice:

Wherefore to speak properly, Natural Right or Just is no other than a Symbol of Utility, or such an Utility agreed upon by Concurrence of Votes, as may keep Men from hurting, or being hurt by one another, so that they may live securely: A Good which every Man is taught by Nature to desire.

(Stanley 1743: 707)

Stanley went on to stipulate two conditions for the existence of justice: first, that ‘it be profitable or respect the common Utility, that is Security’, and second, that ‘it be prescribed by the common Consent of the Society; for nothing is compleatly just, but what the Society by common Consent or Agreement hath decreed to be observed’ (Stanley 1743: 707). In Stanley’s account (as earlier in Gassendi’s) great emphasis was placed not only on utility as the foundation of justice, but also on the importance of agreement and common consent as a condition for its existence. This agreement not to harm others was what in many respects determined utility. Stanley did not provide for any other test of utility nor did he invoke a ‘Legislator’ to determine one. The system was bottom-up, so to speak: what was agreeable to humanity and accepted by members of society was just, because it was useful to them. Stanley developed this position one step further by emphasizing that the utility of a law or practice must extend to all:

whatsoever is by Experience found profitable to a mutual Society, or the common Participation of such Things as are esteemed just, that Thing hath the Nature of Just or Right, if it be such as its Utility extends unto all. But if any Man shall establish such a thing for just, and yet it shall happen not to be profitable to the mutual Society, it hath not the true Nature of Just or Right.

(Stanley 1743: 707)

Beyond the two conditions previously mentioned, that justice was based on utility as security and that the agreement not to harm others was based on common consent, he seems here to be suggesting a third, that the usefulness of any given law or practice *extends* to all members of that society. These tests were not conceived in addition to utility as the foundation of society, but were what utility meant in the context of justice. To answer the question, is this law just, one would first ascertain if it was based on utility. One would then find out if it enhanced security (not harming or being harmed), was based on common consent, and extended to all. This determination would allow one to decide if the law was based on utility and thereby just. There is no discussion here or among other writers on Epicurean themes of the question of whether or not utility would allow some people to be sacrificed to increase the happiness or pleasure of others. Such sacrifice would be precluded by the three conditions listed above. Furthermore, none of these writers envisaged a particular system of government that was intended to enable these conditions to be realized in practice, and their interest (like that of Epicurus) was simply to explore this doctrine as a contribution to moral philosophy. That Hobbes, Locke, Montesquieu, Rousseau, Helvétius, Hume, and Bentham might reach very different conclusions with regard to sovereignty and the institutions of government was not precluded by the arguments concerning the dependence of justice on utility. What these arguments achieved, however, was to establish that justice in society arose not from natural or divine law which could only with difficulty be ascertained by ordinary people, but from the common agreement of the individuals that comprised society. Furthermore, the object of government as a matter of justice was only to enhance the security of the lives, liberties, and properties of its members. From this point of view the virtue of justice was to play an important role in the development of theories of the modern state.

Stanley repeated a number of the doctrines already found in Gassendi, such as that there could not be justice between men and animals because there could not be mutual agreement (Stanley 1743: 710). He also noted that the account of justice and utility did not limit or deny the importance of the other virtues such as beneficence or good will which were concerned with the good of others (Stanley 1743: 712).

In *Epicurus's Morals* John Digby also restated the close connection Epicurus established between justice and utility:

Justice is nothing in it self: Mankind united in Society discover'd the Utility and the Advantage of agreeing among themselves, to observe certain Conditions for their living inoffensively one towards another.

(Digby 1712: 146)

Digby discussed other Epicurean themes such as the importance of prudence and friendship, and stressed how all of the virtues, like temperance, magnanimity, prudence, and justice, were sought because of their 'Consequences and

Effects', that is to say, their utility to individuals and society (Digby 1712: 45–6, 57, 122). He also emphasized that the studies Epicurus made of nature were not done for their own sake only but in order for him to become a moral philosopher (Digby 1712: 80). He distinguished between Epicurus and Socrates by noting that Socrates despised the study of nature and turned to human matters only. On the contrary, Epicurus:

will have us pry and search into the Secrets of Physick, not for her own sake, but because it enlightens the Mind, discusses and examines the Causes and the End of all, makes us despise Death, and supplies us with Remedies against Fear; Which are Certain and sure Means to live and die peaceable.

(Digby 1712: 125–6)

In contrasting the Stoics and Epicureans, Digby criticized the Stoics for believing that there were natural principles of justice, but when it came to discerning them, the ancient Legislator, such as Lycurgus at Sparta, had to turn to divine authority (e.g. the oracle at Delphi) to do so. The Epicureans believed that a primitive people had no idea of justice, as it was developed only in society by those who could grasp its utility (Digby 1712: 143, 144).

Epicureanism in Grotius and Pufendorf

Let us return to the passage quoted from Hume's letter to Hutcheson in which Hume invoked the line from Horace, and, additionally, seemed to link Grotius and Pufendorf with it. As Moore has noted, Grotius in fact used the aphorism in the Prolegomena to *De Jure Belli et Pacis* to illustrate the position to which he was opposed (Moore 1988: 33). Thus, if Hume were attempting to link Grotius to the Epicurean tradition through Horace, Hutcheson would most probably have seen through the ruse. But what Hume was attempting to say here was perhaps more subtle. Even though he alone may well have subscribed to the line from Horace, he could enlist Grotius and Pufendorf, because both were opposed to the doctrine of final causes in the Aristotelian and Scholastic traditions, a doctrine he believed Hutcheson also opposed in line with writers such as Grotius and Pufendorf. Hume's position may well have been, as Moore has suggested, that 'the writers on the law of nature', like Grotius and Pufendorf, 'all return at last to the principle of utility' (Moore 1988: 33). Hume could also assert that what they shared in opposition was stronger than the differences between them.

Grotius's position was not without some ambiguity. On the one hand, he rejected the line from Horace:

And therefore what Carneades said and what others have also said ... Utility, Mother of just and right, if we are to speak accurately, is not true. For the Mother of Right, that is, of Natural Law, is Human

Nature; and this would lead us to desire mutual society, even if it were not required for the supply of other wants; and the Mother of Civil Laws, is Obligation by mutual compact; and since mutual compact derives its force from Natural Law, Nature may be said to be the Grandmother of Civil Laws. But Natural Law is *reinforced* [*accedit*] by Utility. For the Author of Nature ordained that we should, as individuals, be weak and in need of many things to make life comfortable, in order that we might be the more impelled to cling to society. But Utility is the *occasion* [*occasionem dedit utilitas*] of Civil Laws; for the association or subjection by mutual compact, of which we have just spoken, was at the first instituted for the sake of some utility. And accordingly, they who prescribe laws for others, in doing this, aim, or ought to aim, at some Utility, to be produced to them for whom they legislate.

(Grotius Prol. Sect. 16, 1853: i.xlix–l)

Grotius seemed to argue that human nature was the basis of the law of nature, and from the law of nature, came natural rights, justice, and law. Thus, utility could not be the mother of justice and equity. But, on the other hand, utility reinforced natural law and served as the occasion for the formation of civil society and both the occasion for the development of the civil law and the object at which laws should aim. Furthermore, Grotius also linked utility to the law of nations (*jus gentium*), when that was distinguished from natural law itself (Grotius Prol. Sect. 17, 1853: i.l). Thus, if Grotius rejected the line from Horace, he clearly saw a close connection between utility, justice, and law.

In addition, Tuck has noted a passage in *De Iure Praedae Commentarius* where Grotius wrote that ‘Horace should not be censured for saying, in imitation of the Academics, that utility [*utilitas*] might perhaps be called the mother of justice and equity’ (Tuck 1999: 86; see also 1993: 172–3). This suggests that Grotius by no means rejected the Epicurean position regarding utility. However, Tuck has interpreted the significance of Grotius’s sympathy with the line from Horace in terms of ‘thick’ (Aristotelian) and ‘thin’ (Epicurean) conceptions of human sociability (Tuck 1999: 89). In other words, he believes that Grotius followed the Epicurean tradition in emphasizing minimal conditions for the formation of civil society in simply not harming others rather than adopting the Aristotelian ideal of a natural perfection and completion of human nature in political society. But Tuck seems to have confused Aristotle’s conception of political society (as stated in *Politics*, Book I) with the account of justice (as developed in *Nicomachean Ethics*, Book V), and Grotius’s interest lay more with the categories of justice than with conceptions of political society (Tuck 1999: 89). As Tuck appreciates, Grotius took two of Aristotle’s categories of justice, corrective and distributive, and argued that the former should be governed by legal claims enforceable in the courts and the latter by moral claims. The individual thus possessed a perfect right, enforceable at law, in corrective justice, and an imperfect right in distributive justice, not enforceable by law but possessing moral authority in relations

with one's neighbours. Governments might legislate in the realm of distributive (or attributive) justice (Haakonsen 1996: 27–8), but the rights acquired by the individual in respect to these areas were not such as would enable them to obtain legal redress.

Grotius was aware that the categories of justice used by Aristotle and, for the most part, simply repeated in the Scholastic tradition did not make much sense in the context of the modern state. Aristotle's corrective justice was narrowly conceived in terms of restoring to the injured party (and thereby establishing an equality) that which had been taken. As such, it could not cover all aspects of contractual or other kinds of law, where the remedy might not be simply correction or restoration (Grotius I.I.VIII, 1853: i.6–7). The use by Aristotle of the ideas of arithmetical and geometrical proportion to distinguish between corrective and distributive justice made little sense and could not be applied in practice (Grotius I.I.VIII, 1853: i.7–8). Grotius noted that a contract of partnership could not be adjudicated under corrective justice, as it should, because it involved geometrical proportion, and where only one person was suitable for a public office it was to be given to that person under distributive justice, though the proportion could not be applied. Similarly, the idea in Aristotle that distributive justice was concerned with things held in common while corrective justice by implication was concerned with private property also made little practical sense (Grotius I.I.VIII, 1853: i.7–8). If someone bestowed his private property in legacies, he must use distributive justice, but when the state owed money to a private citizen, it fell under corrective justice.

The categories of justice employed by Grotius, expletory and attributive, which replaced the Aristotelian corrective and distributive, were developed to deal with some of these deficiencies. The use of arithmetical and geometrical proportions and the related emphasis on formal conceptions of equality disappeared. The new account of justice focused on individual rights and the distinction between perfect and imperfect rights. Expletory justice was mainly concerned with redressing violations of perfect rights where individuals could expect redress for injuries to their lives, liberties, and properties. Attributive justice was concerned with moral rights and was designed to be 'the companion of the virtues which are useful to our neighbours' such as liberality, mercy, and prudence (Grotius I.I.VIII, 1853: i.7). This distinction, which linked perfect rights with legal redress for injury and hence enjoined the individual not to harm others, was the source of the idea that Grotius was developing a 'thin' conception of human sociability, as it was in these minimal conditions that the law directly intervened. Furthermore, this category became especially relevant in relations between states where Grotius applied it to assessing claims between expanding and competing colonial and commercial empires. But as one looks at the whole of Grotius's account of justice (both expletory and attributive) it is clear that his account of moral and political life is no less 'thick' than Aristotle's. He simply cut the cake differently, though that difference was important, because

it enabled those who followed Grotius to develop conceptions of justice and morality that differed from those which previously existed.

Both categories of justice might be seen as having a connection with the Epicurean tradition. The emphasis on not harming others in expletory justice is obvious and its connection with utility is no less so. Expletory justice was distributive in that a state distributed various rights which the individual held apart from and, if necessary, against other individuals. These perfect rights (enforceable at law) were one means for individuals to minimize pain in their lives. Attributive justice was also linked to the Epicurean tradition. It too was concerned with distribution, although the distribution was not one that could be governed by law. However Grotius conceived this category, it potentially opened up areas of social life to individual effort, satisfaction, and reward based on merit as a matter of justice to which the Aristotelian categories were indifferent (see Griswold 1999: 250–1). Grotian attributive justice could allow happiness to flourish while protecting individuals from harm via expletory justice.

The connection between Pufendorf and Grotius with regard to the categories of justice and the Epicurean tradition is difficult to determine. Pufendorf was aware of the movement away from Aristotelian categories by Grotius, but he did not link this move directly with the Epicurean tradition.⁹ He believed that Hobbes had only one conception of justice (keeping faith and fulfilling covenants) which was taken directly from Epicurus. Pufendorf seemed to prefer the categories of Grotius, though he modified them somewhat (Pufendorf 1729: 81–2). He also criticized the line from Horace regarding utility as the mother of justice and equity, as involving the rejection of natural law (Moore 1988: 38n).

As Moore has pointed out, Hume must have ‘taxed the benevolence’ of Hutcheson, by associating Grotius and Pufendorf with the line from Horace, for Hutcheson had adopted a modified version of the Grotian distinction between perfect and imperfect rights, while at the same time upholding a Stoic conception of natural law and natural jurisprudence (Moore 1988: 33; 1994: 33ff). Smith, however, could see some concern with public utility in Grotius’s account of punishment (see 1982b: 104; 1982c: 398). Hume might have had the last laugh, for the Epicurean tradition in the seventeenth and eighteenth centuries was a complex doctrine, woven within numerous theories, all of which were linked by their hostility to Aristotelian categories and philosophy. As we have seen, Grotius might have been closer to Epicureanism than Hutcheson would have wished, and Hume might have seized upon that connection to urge Hutcheson to appreciate his point of view.

Nevertheless, Grotius also set out a doctrine of human nature and natural rights, which could be linked to a Stoic tradition and opposed to the idea of utility as the foundation of justice. Locke seems to have followed Grotius in this respect, and so did Hutcheson. It was Hume and Bentham who then reasserted most strongly the Epicurean doctrine concerning utility as the basis of justice.

READING HUME BACKWARDS

Utility as the foundation of morals

Few contemporary scholars place much emphasis on the idea of utility in Hume's thought or on his influence or anticipation of the later utilitarianism of Bentham and J.S. Mill.¹ In reading Hume backwards, that is to say, from the themes of Bentham to those of Hume and from the *Enquiry concerning the Principles of Morals* to book III of the *Treatise of Human Nature*, I hope to reveal a different Hume from the one commonly presented today.² For example, John Stewart has argued that there is no evidence in the *Enquiry* that Hume abandoned the idea of sympathy, which he had made so important in the *Treatise* (see Stewart 1963: 329). Reading Hume backwards may not lead to a rejection of this argument but perhaps to a different question. For it is utility and not sympathy which is the key principle of the *Enquiry*, and I shall seek to determine why Hume placed so great an emphasis on it in the *Enquiry* but not in the *Treatise*, where sympathy seems to be of greater importance. From the perspective of the *Enquiry*, that Hume did not expressly abandon sympathy is less important than the emphasis he placed on utility.

My approach to Hume is not as unusual as one might think. Knud Haakonssen's important study of Hume and Adam Smith explores Hume to great effect through the later writings of Smith, which owed a good deal to Hume's analyses of similar topics. But when it comes to the theme of utility in Hume, Haakonssen asserts that 'it is a complete illusion to see the later work [*Enquiry concerning the Principles of Morals*] as an approach towards the utilitarianism of a later age' (Haakonssen 1981: 5–6). The word 'utility', he continues, has a meaning 'rather different from what Bentham and the Mills meant' (Haakonssen 1981: 6, see also 8). To support these assertions, Haakonssen supplies no analysis or references, and no works of utilitarians of 'a later age' appear in the otherwise extensive bibliography. If Haakonssen is prepared to read Hume backwards from Smith, he is not willing to read him backwards from 'Bentham and the Mills'.³ In attempting to do so, one is asking not only about the importance Hume gave to utility in his moral and political philosophy, but also whether Hume's idea of utility was adopted by the 'utilitarians of a later age'. One might argue that utility was an important idea in Hume's thought, but that later utilitarians took little from him. I shall advance the stronger thesis that

utility was of prime importance in Hume's thought, and, in addition, influenced the way Bentham, for example, formulated his own principle of utility.

Some writers on Hume acknowledge the importance of utility in his thought, but use various categories to distinguish his approach from those of later utilitarians. H.O. Mounce, for example, distinguishes between the 'naturalism' of Hume (taken supposedly from Hutcheson) and the 'rationalism' he ascribes to both deontological views (linked with Kant) and the utilitarianism of Bentham (Mounce 1999: 77ff). Mounce omits to consider the very first word and subsequent paragraph of Bentham's *IPML* where Bentham invoked 'nature' and noted the way nature, placing humans 'under the governance of two sovereign masters, *pain* and *pleasure*' determines what they do and what they ought to do (Bentham 1996: 11). The reason he omits this important reference to nature is that he concentrates on the role of rational calculation in Bentham. He also omits to consider the foundational role of feelings of pleasure and pain in Hume, and simply asserts that rational calculation presupposes the passion of benevolence. Mounce only refers to pain and pleasure in Bentham in so far as it makes rational calculation possible, supposedly by providing a mechanism through which quality can be reduced to quantity (see Mounce 1999: 79–80). But contrary to Mounce's view, it is clear that for both Hume and Bentham pleasure and pain provide motives for action and reason is used in subordination to passion within this framework. Hence the distinction between naturalism and rationalism serves only to obscure this fundamental point which links most classical utilitarians.

Mounce also attempts to distinguish between Hume and Bentham by arguing that Hume's conception of rationality differed from that of social contract theorists who tended to see the individual abstracted from society, to which he or she became subsequently attached by rational calculation. In contrast to Hume, according to Mounce, Bentham supposedly started with a collection of individuals who were treated as the main elements in the societal equivalent of a chemical equation (see Mounce 1999: 90). Mounce again fails to consider what Bentham actually wrote, when in *A Fragment on Government* he explicitly followed Hume not only in adopting the principle of utility but also in rejecting the doctrine of the social contract in favour of custom, habit, and convention as the basis of civil society (see Bentham 1988: 51–3). Mounce clearly cannot place Hume and Bentham in the separate categories he has invented for them. Bentham did not subscribe to the rational individualism Mounce ascribes to him, and Hume's penchant for utilitarian calculation does not fit into the naturalist category, wholly separate from rational calculation, that Mounce creates for him. Mounce becomes frustrated at times with Hume's refusal to fit into his categories, and when faced with Hume's use of utility and rational calculation with regard to justice in the *Treatise*, he first berates him for not sticking to his original position and then complains that 'having criticized the social contract theorists for explaining society in utilitarian terms, he switches over, in the course of his account, precisely to those terms himself' (Mounce 1999: 98). Mounce does not

consider the possibility that the problem may rest with his categories rather than with Hume's argument.

Utility in the *Enquiry* and *Treatise*

Reading Hume backwards takes one initially to the *Enquiry* and to Hume's strongest statement about the role of utility:

It appears to be matter of fact, that the circumstance of *utility*, in all subjects, is a source of praise and approbation: That it is constantly appealed to in all moral decisions concerning the merit and demerit of actions: That it is the sole source of that high regard paid to justice, fidelity, honour, allegiance, and chastity: That it is inseparable from all the other social virtues, humanity, generosity, charity, affability, lenity, mercy, and moderation: And, in a word, that it is a foundation of the chief part of morals, which has a reference to mankind and our fellow-creatures.

(Hume 1998: 5.44)

So strong a statement about the role of utility as 'a foundation of the chief part of morals', that concerned with 'mankind and our fellow-creatures', would appear difficult to discount. But the most recent generation of Hume scholars has found no great difficulty in doing so. This has been achieved partly by discounting the role of the *Enquiry* in Hume's moral and political philosophy in spite of Hume's express statements to the contrary (see, for example, Brice 1996; Snare 1991). Few scholars today would accept Henry Sidgwick's approach that 'as the earlier *Treatise* was expressly repudiated by its author, I have in the main confined my attention to the later work, which in Hume's own opinion was of all his writings "incomparably the best"' (Sidgwick 1906: 205n; see also Gauthier 1998: 17–18; Holthoorn 2000). D.D. Raphael has argued that Hume's statement about the *Treatise* was mainly a 'literary judgment' and leaves open the question of the philosophical importance of the *Enquiry* in relation to the *Treatise* (Raphael 1972–3: 92; see also Whelan 1985: 4n). David Fate Norton takes this position a step further. He argues that both *Enquiries* represent attempts to recast the substantive arguments of the *Treatise* into clearer and more palatable forms. As there was little difference in substance between the *Treatise* and the first *Enquiry*, 'we can assume that Hume thought the second *Enquiry* to be essentially consistent with the *Treatise*, and to improve on this earlier work principally by simplifying and clarifying the views found there' (Norton 1993b: 171; see Norton 1982). Although Norton recognizes some differences between the *Treatise* and the *Enquiry*, the emphasis on utility in the *Enquiry* is not one of them.

Haakonssen seems more aware of the problem of the relationship between the *Treatise* and *Enquiry*, and makes no simple assumption about consistency. But as he is reading Hume backwards from Smith, and since his interpretation

focuses on the way Smith brings together two different strands of argument concerning justice from the *Treatise*, the whole of the *Enquiry* tends to be discounted. When one adds to this Haakonssen's assertion that the idea of utility was different from that of later utilitarians, it is no wonder that he then turns to examine the fate of sympathy rather than the promise of utility in the *Enquiry*. As Haakonssen puts it, 'the following account is, therefore, mainly based on the *Treatise*, although the *Enquiry* will not be forgotten' (Haakonssen 1981: 7).

Let us begin this examination of the *Enquiry* by considering first the conception of utility advanced in it. Haakonssen is not unique in wanting to draw attention to a perceived difference between Hume's employment of utility and later versions. J.L. Mackie, for example, acknowledges the importance of utility in Hume but emphasizes a number of differences between Hume in the *Enquiry* and later utilitarians. For Mackie, Hume does not incorporate an idea like maximizing utility through some sort of calculus, which aims at the greatest happiness of the greatest number. He has no conception of measuring utility. Furthermore, Hume, in his view, is more concerned with motive and character than with the rightness and wrongness of actions and their measurement (Mackie 1980: 151–4; see Harrison 1981: 19–20, 87–8).

Geoffrey Sayre-McCord also wants to distinguish between contemporary utilitarianism and that of Hume by first denying that Hume's employment of utility is compatible with versions of act, rule, or motive utilitarianism currently in vogue (Sayre-McCord 2001: 483). For Sayre-McCord, Hume did not write of maximizing utility, did not endorse a calculus for determining the public good, looked to the interests of each as opposed to those of all when determining justice, saw virtue as being desirable in itself and regarded some virtues as not having any regard to public advantage (Sayre-McCord 2001: 483). He goes on to call Hume's approach the 'Bauhaus theory of ethics' – which 'gives a central place to utility, but does so without making either actual or expected utility of acts, or rules, or motives, or character traits the measure or ground of virtue' (Sayre-McCord 2001: 484). He depicts the Bauhaus theory in terms of 'something (a chair, a house, or when it comes to ethics, a durable feature of mind or character) [which] commands approbation, when it does, in virtue of its being *well-suited* for the achieving of certain ends or the solving of certain problems' (Sayre-McCord 2001: 485).

Although this element of usefulness and suitability as means to ends may well have been part of Hume's idea of utility, it neither exhausts the idea of utility in Hume nor is it an idea peculiar to Hume's theory. It is fair to say that what Sayre-McCord calls the Bauhaus theory was ascribed to utility throughout the Epicurean tradition and was a characteristic of classical utilitarianism. But as a defining category that would clearly enable one to see what is distinctive in Hume's ethics or in classical utilitarianism generally, it is only one element in a more complex story.

This sort of depiction of Hume's use of utility depends on a view of what utilitarianism *is*, which bears little resemblance historically to utilitarians like

Bentham and J.S. Mill and more to a crude version of act utilitarianism conceived in the twentieth century as a straw man to be attacked and rejected.⁴ As we shall see, Bentham, for example, did not subscribe to such a view, and in fact took many of his ideas from Hume. And in the quotation placed at the beginning of this section, Hume clearly asserted that utility ‘is constantly appealed to in all moral decisions concerning the merit and demerit of actions’ – contradicting Mackie’s view of his idea of utility as being primarily concerned with motives and character.

The foundational role of utility

We might begin to understand the role of utility in Hume and its influence on later utilitarians by examining the foundational role he gave to it, as in the quotation at the beginning of the last section where he claimed that utility was ‘in all subjects ... a source of praise and approbation’. One contemporary critic of Hume’s *Enquiry* called attention to the significance of ‘that loose and vague idea of approbation, which he [Hume] makes to include the whole of moral feeling, and upon which he founds the distinction betwixt virtue and vice’ (Anon 1753: 24). He added:

It is to be observed, that approbation is a word of a very undetermined signification; and the author has never endeavoured to fix its meaning. It is whatever we take pleasure in; whatever we consider useful or agreeable.

(Anon 1753: 25)

According to this author, the idea of approbation was a way of linking utility to pleasure. Although he accepted that virtue was useful to society in promoting the general happiness, he denied that we give approbation to virtue because of its utility (Anon 1753: 33–4). While he agreed with Hume that chastity, for example, had great public utility, he argued that what sustained chastity as a virtue was ‘an instinct of natural modesty, or a sense of honour or pride’ and not its utility (Anon 1753: 34–5). Thus, one problem with Hume’s concept of approbation was that approbation was not necessarily linked only to utility. Hume, of course, never claimed that only utility received approbation, but he did insist that utility always received it. We always prefer what is useful to ourselves and to society.

The anonymous author also criticized Hume for failing to note that while justice, which was based on utility, might receive approbation, other, more ‘exalted virtues’ and characteristics, such as magnanimity, generosity, and heroism, received greater approbation. This fact seemed to undermine Hume’s view that utility was ‘the chief foundation of the approbation and praise’ (Anon 1753: 36). Hume, of course, never attempted to determine greater or lesser amounts or degrees of approbation and hence was content to argue that

however little approbation we might give to justice and its foundation in utility, the amount or degree of approbation did not undermine that foundational role given to utility.

These comments on and criticisms of Hume's use of 'approbation' call attention to the importance he gave to the concept in this foundational sense. The utility of an action, practice or even a plant or animal recommends it to our approbation. We approve it because it gives us pleasure: 'The eye is pleased with the prospect of corn-fields and loaded vineyards; horses grazing, and flocks pasturing: But flies the view of briars and brambles, affording shelter to wolves and serpents' (Hume 1998: 2.9). Hume later expanded his account of the relationship between utility and pleasure:

Usefulness is only a tendency to a certain end; and it is a contradiction in terms, that any thing pleases as means to an end, where the end itself no wise affects us. If usefulness, therefore, be a source of moral sentiment, and if this usefulness be not always considered with a reference to self; it follows, that every thing, which contributes to the happiness of society, recommends itself directly to our approbation and good-will. Here is a principle, which accounts, in great part, for the origin of morality: And what need we seek for abstruse and remote systems, when there occurs one so obvious and natural?

(Hume 1998: 5.17)

Utility (which embraces the means, the ends, and the way the two fit together (cf. Haakonssen 1981: 41)) nearly becomes synonymous here with 'the happiness of society', and such utility recommends itself to our approbation by virtue of its connection with happiness in giving us pleasure. Furthermore, Hume was willing to consider this utility as the foundation or origin of morality. In a footnote he added that 'no man is absolutely indifferent to the happiness and misery of others. The first has a natural tendency to give pleasure; the second, pain' (Hume 1998: 5.17n).

Hume was attempting in this material to reject the idea that moral approbation was based on self-love, and used the idea of approbation of utility, based on the pleasure it gives, to do so. We approve of the utility of a practice or object, not because it appeals to our selfish regard for our own welfare, as opposed to that of others, but because it gives us pleasure, regardless of whether or not it appeals to self-interest. Connected with this link between utility, approbation, and pleasure is a sympathy with the pain and pleasure of others that we share as part of our humanity. Our sympathy with humanity, however, is not the source of pleasure; our feelings of pleasure through the approbation of utility is the source of our humanity. If we did not experience pleasure at the sight of the great and useful deeds and practices of other human beings, we would not be able to develop the sympathy with humanity which is one aspect of moral approbation. Hume clearly took this view in a cautious, though clear, note he added to

the passage just quoted, in which he detached utility and happiness from self-interest. He first wrote:

It is needless to push our researches so far as to ask, why we have humanity or a fellow-feeling with others. It is sufficient, that this is experienced to be a principle in human nature. We must stop somewhere in our examination of causes; and there are, in every science, some general principles, beyond which we cannot hope to find any principle more general.

(Hume 1998: 5.17n)

Had Hume's note ended here, one might ascribe to human beings a fellow-feeling or sense of humanity that was itself the foundation of human well-being. But he then continued as follows:

No man is absolutely indifferent to the happiness and misery of others. The first has a natural tendency to give pleasure; the second, pain. This every one may find in himself. It is not probable, that these principles can be resolved into principles more simple and universal, whatever attempts may have been made to that purpose.

(Hume 1998: 5.17n)

It thus seems that happiness and misery in others stimulates in us a response in terms of pleasure and pain. These feelings in turn are the source of the development of our sense of humanity and our approval of utility particularly in relation to humanity in general or to members of our own community. This developed sense of humanity enables us to express 'a general approbation of what is useful to society, and blame of what is dangerous or pernicious' (Hume 1998: 5.39).

That Hume gave foundational status to feelings of pleasure and pain was clearly stated at a number of points in the earlier *Treatise*:

The chief spring or actuating principle of the human mind is pleasure or pain; and when these sensations are remov'd both from our thought and feeling, we are, in a great measure, incapable of passion or action, of desire or volition.

(Hume III.III.I, 1978: 574)

We have already observ'd, that moral distinctions depend entirely on certain peculiar sentiments of pain and pleasure, and that whatever mental quality in ourselves or others gives us a satisfaction, by the survey or reflexion, is of course, virtuous; as every thing of this nature that gives uneasiness, is vicious.

(Hume III.III.I, 1978: 574–5)

Hume also linked feelings of pleasure with approbation (Hume III.II.I, 1978: 477), and in general the *Treatise* contains a number of important discussions of pleasure and pain, particularly in relation to virtue and utility (see, for example, Hume III.I.I, III.I.II, III.II.VI, III.III.V, 1978: 469–71, 472, 475, 528, 614). In part, these discussions of pleasure and happiness, in the *Treatise* as well as in the *Enquiry*, are related to Hume's belief that virtue is based on happiness and that it fits in with the morality of the ordinary person. This underlying propensity for happiness is then reflected in what one commentator has called Hume's 'unblinking acceptance of the actual desires and preferences of mankind – that is, in its entire accordance with common life, or at least with the principles implicit in it and discernible to a careful eye' (Danford 1990: 160). In this respect, and in numerous others, Bentham was a close student of Hume, as when he wrote with regard to the principle of utility:

Nor is this a novel and unwarranted, any more than it is a useless theory. In all this there is nothing but what the practice of mankind, wheresoever they have a clear view of their own interest, is perfectly conformable to.

(Bentham 1996: 40)

Earlier in *IPML* he noted that 'by the natural constitution of the human frame on most occasions of their lives men in general embrace this principle, without thinking of it' (Bentham 1996: 13). Furthermore, both Hume and Bentham believed that the theory and practice of austere and ascetic moral doctrines was the source of much unhappiness in society. When Hume wrote of character, he tended to use terms like 'sociable', 'good natured', 'humane', 'merciful', all of which were useful to oneself and to society, and which gave pleasure and received approbation. In an important passage Hume listed numerous qualities that were immediately agreeable in giving pleasure, apart from their utility, and in the process he rejected a line from Horace to the effect that the melancholy hated the merry. Hume responded with the remark that 'where the jollity is moderate and decent, serious people are so much the more delighted, as it dissipates the gloom with which they are commonly oppressed; and gives them an unusual enjoyment' (Hume 1998: 7.1). Nature itself seemed to dictate that we respond to pleasure and approve it, however misanthropic we might be or however much we take pleasure in acts of cruelty. Although Hume was aware of the dark side of human character, he stressed the way pleasure enabled human sympathy to develop and respond favourably to utility and other more directly agreeable feelings. This is a powerful force and the main motivating factor behind morality.

Although Hume gave utility an important role in his thought, in many respects a greater role than that given to it by ancient or early modern writers in the Epicurean tradition, he did not simply assume that we should approve of utility as a moral doctrine or imperative. As one commentator has pointed out:

In fact, Hume's *Enquiry* is an attempt to empirically substantiate the validity of the utilitarian principle. Hume is not maintaining merely that spectators *should* approve of those qualities which tend to promote the happiness of humanity. He is trying to show that as a matter of fact those qualities which tend to promote the happiness of humanity *are* approved by disinterested spectators.

(Glossop 1967: 536)

At times, however, Hume's attempt to show that empirically utility nearly always receives a response in humans in terms of pleasure seems to be mingled with a recommendation that this should be the case. For example, Hume did not clearly distinguish between sentiments of approval and judgements of approval so that the link between feelings of pleasure and approbation is not as straightforward as he seemed to indicate. Furthermore, it is arguable that Hume's acceptance of the utility principle as the common standard involved his moving 'gradually from descriptive elucidation to approval or acceptance of utility as the appropriate standard, without ever affirming unequivocally a prescriptive ethical formula' (Whelan 1985: 211). While these criticisms are commonplace and relevant, Hume himself was emphatic that utility could be first understood in empirical terms:

How, indeed, can we suppose it possible in any one who wears a human heart, that, if there be subjected to his censure, one character or system of conduct, which is beneficial, and another, which is pernicious, to his species or community, he will not so much as give a cool preference to the former, or ascribe to it the smallest merit or regard?

(Hume 1998: 5.39)

Hume then continued in this vein to argue that however self-interested we might be, we still have '*some* propensity to the good of mankind'. 'Would any man', he continued, 'who is walking along, tread as willingly on another's gouty toes, whom he has no quarrel with, as on the hard flint and pavement?' (Hume 1998: 5.39). This feeling for humanity, then, has '*some* authority over our sentiments, and gives us a general approbation of what is useful to society, and blame of what is dangerous or pernicious' (Hume 1998: 5.39). Hume then generalized this position as follows:

All mankind so far resemble the good principle, that, where interest or revenge or envy perverts not our disposition, we are always inclined, from our natural philanthropy, to give the preference to the happiness of society, and consequently to virtue above its opposite. Absolute, unprovoked, disinterested malice has never, perhaps, place in any

human breast; or if it had, must there pervert all the sentiments of morals, as well as the feelings of humanity.

(Hume 1998: 5.40)

In this material Hume thus claims that utility gives pleasure and that we respond to this pleasure by giving approbation to utility. On the face of it, Hume has effected a great revolution and consequent simplification of moral theory. If we assume that morality exists, and we must because we see it empirically everywhere in human society, utility and pleasure must function in the way he indicates that they should. ‘Absolute, unprovoked, disinterested malice’ either does not exist or if it does, there cannot be morality.

Hume was not so naïve as to believe that no one would prefer to tread on a person’s gouty toes rather than to walk on the pavement, and he believed (as indicated in the last quotation) that there were sources of unhappiness (e.g. interest, revenge, envy, etc.). He acknowledged other sources of unhappiness as when he referred at one point to a ‘want of STRENGTH OF MIND’, which would otherwise enable people to resist the temptations of immediate pleasure and look to happiness over the longer term (Hume 1998: 6.15). At another point he recognized the existence of a type of person (‘this fancied monster’) who had no concern for his fellow creatures (Hume 1998: 6.5). But he seemed to deny this source of unhappiness a separate basis in human nature: ‘One may venture to affirm, that there is no human creature, to whom the appearance of happiness (where envy or revenge has no place) does not give pleasure, that of misery, uneasiness. This seems inseparable from our make and constitution’ (Hume 1998: 6.3n). As an example of this he referred to the ‘gripping miser’ whom, he argued, praised frugality in others even though the miser would not part with a shilling to help an industrious person. But the miser did respond with pleasure to the ideas of industry and frugality, and in so doing reflected both the feelings of humanity and the connection with utility and pleasure Hume ascribed to everyone (Hume 1998: 6.3n). Self-love, for Hume, was neither a source of morality nor of evil. It simply prevented one from understanding the language, forms, and, above all, the foundations of morality. When we call someone ‘vicious’, ‘odious’, or ‘depraved’, we are using a language common to society and to humanity, and this use of language presumes the acceptance of a common morality and its foundation in pleasure and pain to which even the most depraved has access. Even robbers and pirates, Hume believed, must have a system of morality, even a system of distributive justice, which regulates their organizations (Hume 1998: 4.15).

It would be tempting to use Hume’s own examples against him, and to assert that the melancholy often hate the merry for making them feel their melancholy even more acutely when they compare their disposition with that of others. Furthermore, there are people who take great pleasure in treading on gouty toes (and even worse acts of cruelty) even though numerous alternatives are available. Hume did not deny that such acts of cruelty took place, and he recognized a

kind of struggle between morality and virtue on the one hand and immorality and vice on the other, as in the following passage:

But these principles, we must remark, are social and universal: They form, in a manner, the *party* of humankind against vice or disorder, its common enemy: And as the benevolent concern for others is diffused, in a greater or less degree, over all men, and is the same in all, it occurs more frequently ... Other passions, though perhaps originally stronger, yet being selfish and private, are often overpowered by its force, and yield the dominion of our breast to those social and public principles.

(Hume 1998: 9.9)

Why should the ‘social and public’ principles take the ascendancy over the party of vice and disorder? How can Hume be so confident that on the whole the melancholy will take pleasure in the merry and that few will intentionally tread on someone’s gouty toes? Hume’s answer is given in the last quotation and is simply that utility and humanity are highly prized, because they give pleasure, and, furthermore, allow pleasure to be increased through the way it permeates and resonates in society (see Hume 1998: 5.45–6).

The happiness of others gives us pleasure and their suffering gives us pain. In addition, we obtain a degree of pleasure from the way our sympathy intermingles with the pain of others. The pleasure we obtain from utility is primarily social in nature. We take pleasure in practices, events, laws, and institutions, which are useful to society not only because we receive a benefit from such practices, etc., but also because we are pleased by the pleasure others take in such usefulness. Utility and humanity go hand in hand creating a force for morality in society. They prevail over selfishness and cruelty, because they provide many opportunities for pleasure and happiness.

The anonymous critic of Hume’s moral theory had no doubt that ‘utility is his favourite and capital principle, to which he reduces all the several branches of morals’ (Anon 1753: 13). Furthermore, one modern critic, writing nearly 250 years later, has noted that in invoking utility Hume was the father of ‘the most famous tradition of English-speaking ethics’ (Penelhum 2000: 15). Even if we grant the foundational role of utility in Hume’s system, we have not yet seen how he intended utility to work in practice.

Benevolence, justice and utility

One important theme for Hume was benevolence to which he gave a prominent, but, unlike Hutcheson, not a foundational role in human affairs.⁵ It is a powerful sentiment and one that is connected with the sense of humanity and fellow-feeling considered above. Hume discussed benevolence in four brief examples where he showed that on its own benevolence could not form the basis of

morality but required guidance and supplementation from the principle of utility. As he put it:

In all determinations of morality, this circumstance of public utility is ever principally in view; and wherever disputes arise, either in philosophy or common life, concerning the bounds of duty, the question cannot, by any means, be decided with greater certainty, than by ascertaining, on any side, the true interests of mankind. If any false opinion, embraced from appearances, has been found to prevail; as soon as farther experience and sounder reasoning have given us juster notions of human affairs; we retract our first sentiment, and adjust anew the boundaries of moral good and evil.

(Hume 1998: 2.17)

In each of the examples Hume began with acts motivated by benevolence, which, in fact, did not advance human happiness and were gradually adjusted accordingly. In the first of these Hume argued that giving alms to common beggars, though ‘naturally’ praised, was seen more as a weakness than as a virtue, once we ‘observe the encouragement thence arising to idleness and debauchery’ (Hume 1998: 2.18). The second example recorded the change in attitude towards tyrannicide, from approval of the practice as it rid humanity of its oppressors to rejection of it, as ‘history and experience’ had convinced us that the practice ‘increases the jealousy and cruelty of princes’ (Hume 1998: 2.19). In the third example Hume noted that liberality in princes, which was often taken as a mark of beneficence, might not be so when ‘the homely bread of the honest and industrious is often thereby converted into delicious cakes for the idle and the prodigal’ among their courtiers (Hume 1998: 2.20). Finally, Hume stated that the pursuit of luxury, which had been regarded as a source of corruption and slavery, might better be seen as increasing industry, various arts, and human civility (Hume 1998: 2.21). In all of these examples Hume referred to experience and rationality which led to changes of view in morality and politics. In the two perspectives exhibited in the four examples we see ample evidence of benevolence, but in the second perspective Hume attempted to ensure that benevolence in fact served the ‘interests of mankind’.

How is this achieved? Experience and reasoning from experience have taught us that what is apparently an act deserving approbation, because it is motivated by benevolence or because we think that it is an act motivated by benevolence, does not deserve such approbation, because the consequences of such an act do not serve the ‘interests of mankind’. In the first example Hume believed that acts of apparent benevolence encouraged idleness and debauchery, even though they might reduce the sense of pain felt by the hungry and suffering indigent on receiving alms. Hume suggested that we must look beyond the pleasures and pains of the alms-giver and receiver to the public interest. From this perspective we are able to see that alms-giving pure and simple might well increase idleness

and debauchery and lead to an increase in pain and suffering in society as a whole, as the number of people who obtain the necessities of life through begging rather than working increases. This development might then lead to an increase in crime and immorality where the alms provided are limited and habits of idleness increase and become entrenched. Even if we grant that the change of perspective from the individuals involved to the public interest leads to a different assessment of the value of some benevolent acts, how do we know that this is the case and how can we establish our position? Those who give alms might argue that they receive great pleasure and satisfaction in doing so, as well as advancing for themselves the prospects of eternal happiness. The indigent might call attention to the pleasure they give to alms-givers in allowing them to be virtuous, and, in addition, the relief from pain they feel in receiving alms. Being poor and needy, they might add, also has certain advantages in an afterlife. From the point of view of both rich and poor, and, indeed, from the perspective of all mankind, there are considerable benefits to be derived in this life and in an afterlife from the practice of giving alms.⁶

Hume's argument receives powerful support from the fact that it is empirically based. It was not his personal view that giving alms to beggars is a bad practice, but one which was gradually adopted by reflective writers and politicians in civilized societies. Furthermore, Hume's approach denied any automatic validity to the view held by those who believed that God's word itself (as well as benevolence, generosity, kindness, charity, etc.) supported the practice of indiscriminate alms-giving. Having challenged such a position and placed the two views on a level playing field, Hume was then able to suggest *why* those opposed to giving alms took this point of view. Rationality entered the argument here for a third time (the first being the elevation of experience and the second, the establishment of the level playing field), and pointed to utility as a way of understanding and adjusting experience. In the first place giving importance to utility (as the guardian of human happiness in moral matters) enabled Hume to point to the public interest rather than simply to self-interested satisfactions. This was possible, because although utility was ultimately connected to individual perceptions of pleasure and pain, it was mediated by ideas of sympathy and humanity that sustained the idea of utility as being intensely social. The reason society had come to criticize the practice of giving alms was that, despite the pleasures afforded to both givers and receivers, the practice was harmful to society, that is to say, to every individual in society. Changes to the practice might well have meant that greater happiness was provided not only for members of society generally (in the reduction of poverty, crime, and other immoral practices) but also for those actually involved in the practice despite their potential opposition to change. Beggars might become industrious, hard-working members of society and alms-givers might invest their money in productive enterprises which would provide opportunities for employment for former beggars.

For Hume, therefore, the invocation of utility enabled him to advance the perspective of the public interest from which his empiricism could more effi-

ciently operate. It also enabled him to develop a new sense of objectivity in discussing and resolving moral differences. The old sense of objectivity may have been provided by the Bible or by conceptions of goodness in nature, but Hume would discount these as not being fully able to assist humanity in resolving social problems. Utility contains a rationality that is clearly evident in the way we can adjust our attitudes and institutions on the basis of experience, and enhance the happiness of those who live in society with us. Above all, Hume's approach was not reductive: it made no attempt to provide a utilitarian ideology. The 'party of humankind', as he called it, existed to advance the happiness of mankind rather than any particular sect within it. It attempted to incorporate the wide variety of moral views within it, and if the 'party of humankind' had an opposition, it was only those forces that opposed morality entirely. When Hume discussed the various moral sects (Epicurean, Stoic, Platonist, and Sceptic), it was to show that all could be embodied in what one commentator has called 'the complexity of the moral universe of common life' (see Hume 1985: 138–80; Danford 1990: 161).

Although considerations of public utility may provide an important role in our approval of actions performed from benevolent motives, for the most part benevolent actions receive our approval and are valued in themselves. Justice is different in a number of respects. Unlike benevolence, justice must deal with and possibly accommodate strong feelings of vengeance and envy which can threaten the very foundations of society. Justice must also inflict pain either directly or indirectly by depriving people of their liberty and goods which they might otherwise consider to be theirs by right. Furthermore, justice is associated with such powerful sentiments that there is a widespread feeling that it is something natural and fixed and means the same thing everywhere (Anon 1753: 13, 16). Justice and injustice play such a role in morality that it might be thought that they form the basis for virtue and vice and right and wrong so that the whole of morality seems based on this virtue in society.

From this perspective one can imagine the outcry Hume's conception of justice aroused. The idea that there is no natural basis for justice, based on a simple instinct in the breast of each person, which distinguishes right from wrong, but that justice is based on artifice and utility, not only undermines justice but also seems to threaten what justice is meant to support: the foundations of society. The anonymous contemporary critic of Hume not only held most of the views expressed above, but thought that Hume's deprivation of natural status to justice was sufficient in itself to threaten society:

for to me it appears not only ill founded, but even of dangerous tendency; and it puts justice, which of all virtues is the most necessary and fundamental to society, on a more loose and precarious bottom than the rest; and somehow degrades it into a lower class, and distinguishes it in a dishonourable manner.

(Anon 1753: 14)

For this author utility did not provide any foundations at all. As we developed different ideas of what was in the public interest, ‘the rules of right and wrong would be perpetually shifting’ (Anon 1753: 16). While he could accept that utility might form an ‘additional motive’, it could not play this foundational role, ‘which, I think, can be clearly traced back to a primary, original feeling in human nature’ (Anon 1753: 43). James Balfour, another contemporary critic of Hume, writing in 1753, took a similar view:

Thus the idea of just and right is evidently antecedent to the idea of common utility. [T]his last is a consequence, and not the source of the first.

Such is the original frame of our constitution, that we have a natural sense of right and wrong, a feeling and perception of just and unjust. The idea of good or useful, must then relate to our original constitution.

(Balfour 1989: 56)

For Balfour, then, Hume not only grounded justice on shifting sands, but he also put the cart before the horse in claiming that utility was the foundation of justice, when arguably justice might be regarded as the foundation of utility. Balfour was critical of Hume’s account of justice in other respects. He thought that Hume had based justice ultimately not on utility at all but on self-interest so that each individual agreed to the rules of justice simply to prevent disorder and civil strife (see Balfour 1989: 50–1). For Balfour, this foundation had little to do with morality or justice, and he believed that Hume himself was so eager to avoid basing justice on self-interest that he developed the idea of sympathy with the public interest mainly in an attempt to avoid it. But such sympathy was, according to Balfour, a confused idea, linked to benevolence but ultimately distinguishable from it, because Hume himself insisted that benevolence was distinct from justice (see Balfour 1989: 54). If the idea of sympathy was distinct from benevolence (as we have seen it is), then Balfour believed that as a general principle of humanity, it was unable to form the basis of justice. Thus, for Balfour, the crucial link between sympathy and utility was so vague that it could not do the work Hume had allocated to it. Finally, Balfour believed that utility did not allow for clear distinctions between virtue and vice. The actions of an evil genius might be highly useful to society, but they were still the actions of a person lacking morality.

Hume clearly rejected the commonplace view that there was a natural instinct regarding justice like ‘hunger, thirst ... resentment, love of life, attachment to offspring’ or a simple passion arising from an instinct ‘which nature has implanted for like salutary purposes’ (Hume 1998: 3.40). He asked rhetorically if anyone had discovered a simple, original instinct regarding the rules of property and justice and suggested that if such an instinct existed, there would have to be 10,000 of them to deal with the complexities surrounding such rules concerning

only the possession of property by such various means as occupation, industry, prescription, inheritance, and contract (Hume 1998: 3.41–6).

Hume also knew that the virtue of justice had no universally accepted meaning but was often used in different ways in varying contexts. The Platonic and Christian conceptions of the just soul, the just man, and the just state, emphasizing order and harmony, and reflecting a universal justice in heaven, represented one approach to justice, albeit one that Hume did not adopt. Nor did he admit various theories of distributive justice, such as distribution on the basis of merit or equality, which are well-known today and would have been well-known to Hume. Distribution on the basis of merit might be rational, but, for Hume, such a proposal reflected a reason that was not acquainted with human nature (Hume 1998: 3.23). Self-conceit would lead to a wide variety of conceptions of merit and no rule of conduct could ever be derived from it. Distribution on the basis of equality was similar, but also raised additional problems. It was similar in so far as rational claims might be made for equal distribution. Hume even invoked a principle of marginal utility on the side of rationality. Every departure from equality deprived the poor of much greater satisfaction than it added to the rich (Hume 1998: 3.25). But given inequalities in individual ‘art, care, and industry’, such an equality of distribution would, in Hume’s view, immediately disappear, and any attempt to prevent such ‘art, care, and industry’ for the sake of equality would reduce the whole of society to indigence (Hume 1998: 3.26). The political power necessary to achieve such equality would have to be so great that the government would soon become a tyranny.

Hume’s own approach to justice, conceived as the stability of possessions and property, was also open to a wide variety of interpretations. In the first place it was not immediately attractive, and at one point Hume referred to it as ‘the cautious, jealous virtue of justice’ (Hume 1998: 3.3). Specific acts of justice did not evoke a direct sense of approbation in the way that acts of benevolence did, and hence there was no obvious feeling connected to the approval given to justice. In the second place, it was not easy to distinguish the rules of justice concerning property from vulgar superstition:

I may lawfully nourish myself from this tree; but the fruit of another of the same species, ten paces off, it is criminal for me to touch. Had I worn this apparel an hour ago, I had merited the severest punishment; but a man, by pronouncing a few magical syllables, has now rendered it fit for my use and service.

(Hume 1998: 3.37)

All that makes the apparent absurdities of securing property differ from the superstition of a Syrian preferring to starve rather than eat pigeon, or an Egyptian refusing to come near bacon, is public utility (Hume 1998: 3.36). On their own the various precepts of justice are as strange as any religious superstition.

The idea that there was a virtue of justice relating to both the individual and society, which could be easily defined and readily implemented without controversy, was, for Hume, clearly absurd. Even within a widely accepted conception of justice, such as that connected with security of property, there could be pernicious consequences. For example, a bad person might inherit money from a parent and use it for evil purposes. At times the system of justice might even appear absurd, as when Cyrus allowed a tall boy to take a long coat from a short boy and give to him his short coat instead, thereby violating the system of justice that secured to each the stability of possessions (Hume 1998: App. 3.4).

Hume linked justice to public utility by setting forth what must have been a highly novel argument, that public utility (as he conceived it) ‘is the *sole* origin of justice, and that reflections on the beneficial consequences of this virtue are the *sole* foundation of its merit’ (Hume 1998: 3.1). The cornerstone of his position is his argument which links his own conception of justice to utility by showing that in other circumstances no such link is necessary. For example, where nature provides all the conveniences and luxuries the human race could need, there is no reason to be concerned with the division and security of property; every person simply takes what is required. Similarly, where there is extreme scarcity, through war or famine, for example, people must obtain whatever sustenance they can find. How they obtain it and how they distribute it is of no great concern in such desperate circumstances. Hume argued that where there is great plenty or great scarcity, justice becomes irrelevant. Where justice is relevant, it is only due to its utility. Conditions are such that stability of possessions and security of property are useful to mankind.

In these circumstances justice is highly regarded not in itself, but for its consequences. It enables us to have settled, happy, and prosperous lives, and to plan for the future. In these respects nothing can be more attractive than justice despite the fact that at the level of the individual, justice might well cause great hardship and unhappiness by forcing some to abstain from using the property of others and live in poverty and misery. Indeed, at the level of individual self-interest, one might hesitate to adopt such a theory of justice. Nevertheless, the virtue of justice was established by reference to its utility, and by showing that utility brings pleasure and happiness. Furthermore, Hume’s novel approach to justice allowed him to affirm only one conception of justice, that concerned with the division of property and its secure possession. This is the ugly duckling that grows into the beautiful swan and secures the interests of mankind.

Utility and morality

In the material on benevolence and justice, utility, as we have seen, plays a crucial foundational role. In both cases Hume called attention to complex systems of social interaction to which we give approval on the basis of their utility to human security and happiness. The systems might consist of laws, customs, manners, conventions, etc., and those participating in them would feel

the benefits through their utility. Nevertheless, for a number of Hume's contemporaries and, to a lesser extent, for moralists today, it was felt that there was something odd about the transformation of a traditional moral language into a novel language of utility.

The cultivation of virtue and vice might begin with the study of society, and, in particular, with its institutions, customs, and practices, and the language used to make moral distinctions within society. Morality in these contexts emerges as a necessary part of social life. Without justice society might be plunged into civil strife and war; and without benevolence, it would be deeply impoverished. The cultivation of morality for individuals does not disappear, but it is more a matter of education, parental affection and chastisement, and the cultivation of feelings, particularly those linked to our sense of humanity. For traditional churchmen Hume's approach was obviously deeply disturbing, but there were points of agreement, where the two perspectives could come together. Utility and humanity deserved approval in any moral vocabulary, even though for the traditional churchmen they were not thought to stand at the foundations of morality. Nor, for many, would they allow for the development of a superior moral excellence despite the fact that the actions of a person possessing this superior excellence might be regarded as contributing considerable utility. Furthermore, no clear and unchanging distinction between virtue and vice would be established through the use of utility. But Hume was not troubled by these criticisms. In one passage he depicted the superior excellence of the Socratic philosopher in terms which gave full credit to that excellence, and, in addition, in terms of the grandeur of his elevated position and tranquillity as it struck others who beheld him and his achievements:

Of the same class of virtues with courage is that undisturbed philosophical TRANQUILLITY, superior to pain, sorrow, anxiety, and each assault of adverse fortune. Conscious of his own virtue, say the philosophers, the sage elevates himself above every accident of life; and securely placed in the temple of wisdom, looks down on inferior mortals, engaged in pursuit of honours, riches, reputations, and every frivolous enjoyment. These pretensions, no doubt, when stretched to the utmost, are, by far too magnificent for human nature. They carry, however, a grandeur with them, which seizes the spectator; and strikes him with admiration. And the nearer we can approach in practice, to this sublime tranquillity and indifference (for we must distinguish it from a stupid insensibility) the more secure enjoyment shall we attain within ourselves, and the more greatness of mind shall we discover to the world. The philosophical tranquillity may, indeed, be considered only as a branch of magnanimity.

Who admires not Socrates; his perpetual serenity and contentment, amidst the greatest poverty and domestic vexations; his resolute contempt of riches, and his magnanimous care of preserving liberty,

while he refused all assistance from his friends and disciples, and avoided even the dependence of an obligation?

(Hume 1998: 7.16)

Hume fully demonstrated the superior excellence of the philosopher, without compromising his own system of morality. Nevertheless, it is of more than passing interest that the philosophical tranquillity he so elevated resembles closely that enjoyed by the Epicurean sage.

Enquiry versus Treatise

When one turns from the *Enquiry* to the earlier *Treatise*, one finds the same terminology in the account of justice, but it is clear that Hume used this terminology differently. The most obvious difference is that he made no attempt to establish utility as the foundation of justice, and concentrated on the origins of and motives for justice rather than on foundations. He found these origins or motives firstly in self-interest and second in sympathy with the public interest as the source of approbation of the virtue. We are led by self-interest to establish the virtue of justice as security of property, and we sustain that virtue through our sympathy with humanity or with the public interest.

This formulation omits to consider why we should choose one conception of justice over another. If our self-interest leads us to establish security of property as the principle of justice, our sentiment of sympathy with mankind, if not our self-interest, might lead us to support equal distribution or distribution according to merit so that property would be in the hands of those people able to make the greatest contribution to the happiness of mankind. The motives for establishing justice do not necessarily lead to justice as the stability of possessions. Hume seemed aware of this problem, but he disguised it by distinguishing between single acts of justice and the whole scheme of justice. He used the example of a man of merit who would otherwise use a fortune to increase public welfare, but who had to return the fortune to a person who was a miser. The public suffered in this instance of justice, but benefited overall, Hume argued, from having a system of justice. But Hume omitted to acknowledge that in the so-called single instance there were two different and often opposed principles of justice: security of property and distribution on the principle of merit. Hume wanted to say that the first was the only fully plausible conception of justice, given the self-interested motivation of much human action. But sympathy undermined his argument, as it suggested that human sentiment would approve of justice, even where justice was not conceived as security of property.

In the *Enquiry* Hume turned the argument around and showed that under certain circumstances justice would inevitably arise to give stability of possessions and security to property. He omitted the material on the origin or motives for justice, because it was unnecessary. Whatever our motives, we will turn to security of property and call it justice. We will justify this move by reference to public

utility. That is to say, the system of justice will enable all sorts of good and useful things to develop. It does not matter if particular acts of justice cause pain or if the whole system is a painful burden to mankind. What matters is that the system of justice is useful to mankind, and, in addition, that utility brings pleasure and hence happiness.

Hume and Bentham

It is important that we dwell on the similarities and differences between Hume and Bentham (already touched on at various points), because the widely held but false views of Hume's conception of utility, which have been discussed in this chapter, seem to depend on and were arrived at by equally false views of Bentham's utilitarianism. Those who have argued that Hume was not a utilitarian or that his utilitarianism had little influence on later classical utilitarians have often reached this position through a caricature of Bentham's theory. It will seem odd to some that one can misconstrue and misunderstand the ideas of one thinker because one misunderstands the ideas of another, but the practice is not entirely uncommon in the history of ideas where one is often attempting to understand a thinker as part of a larger tradition.⁷ We shall encounter a similar problem in the chapters on J.S. Mill, where Mill's hedonism is shown to be widely misunderstood, mainly because that of Bentham is also misunderstood.

We shall begin here, however, by noting the similarities between Hume and Bentham, as much of the confusion regarding Hume's conception of utility depends on the denial of numerous points of agreement. These points of agreement stem from two sources. First, both Hume and Bentham drew on and worked within the Epicurean tradition discussed in the previous chapter. Hence there is a similarity in some of their ideas which is based not on direct discipleship but on their sharing a common intellectual tradition.⁸ In this respect one can note, for example, a number of similarities in their use of pleasure and pain. For both Hume and Bentham there was a clear distinction between pleasure as a good and pain as an evil (see DeWitt 1954: 217). Unlike Plato and Aristotle, for example, neither wrote of good and bad pleasures or good and bad pains, and for both, to say that utility generated pleasure was to say that utility was good. Similarly, neither suggested that there might be a neutral state between pleasure and pain (see Cicero I.xi, 1999: 42–3), but both agreed that pleasure was a normal part of life, with pain being abnormal in the same sense that disease was considered abnormal. Thus, for neither Hume nor Bentham did utility present itself as a neutral activity from which we might or might not obtain pleasure; we respond to utility with pleasure, and the only alternative would be to respond to it with pain.

Furthermore, neither of the two writers assumed (as did Plato and Aristotle) that there was 'an ascending series of pleasure' which depended on the organ affected so that the pleasures of a full stomach would be inferior to the enjoyment of intellectual contemplation, because the stomach was considered inferior

to the soul (DeWitt 1954: 236). This is not to deny that one might obtain greater pleasure from contemplation than from eating (from the satisfactions of Socrates as opposed to those of a pig), but it is to say that there are not different levels of pleasure related to different parts of the body. Both Hume and Bentham subscribed instead to the Epicurean doctrine of the unity of pleasure (DeWitt 1954: 235).

These basic assumptions about pleasure and pain have important implications for both Hume and Bentham. In Hume's empiricism and its regard for ordinary human life, its pleasures and pains, and virtues and vices, he never paused to consider different kinds of pleasure and pain. If utility pleased, the pleasure it provided was like any other pleasure. Bentham would fully agree. The various categories depicted in *IPML* (1996: 42–50) led to no conclusions regarding some pleasures being superior to any others. Indeed, not only did Hume's empiricism and attention to the virtues and vices praised and deplored in ordinary life depend on the doctrine of the unity of pleasure, but also ideas of sympathy and humanity seemed to require it for their coherence and force. The party of humankind might be regarded as the party of pleasure; the party of vice and disorder might well be depicted also as the party of pain (see Hume 1998: 9.9). At this point I am not claiming that Hume and Bentham used pleasure in the same way in every respect, but that they shared several important assumptions about pleasure and pain, derived from the Epicurean tradition, which made other aspects of their thought coherent.

Second, Bentham was a careful student of Hume, and he consciously took numerous ideas from Hume's writings. In this respect one might begin with *A Fragment on Government*, published twenty-five years after the second *Enquiry*, and Bentham's first significant work. In a well-known passage referring to Hume, Bentham noted that he 'felt as if scales had fallen from my eyes [and] I then, for the first time, learnt to call the cause of the people the cause of virtue'. He then added that 'I learnt to see that *utility* was the test and measure of all virtue ... and that the obligation to minister to general happiness, was an obligation paramount to and inclusive of every other' (Bentham 1988: 51n–2n). When Bentham wrote that he 'learnt to call the cause of the people the cause of virtue', he was referring to Hume's belief that to understand morality one must study it empirically as part of ordinary life. One must also understand Bentham's position by recalling the remarks in *IPML*, as quoted above, that the principle of utility reflected the ordinary practices of mankind and that most people tended to live by this morality. There was thus a recognition in Bentham, following in the footsteps of Hume, that utility was to be the test of virtue. In making this point Bentham was not denying Hume's point that some virtues were useful and others more directly agreeable, but he was calling attention to the way Hume made utility the foundation of virtue as a social practice.

In the early *Fragment* (1988: 51 and n) Bentham also followed Hume in rejecting the doctrine of the social contract. We have already noted how Mounce, for example, builds a major distinction between naturalism (Hume) and

rationalism (Bentham) around this doctrine, but omits to notice that Bentham explicitly followed Hume in rejecting it. Bentham also followed Hume in turning to habit, custom, and, wherever relevant, established laws to conceive the basis of political obligation (Bentham used the phrase ‘habit of obedience’), and to resistance, where he found its rationale in the established conventions whereby governments divided and allocated power (see Bentham 1996: lviii ff).

Many Hume scholars might acknowledge this dimension to Bentham’s thought, but nonetheless argue that there is in Bentham an emphasis on rationality which takes the form of the measurement and calculation of pleasure and its maximization, emphasizes the importance of the individual making these calculations, and uses the external force of law to effect changes in society in order to create a society generating even greater happiness – all of which was foreign to Hume’s approach. However much Bentham began as a disciple of Hume, it might be argued, he did not finish as one, and the contrast between Hume’s naturalism and Bentham’s rationalism might still be valid.

These sentiments are based on a widely accepted reading of Bentham’s *IPML* to which we shall now turn. Two points, both of which have been mentioned earlier, require further attention. The first is Bentham’s invocation of nature in the first sentence of the text: ‘Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*.’ Seldom noticed here is Bentham’s use of an extensive political metaphor in this opening paragraph. ‘Governance’, ‘sovereign’, and ‘masters’ appear in this sentence, and Bentham carried on in the rest of the paragraph to use words such as ‘govern’, ‘empire’, ‘subjection’, ‘subject’, and ‘law’ (Bentham 1996: 11). In one sense the use of the metaphor simply supports Bentham’s emphasis on the role and power of pleasure and pain, and, additionally, utility in human affairs. As in political subjection we are bound by pleasure and pain, but unlike political subjection, we cannot throw off this subjection. The metaphor makes our subjection to pleasure and pain seem utterly absolute and even different from political subjection. Nature, it seems, puts us under a different sort of subjection. Pleasure and pain govern us ‘in all we do, in all we say, in all we think’ (Bentham 1996: 11): emphasizing its control over the totality of human life. Reason itself is as much subject to pleasure and pain as the appetites. In this sense the increase of happiness does not depend on or is not subject to rational calculation, but to pleasure and pain. No matter how much we calculate rationally, reason alone cannot produce happiness nor can we change our lives and the institutions under which we live simply by rational calculation. The utility principle differs from all other principles, not in being more rational, but in its recognition and acceptance of the absolute power in nature of pleasure and pain.

How then did Bentham think that happiness was determined? When he referred to the principle of utility in this fundamental role, he added a footnote in which he explained what he meant by a principle, and, in particular, the principle of utility. A principle was ‘a term of very vague and very extensive signification’ which was ‘applied to any thing which is conceived to serve as a

foundation or beginning to any series of operations'. In developing this point, he continued: 'the principle here in question may be taken for an act of the mind; a sentiment; a sentiment of approbation; a sentiment which, when applied to an action, approves of its utility' (Bentham 1996: 12n). Not only did Bentham follow Hume in basing utility in sentiment, but he also used the novel term, 'approbation', with which Hume's anonymous critic took issue. For Bentham as for Hume, the utility principle evoked sentiments of approbation based on feelings of pleasure. These sentiments might be simple or highly complex and those concerned with society are based on a complex set of responses but always ultimately on pleasure and pain.

Both Hume and Bentham gave ample scope to rationality. In the examples concerning benevolence Hume showed how over time reason corrected views of tyrannicide, luxury, beneficent princes, and giving alms to beggars, all of which gave pleasure when seen in one light but gave even greater pleasure when painful aspects were eased following greater insight and understanding. For Bentham the human condition was the same. A given practice might give pleasure, but its reform might give even greater pleasure. The ultimate standard was the happiness of society, seen in terms of the happiness of the individuals that composed it.

The idea that Bentham was more of a rationalist than Hume and hence differed from him is often linked to the supposed emphasis Bentham placed on the *individual* making rational calculations, a perspective Hume supposedly did not emphasize in his focus on *public utility*. Mounce develops this perspective as follows:

Bentham, for example, insisted that society is simply a collection of individuals and is therefore to be understood by understanding the individuals which comprise it. The method is comparable with that of the physical scientist. A chemist, for example, breaks down a substance into its component parts, analyses the nature of the parts and then, through bringing them together again, understands the nature of the substance. In a similar way, individuals are taken in abstraction from society, their nature analysed and society explained as what results when the individuals who have this nature come together.

(Mounce 1999: 90)

Mounce goes on to relate this method to Hobbes and other social contract theorists, arguing that individuals are understood as they existed prior to their entrance into society. By contrast, he depicts Hume's position as follows:

Now Hume, by contrast, argues that the benefits of society can be calculated only by those who *already* have some experience of it. Consequently it cannot have arisen as a result of such a calculation.

(Mounce 1999: 90)

This stark contrast between Hume and Bentham is often based on evidence in *IPML* in which Bentham seems to define utility in terms of individual happiness:

The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning of it is often lost. When it has a meaning, it is this. The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what? – the sum of the interests of the several members who compose it.

It is in vain to talk of the interest of the community, without understanding what is the interest of the individual. A thing is said to promote the interest, or to be *for* the interest, of an individual, when it tends to add to the sum total of his pleasures: or what comes to the same thing, to diminish the sum total of his pains.

(Bentham 1996: 12)

If my argument regarding Hume and Bentham is to succeed, I must show that what Bentham stated in this material is not equivalent to the doctrine of the social contract, which, as we have seen, he clearly rejected in the earlier *Fragment*. First, the passage in question appeared in the midst of an account of what is meant by the principle of utility. In the passage just prior to the quotation, Bentham said that the term could apply to the happiness of the community or the happiness of the individual. Just after the quotation, Bentham wrote that he was using the principle of utility so that ‘the tendency it has to augment the happiness of the community is greater than any it has to diminish it’ (Bentham 1996: 12–13). A few paragraphs further Bentham depicts the ‘partisan’ of the principle not as one who calculates his pleasures and pains from self-interest, but one whose ‘approbation or disapprobation ... is determined by, and proportioned to the tendency which he conceives it to have to augment or to diminish the happiness of the community’ (Bentham 1996: 13).

On the basis of these statements, Bentham scholars have tended to argue that for both Hume and Bentham utility means public utility, and the utility for the individual refers to that part of public utility in which he or she shares (see Long 1990: 35–6). Furthermore, there are no references in either Hume or Bentham to a state of nature or a pre-political condition in which the individual possesses certain characteristics that can be abstracted from society itself, or general characteristics such as one finds in Locke of a state of nature in which there is freedom and equality (see Burns 1993). For Bentham, as we have seen, we are not free and equal, but subject to nature; such subjection is of a special kind, that is to say, subjection to pleasure and pain. By nature, all that we can say is that humans are sentient creatures. Our ethics and politics depend entirely on the prior existence of society and polity. Bentham put it memorably when he stated

that the principle of utility recognized the subjection to pleasure and pain 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 of law’ (Bentham 1996: 11). Reason thus enters the system as the slave or servant of feeling or passion.

Consider, then, those passages (which have been quoted) where Bentham wrote that the community was a fictitious body and the interest of the community could not be seen as anything other than the sum of the interests of the individuals who composed it. Surely here is the source of Mounce’s point that the rationalist proceeds like a scientist in breaking down a substance into its component parts, analysing the parts, and by bringing them together understanding the substance. This procedure may be true for scientific understanding (though I doubt it), but it is not true for Bentham. He did not say that if one understood, in the context of the community, the elements of the community (in terms of the pleasures and pains felt by individuals), one thereby knew the community. What he insisted on was that the community could not be understood apart from the individuals who composed it. If a politician said that war in a given situation was in the public interest, because it brought glory and honour to the nation, Bentham would want to establish what was meant by the public interest in this particular context. He would insist that one could not establish the public interest without reference to the individuals who composed society, and that meant all the individuals. This did not mean that by considering individual interest one could understand whether or not war was in the public interest. But if war did not promise to bring security and happiness to all members of society by defending them against the pain of invasion and subjection, then it was not obviously in the public interest. When the politician justified war in terms of the glory and honour of the nation, he did not refer to the interests of the individuals who composed the community. When Bentham considered war in terms of the security and happiness of the community he did refer to the interests of the particular individuals who constituted it. In the former case the community was, in Bentham’s terms, a fictitious body unrelated to individual interests. In the latter case the community was also a fictitious body (all general nouns were considered fictions by Bentham), but in this case the fiction was a useful one, because it referred empirically to the interests, feelings, and aspirations of the individuals in society. One might say that Bentham meant by the community consisting of the sum of the interests of the individuals the same as Hume did when he referred to the party of humanity, based on utility, as that advancing good, and the other party representing evil. This was where utility and humanity took their stand and used reason and law to establish the fabric of felicity.

This account of the analysis of the public interest in terms of the individual might not persuade those who insist on the distinction between Hume’s and Bentham’s utilitarianism to abandon their positions. They might call attention to the emphasis on rational calculation, the measurement of pleasure and pain, and the maximization of happiness they find in Bentham but not in Hume. Even if reason is the slave of passion for both thinkers and even if society must be

presupposed for individual happiness to make sense, there seems to be a much greater emphasis on rationality in Bentham's *IPML*. I shall deal with Bentham's account of pleasure and pain later, in chapter 10 on J.S. Mill's hedonism, and with the emphasis on maximization, in chapter 13 on Bentham and Mill on utility and rights. It will be shown there that these aspects of Bentham's doctrine do not reveal any clear distinction between Hume and Bentham with respect to their understanding of the principle of utility. Nevertheless, it would be naïve for any student of Hume and Bentham not to notice differences between them, even if these differences are ones of emphasis or style rather than substance.

Compare, for example, Hume's emphasis on justice in both the *Treatise* and *Enquiry* with the fact that Bentham in *IPML* consigned the whole theme of justice to a footnote, where he identified it with utility when applied to certain particular cases, and partly with benevolence (Bentham 1996: 120n). Although he placed the same emphasis on security of property as did Hume, he made such security the most important secondary principle concerned with the civil law, and eventually depicted it in terms of his disappointment-prevention principle (see Kelly 1990). He thus stripped security of property of its association with justice for which three reasons might be given. First, he acknowledged that justice had at least one other role besides securing stability of possessions, namely the enforcement of the penal law. Such enforcement of the penal law might well require the confiscation of property as punishment. Second, he wanted no rivals to the principle of utility as the foundation of morals and legislation, and might well have concluded that the notion of justice had so many ideas associated with it that to link it with security of property alone, as Hume did, was a pointless exercise. To replace it with utility and to make security of property the most important secondary principle under utility would still represent Hume's position using a slightly different terminology. Third, Bentham followed Locke and Montesquieu in linking security of property with liberty rather than with justice. This was liberty secured by law and Bentham would hesitate to lose that association (see Rosen 1992: 25–76). It is worth noting that J.S. Mill repeated Bentham's emphasis on security in the last chapter of *Utilitarianism*, but like Hume, he associated it with justice (see Mill 1969: 240–59; 1998: 87–107). Perhaps having already advanced a new idea of liberty in *On Liberty*, he hesitated to confuse it with another, and returned to the link Hume had established between security of property and justice.

We can see here that on the one hand Bentham followed Hume in making security of property depend on utility and the basis of justice. On the other hand, he could give good reasons for changing the terminology so that justice was seen as an imprecise and misleading term which could be replaced entirely by the principle of utility and its subordinate principles concerned with the civil and penal law. If Hume wanted to change the meaning of accepted terms so that they no longer needed to be understood as part of traditional morality, but would be linked to utility, Bentham went one step further to consider the logic of

the newly defined concepts. Once utility and liberty were on their respective thrones, justice need not have a throne of its own.

If this one difference between Hume and Bentham does not establish just what distinguishes them, consider another example, to which Hume referred – the virtue of chastity. The anonymous critic of Hume, as we have seen, took issue with the way Hume based chastity on public utility, and suggested that Hume belittled the ‘instinct of natural modesty, or a sense of honour or pride, which acts as the guardian of chastity, independent of utility’ (Anon 1753: 34–5). Bentham followed Hume in connecting chastity to utility, but he was less enthusiastic about calling chastity a virtue at all. ‘Constipation’, he wrote at one point, ‘is a virtue of the same quality as chastity’ (Bentham 1983b: 362). Bentham also clearly distinguished chastity from modesty:

A woman may talk bawdy all her life long without having sexual intercourse. She is immodest, but not unchaste. Another may have sexual intercourse with hundreds, and yet preserve her modesty. A clap doctor is not immodest though occupied all his life about the sexual urgencies.
(Bentham 1983b: 362)

In these remarks Bentham has exhibited a sharp, critical wit, which Hume, I believe, would have enjoyed. Bentham clearly started from Hume, but used his analytic skill to move the argument on. If Hume half-demolished the traditional praise of modesty and chastity, Bentham in these brief remarks has completed the task. Nevertheless, one difference between Hume and Bentham is emerging. If Hume put the virtues on a different foundation and in the process altered their meanings somewhat, he left them all in place (indeed, he added a good number) to be admired and appreciated even by those who rejected his new foundations (see Moore 2002). Indeed, when Paley attempted in his *Principles of Moral and Political Philosophy* to bring together Hume’s emphasis on utility and Christianity, many (though by no means all) theologians thought that he was reasonably successful. But Bentham wanted to start again from the principle of utility and reconsider the various traditional virtues. Some, such as justice, would disappear entirely; others would be redefined; still others would be invented and given new names, because they more accurately captured the human disposition we admired.

For the redefinition of a virtue, a good example would be his remarks on the traditional virtue of courage. In his discussion Hume insisted on the utility of courage, though not all practices traditionally associated with courage (as when the Scythians scalped their enemies, dressed the skin, and used it as a towel (see Hume 1998: 7.14)) would be considered virtuous. But courage was important for Hume both in itself and because the fact that we admired courage in heroes of distant times and modelled our lives on them meant that we were capable of a widespread and deep sympathy. Bentham admired courage as much as Hume, but he noted that its meaning had changed in modern times. He also thought

that self-denial was not necessarily part of the virtue. Just as Hume contrasted Fenélon with Homer (Hume 1998: 7.15), Bentham noted that physical courage was no longer as important as it once was: ‘the old days were days of force; these are the days of fraud. Formerly, it was the powers of the body, now those of the mind ... Formerly it was physical force; now it is mental fraud’ (Bentham 1983b: 360). For Bentham, therefore, courage must be redefined to incorporate honesty and integrity in advocacy and not simply conceived in physical terms. Hume, however, proceeded to link philosophical tranquillity to courage, as something to be admired, and, in particular, the example of Socrates who combined ‘his perpetual serenity and contentment’ with his contempt for wealth and preservation of his liberty (Hume 1998: 7.17). Bentham was scathing of this analysis and suggested that this tranquillity led to an insensitivity to external and particularly distant suffering. Furthermore, Socrates’s contempt for wealth was dismissed as ‘vanity and pride’:

Like standing a long while on one leg, it is denying to himself the doing the good which could only be done by riches. So, his denying himself assistance from others was only to excite their self esteem for other purposes. He does a calculation: he refuses £100 to get £200.

(Bentham 1983b: 361)

In his ethical writings Bentham reformulated the traditional virtues and Hume’s vast array of virtue by conceiving them to constitute three in number. Prudence was the virtue appropriate to self-regarding actions; probity to those actions designed not to harm others; and beneficence to help others in a positive and effective manner. All of the virtues could be incorporated in these three and reformulated more coherently than was achieved either in traditional philosophy or by Hume. Bentham argued, for example, that temperance, continence, fortitude, magnanimity, and veracity, in so far as their effects only concerned oneself, fell under the heading of prudence; otherwise, of benevolence (see Bentham 1983b: 187).

It is important that Bentham’s reformulation of the virtues is not seen as an attempt to somehow deprive the human condition of the rich variety of human feeling as manifest in society. It is rather an attempt to change the vocabulary used in such human interaction in order to bring clarity to it and to enhance human understanding. If Bentham is to be accused of a rationalistic reduction of human feeling and virtue, so must Hume in his insistence that so much of traditional morality might be better understood in terms of public utility. But neither accusation is true.

Bentham went much further than Hume in his attempt to restate the ‘logic of the will’ so that it would cease to rest at all on the obscure categories of Aristotelian logic. In *IPML* one finds such logical analysis in key chapters dealing with action, intention, consciousness, motive, and disposition, all of which form a prelude to the analysis of punishment (see Bentham 1996: 74–157).

Nevertheless, Bentham's moral psychology is obviously indebted to Hume, and the starting point for both is the recognition of the importance of this psychology to ethics and politics. Furthermore, in the analysis of punishment in *IPML* Bentham never rejected several principles he shared with Hume. First, as in Hume, punishment is both forward and backward looking (see Russell 1995: 137–8, 140ff). The justification of punishment is forward looking and the analysis of the distribution of punishment is backward looking. Second, Bentham's magisterial analysis of offences in *IPML* (Bentham 1996: 187–280) presumes throughout the prior existence of a society to which he is recommending this new way of looking at crime. Although these new categories might have utility through their clarity and accessibility, whether or not certain actions are considered offences is left to society to determine (see Bentham 1996: lviii–lix). In so doing Bentham was well-aware (perhaps more than Hume) that societies used means, opposed to happiness, to sustain an order or establishment that worked in ways that were hostile to utility. Bentham's empiricism had to work side by side with a doctrine of false consciousness which prevented the happiness of the community from establishing and manifesting itself. The inability of the people, as individuals, to enjoy elementary security through law and morality, and a modicum of happiness, due to powerful political forces in society, eventually led Bentham to adopt an outspoken radicalism in his later writings. Such a move made his utilitarianism *appear* distinct from that of Hume, in being more active and reformist, but he never abandoned his starting point in the empirical aspiration of individuals in society to happiness. Moore has depicted Hume's approach to a science of politics as follows:

Hume's conception of the experimental method of reasoning thus stands intimately related to the problem of providing the general rules and artificial restraints that make life in society possible. And the experimental nature of the rules and conventions of society was to become Hume's point of departure for a science of politics in which forms of government and policies were themselves regarded as experiments, as uncertain trials of judgment by which politicians have attempted to contrive a world consistent with the uniform interests and passions, the needs and wants of human beings.

(Moore 1979: 40–1)

It is not far-fetched to suggest that Bentham's numerous plans, schemes, codes, laws, and proposals were 'experiments' – 'uncertain trials of judgment' in which Bentham attempted 'to construe a world consistent with the uniform interests and passions, the needs and wants of human beings'. It was this grounding of his various proposals in an understanding of society and its well-being that linked Bentham with Hume, and it was a position from which Bentham never strayed.

THE IDEA OF UTILITY IN
SMITH'S *THE THEORY OF*
MORAL SENTIMENTS

Among historians of utilitarian thought Adam Smith's *The Theory of Moral Sentiments* (1982c) has not been accorded much attention. Elie Halévy (1901–4; 1952), for example, ignored the work as did Ernest Albee (1902) and Leslie Stephen in *The English Utilitarians* (1900). When Stephen examined *TMS* in his *History of English Thought in the Eighteenth Century* (1962: ii.61–2), in a brief discussion he treated Smith as a critic of the notion of utility found in Hume. Furthermore, neither Bentham, J.S. Mill, nor Henry Sidgwick paid much attention to *TMS*, and if they did, they did not see its discussions of utility as being of any significance (see, for example, Sidgwick 1906: 213–18). For example, despite the fact that Bentham was a keen student of Smith's *Inquiry into the Nature and Causes of the Wealth of Nations* (1981) and referred to it in many of his writings, I have found only one reference to Smith as a moral philosopher (1983b: 55). One might have expected Bentham to discuss Smith in *IPML* where he could have referred to him in a critical sense as he did to Hutcheson, Hume, and others (see 1996: 25–33). Because Bentham ignored the work, it seems that others have followed his example. Anthony Quinton's *Utilitarian Ethics* begins by crediting Hume with writing 'by far the most important, elaborate and philosophically penetrating anticipation of the utilitarianism of Bentham and Mill' (1973: 17). Nevertheless, Quinton, who approaches this 'anticipation of utilitarianism' from the point of view of Bentham, that is to say, using Bentham as the starting point for the doctrine itself, also seems to follow Bentham in not discussing *TMS*.¹

Among scholars of Hume, Smith, and the Scottish Enlightenment there are major differences of opinion about *TMS* as a utilitarian work, because there is less agreement about what, if anything, being a utilitarian meant in the eighteenth century and the extent to which either Hume or Smith adopted the idea of utility. Knud Haakonssen has clearly distinguished between the conceptions of utility in Hume and Smith and what he calls 'later utilitarian theorists' (1981: 41). More recently, he has replaced 'later utilitarian theorists' with 'hedonistic utilitarianism', which, though not specifically identified, is probably associated with Bentham and James Mill.² Donald Winch initially distinguished between Smith's 'negative and contemplative utilitarianism' and later utilitarianism. He insisted that Smith's legislative science 'is not the Benthamite science of

legislation' (1979: 181).³ More recently, however, while still rejecting (and rightly so) attempts to construct a 'liberal tradition' from Locke to Mill which includes Smith and Bentham, he cautiously concedes that 'it makes sense to speak of a journey *from* Smith *to* Bentham' (Winch 1993: 65, see also 72; see additionally 1996). At the same time, however, he endorses Haakonssen's view of 'the differences between Hume and Smith on one side and Bentham on the other, largely by emphasizing the priority attached to the negative principle of pain-avoidance rather than the positive injunction to maximize happiness, and the different kinds of knowledge which these priorities entailed' (Winch 1993: 72n).

While Haakonssen and Winch succeed in presenting highly penetrating discussions of Hume, Smith, and other writers, they seem to impose on these key figures of the Scottish Enlightenment an unsubstantiated exclusiveness and uniqueness which might tend to cut them off from the traditions on which they drew and exercised great influence, and through which they might be better understood (see, for example, Long: 1990: 12–39). Bentham's conception of utility clearly draws on Hume as well as on Helvétius and Beccaria, and is not different in any major way from the idea of utility, which appears in Hume and Smith. A crucial feature of the eighteenth-century context is the role of pleasure and pain. If 'hedonistic utilitarianism' is banished to the nineteenth century, the importance of hedonism in the eighteenth century may be overlooked. Hume and Bentham, for example, followed closely the Epicurean tradition in their treatment of pleasure and pain and in their belief in the importance of avoiding pain as a key feature of politics. Another feature is the close connection between justice and utility which is clearly apparent in both Hume and Smith, and which is transformed by Smith into a theory of individual liberty and adopted and extended by Bentham (see chapters 6 and 7 in this book).

Even if one discounts these fairly general positions and distinctions, Smith scholars are divided concerning the importance of utility in *TMS* and in Smith's thought as a whole. A.L. Macfie has most emphatically distinguished Smith's doctrine from any important conception of utility: 'Clearly', he affirms, 'Adam Smith was not endeavouring to establish the system of utility' (1967: 47). At another point he writes: 'Smith then was not a utilitarian, even in Hume's sense. Utility for him was not basic' (1967: 48). The problem among Smith scholars is partly one of identifying the contexts in which Smith employed the idea of utility and not confusing these with later ideas, especially in economics.⁴ Macfie, for example, is so convinced of Smith's hostility to utilitarianism, because he thinks of utility in terms of a later doctrine associated with Bentham and J.S. Mill. Like Haakonssen and Winch, he too fails to consider the eighteenth-century context of the idea of utility (see Macfie 1967: 155ff). J.B. Schneewind, a writer more sensitive to philosophical context, can see that 'utility does, however, play a major part in Smith's view of morals'. Schneewind refers to Smith's emphasis on the unintended consequences of action, and points out that sympathy 'does the work of utility' in his theory (Schneewind 1998: 390–1).

In part the problem among Smith scholars is one of estimating Smith's indebtedness to Hume. David Raphael has written: 'Hume is by and large a utilitarian. Adam Smith is an anti-utilitarian'. But when Raphael examines Smith on the relationship between justice and utility, he concedes: 'When Smith came to consider the relation of justice to utility, he conceded quite a lot to Hume, indeed perhaps too much' (Raphael 1972–3: 88, 94, see also 96).

What is clear in *TMS* is that whenever the theme of utility is raised it is done so in conjunction with the thought of Hume. According to T.D. Campbell:

'Utility' is a recurring theme throughout the *Moral Sentiments*; it crops up wherever Smith thinks that other theorists, and in particular David Hume, have given excessive importance to utility in the analysis and explanation of moral judgments.

(Campbell 1971: 116)

I would put the connection between Smith and Hume more strongly. Whenever Smith invoked the idea of utility as a concept in *TMS* (as opposed to employing it as a substitute for 'useful') he was referring to Hume; in fact, at times the term 'utility' is a code word for 'Hume' who is not mentioned by name in *TMS*, but is alluded to occasionally either directly, for example, as 'an ingenious and agreeable philosopher' (Smith IV.1.2, 1982c: 179), or indirectly (see Smith VII.iii.3.17, 1982c: 327), but always in relation to utility. If I were asked the simple question, what does 'utility' mean in the thought of Smith, I should reply 'David Hume'. Furthermore, it is wrong to conclude from *TMS* that whenever Smith discussed utility, he intended to diminish its importance. Although he appeared to do so with respect to the bases of moral approbation, Smith's use of utility was far more complex than a simple critique of Hume on this point would suggest. This complexity is one reason for the wide variety of interpretations of the role of utility in Smith's thought. As I shall argue, in several respects Smith gave greater scope and importance to utility than did Hume, even though he rejected the very prominent foundational role which Hume gave to it as the basis of justice and the other social virtues.

Utility and justice

TMS is a lengthy and complex work, in which the idea of utility appears in various ways in most of its seven parts, not all of which will be considered here. Its first substantial appearance is in Part I, 'Of Propriety', in a discussion of the relationship between passion and propriety. Smith distinguished here between three sets of passions: social, unsocial, and selfish. Of the three, the unsocial passions, consisting mainly of hatred and resentment, appeared the most problematic. We may find ourselves in sympathy with both the subject and object of the passion (e.g. we sympathize with the person who resisted wrong with resentment and the person who might be injured by anger or hatred he or she

innocently received). Furthermore, despite our understandable aversion to these passions ('hatred and anger are the greatest poison to the happiness of a good mind' (Smith I.ii.3.7, 1982c: 37), Smith nonetheless claimed that they can be highly useful to both the individual and society:

But though the utility of those passions to the individual, by rendering it dangerous to insult or injure him, be acknowledged; and though their utility to the public, as the guardians of justice, and of the equality of its administration, be not less considerable, ... yet there is still something disagreeable in the passions themselves, which makes the appearance of them in other men the natural object of our aversion.

(Smith I.ii.3.4, 1982c: 35)

It is worth pausing to acknowledge the appearance of the ideas of utility and public utility early in the treatise. In addition, utility appears here in close proximity to justice. On their own the unsocial passions of hatred, anger, and resentment are a source of considerable pain and disruption. But we are capable of reacting to them in another way by appreciating their utility. This appreciation is not so difficult when one traces out the remote consequences of the unsocial passions, where their utility becomes more obvious. But the immediate effects of such passions are more problematic. Smith illustrated this difficulty in a striking passage comparing prisons and palaces:

A prison is certainly more useful to the public than a palace; and the person who founds the one is generally directed by a much juster spirit of patriotism, than he who builds the other. But the immediate effects of a prison, the confinement of the wretches shut up in it, are disagreeable; and the imagination either does not take time to trace out the remote ones, or sees them at too great a distance to be much affected by them. A prison, therefore, will always be a disagreeable object; and the fitter it is for the purpose for which it was intended, it will be the more so. A palace, on the contrary, will always be agreeable; yet its remote effects may often be inconvenient to the public. It may serve to promote luxury, and set the example of the dissolution of manners. Its immediate effects, however, the conveniency, the pleasure, and the gaiety of the people who live in it, being all agreeable, and suggesting to the imagination a thousand agreeable ideas, that faculty generally rests upon them, and seldom goes further in tracing its more distant consequences.

(Smith I.ii.3.4, 1982c: 35)

In the comparison between prisons and palaces, prisons will, as Smith said, always be more disagreeable than palaces. Rulers and their subjects will be tempted to invest in the delights and beauty of grand palaces rather than in grim

prisons. Most people may not trouble to trace out the remote effects beyond their aversion to prisons to see their utility to a system of justice; they may also fail to see that the larger and grander palaces may only serve a useless luxury and promote decadence. How is it possible to transform ordinary perceptions to accept the utility of prisons? Smith had no answer to this question in Part I, but he approached it again in Part II, where he considered the way the unsocial passions, which were mainly disagreeable, were transformed in a system of justice.

Smith began Part II, 'Of Merit and Demerit', by linking the unsocial passion of resentment to punishment (Smith II.i.1.1–7, 1982c: 67–9). The connection is a complex one, as we not only dislike expressions of resentment, but we also sympathize with such expressions when we feel sorry for the victim, and feel resentment towards the offender (and hence approve the punishment of the offender). Rather than seeing resentment only as an unsocial passion and much disliked, Smith used it to serve as the basis of justice. He explained the connection as follows:

Resentment seems to have been given us by nature for defence, and for defence only. It is the safeguard of justice and the security of innocence. It prompts us to beat off the mischief which is attempted to be done to us, and to retaliate that which is already done; that the offender may be made to repent of his injustice, and that others, through fear of the like punishment, may be terrified from being guilty of the like offence.

(Smith II.ii.1.4, 1982c: 79)

Smith pointed out that resentment was confined to where there was injury, as opposed to the withdrawal of beneficence, which might also be hated or disliked. The connection with justice was then stronger and more obvious. Justice was 'the proper object of resentment, and of punishment, which is the natural consequence of resentment' (Smith II.ii.1.5, 1982c: 79).

To link resentment to the virtue of justice is relatively straight-forward, if somewhat stipulative, in reserving resentment for the passion surrounding defence against injury. In practice, anger, hatred, resentment, and various sadistic feelings might well be intertwined and more difficult to distinguish than Smith indicated. Nevertheless, Smith established a strong and clear link between justice as a virtue, and the unsocial passion of resentment, and in this connection it differed from other virtues, such as beneficence, friendship, charity, etc. (see Griswold 1999: 229). We feel under a stricter obligation to act according to justice and such actions are not open to choice. In addition, we recognize that force may be necessary to constrain us to obey the rules of justice. But recognizing injustice may not be a simple matter. There is a good deal of behaviour, e.g. acts of cruelty, which one dislikes, and this disapprobation might easily turn into anger and a call for compulsion to see them curbed. We might also wish to see our neighbours act more kindly and charitably and consider using force to

require more virtuous conduct. If the state has other roles than securing justice, such as promoting prosperity, discouraging vice, and encouraging discipline, justice might not be so special a virtue, and force might be used to promote happiness generally in society.

Smith, however, held fast to the view that the virtue of justice had a special role in the state. Unlike the practice of beneficence, which deserved reward, the observance of justice did not seem to do so. ‘Mere justice is ... but a negative virtue, and only hinders us from hurting our neighbour’ (Smith II.ii.1.9, 1982c: 82). ‘We may often fulfil all the rules of justice’, he continued in a famous remark, ‘by sitting still and doing nothing’ (Smith II.ii.1.9, 1982c: 82). One did not need a reward for fulfilling one’s obligations with regard to justice, especially if they could be fulfilled by doing nothing. But punishment might well be necessary, as one expected that if one observed the rules of justice, others would have to do so as well.

Smith thus moved directly from the unsocial passion of resentment to seeing justice as a kind of retaliation or punishment for injury, reflecting the resentment we feel whenever we receive or observe such an injury.⁵ In an important passage he not only confined the virtue of justice to the redress of injury, but he also specifically ruled out any redistribution of property in order to advance an equal or greater happiness:

There can be no proper motive for hurting our neighbour, there can be no incitement to do evil to another, which mankind will go along with, except just indignation for evil which that other has done to us. To disturb his happiness merely because it stands in the way of our own, to take from him what is of real use to him merely because it may be of equal or of more use to us, or to indulge, in this manner, at the expence of other people, the natural preference which every man has for his own happiness above that of other people, is what no impartial spectator can go along with.

(Smith II.ii.2.1, 1982c: 82)

This appeal to the impartial spectator was based on the assumption that each person preferred what was his or her own, and would be unwilling to allow others or the state to take his or her property by force in order to advance a greater happiness. It was also based on the assumption that such a conception of justice had utility. A society could exist among people who shared little mutual love or affection, and with no basis but in the mutual exchange of goods. A society might therefore exist without many of the virtues, but Smith argued that no society could exist without justice. ‘Justice ... is the main pillar that upholds the whole edifice’ (Smith II.ii.3.4, 1982c: 86). Nevertheless, the utility of the precepts of justice was not always obvious. First, rulers were tempted to extend the conception of justice to the enforcement of morals not connected with justice and to advance prosperity via the redistribution of property. They might

also lose sight of the more modest aims to be achieved by justice in their own ambitions for honour and glory. Smith recognized the difficulties for legislation in drawing a line which secured justice without destroying individual liberty or society. In the following passage he expressed the importance of this task:

Of all the duties of a law-giver, however, this, perhaps, is that which it requires the greatest delicacy and reserve to execute with propriety and judgment. To neglect it altogether exposes the commonwealth to many gross disorders and shocking enormities, and to push it too far is destructive of all liberty, security, and justice.

(Smith II.ii.1.8, 1982c: 81)

The allusion to liberty in this quotation was reflected in the idea of ‘natural liberty’ developed in *WN* (see chapter 6 in this book), where the role of the sovereign was equally limited, and an emphasis was placed on the liberty of the individual to order and develop his or her life within a framework of security established by justice (see Smith IV.ix.51, 1981: ii.687–8).

Second, most people saw justice as a negative virtue requiring them not to harm others. They responded almost instinctively with anger and hostility to acts of injustice. Another principle was necessary, however, to see justice as part of a system and, additionally, in a positive light as the foundation of the whole edifice of society. When I am attacked by my neighbour, there is more at stake than the injury I receive and any retaliation that might follow. But what would be additionally at stake, and its relationship to society as a whole, might require different calculations. Smith used the example of the sentinel who received a very severe punishment (i.e. death) for falling asleep during his watch. This punishment, though perhaps appropriate for murder, might bear little resemblance to the injury caused by his action. A judge or superior officer might hesitate to sentence the guard to death, where no injury actually occurred, but Smith recognized that such a sentence would be based on an understanding that justice was concerned with more than responding to particular injuries and must take into account public utility as well as private injury.

Raphael has examined this example and concluded that Smith had ‘perhaps conceded too much to Hume’ in being ‘too ready to agree that *justification* on grounds of utility makes an act *just*’ (Raphael 1972–3: 96). He also suggests, on the basis of a lecture given by Smith prior to his writing *TMS*, that Smith was somewhat inconsistent in declaring the sentence of death as the punishment of the sentinel just, when he conceded that an excessively severe punishment did an injustice to a person who committed a crime (Raphael 1972–3: 96–7). Campbell explores the same example, and seems more willing to see the dimension of utility as playing a crucial role in Smith’s account of justice: ‘he was prepared to admit that utilitarian reflection has some effect in determining the content of the law, and it would seem that he himself welcomes the fact that immediate resentment is occasionally subordinated to considerations of utility’ (Campbell 1971:

204). Campbell also appreciates the fact that Smith recognized, as we have seen, the importance of utility in relation to propriety and the connection between justice and propriety (Campbell 1971: 200). Although Campbell refers to ‘a certain ambivalence’ in Smith’s remarks about justice and utility, he is aware that for Smith utility (a) affected the content and application of the rules of justice; and (b) was important in developing justice beyond the obvious limitations of specific feelings of resentment (Campbell 1971: 200–1).

There is a temptation to see in Smith’s account a diminution of justice as a *moral* virtue and its replacement by a set of rules establishing civil order.⁶ Such a view neglects several key elements in Smith’s theory which have now been set forth. First, the important link between the idea of utility and that of justice, which Smith established, brought forth related ideas of happiness and the public good or welfare. These ideas surely count as moral ideas, and in so far as individuals are concerned with the public good and happiness for themselves and for society at large, their concerns and judgements must be moral. Second, Smith’s ‘negative’ account of justice went hand in hand with the idea of liberty. Justice was conceived as providing the legal and social framework for individual freedom, which allowed morality to develop and flourish in numerous spheres of life. This flourishing of individuality implied a flourishing of individual morality as well as other social and economic activities within a pacific framework.

Smith and Hume on justice

Besides these reflections on Smith’s account of justice and utility, it may be worth approaching Smith from the perspective of Hume’s idea of justice (particularly in the *Enquiry*) to see how Smith might have responded to the connection Hume established between justice and utility. Both Hume and Smith appreciated that justice was different from the other virtues and had a special, foundational role in society. Both were also dissatisfied with existing conceptions of justice largely inherited through the Aristotelian tradition. Hume attempted to confine the scope of justice to a concern with security of persons and property. Smith linked justice to what the Schoolmen called commutative justice, which also consisted in abstaining from injuring others and taking their property (see Smith VII.ii.1.10, 1982c: 269). In addition, as Christopher Berry has noted, both emphasized the importance of rules to justice; both considered justice to be indispensable to society; and both regarded it as a negative virtue in requiring forbearance in not injuring others (Berry 1997: 131).

Nevertheless, Hume left a number of outstanding problems which he only partially resolved. The first concerns the role of distributive justice. As we have seen in chapter 3, Hume was fully aware of the fact that limiting justice to security of property was not a wholly rational or attractive doctrine and difficult to distinguish from vulgar superstition (see Hume 1998: 3.36–7). But what was intentionally missing from Hume’s account of justice was any idea that one distribution of property, say one based on merit or equality, might be superior to

another. Indeed, he specifically excluded such distributive considerations earlier in the *Treatise* where he argued that a man of merit must return a fortune to a miser, who was its rightful owner, rather than use it to increase public welfare (Hume III.II.II, 1978: 497). But the provision of security of property, he suggested, would form the basis of a better society, because it would allow many good and useful things to develop, and squabbles over the distribution of property would only lead to insecurity and the failure of society and civilization to grow and prosper. Hume was able to justify his account of justice through the role he gave to utility, and he needed utility to replace sympathy, which on its own might lead us to support an equal distribution of property or one based on merit. Utility transformed an irrational conception of justice, which on its own might appear to serve narrow self-interest, and used it to justify what eventually served the public interest. The idea of utility enabled us to see that in a society where property rights were settled and expectations were secure, there would be prosperity, comfort, civil peace, and the flourishing of civilized life. To attempt to distribute property according to one formula or another would only undermine the secure foundations of society.

Smith provided an argument (missing in Hume) as to how justice was necessarily linked to security and seemed to exclude distributive concerns. He linked justice, not to scarcity, as Hume did, but to the unsocial passions, particularly that of resentment, and showed how justice as a virtue and as a system of rules emerged from feelings of resentment to injury and the threat of injury and sympathy with those feelings. Although utility was an important concept here, as also for Hume, its task was less demanding. It was not the foundation of justice (resentment and the sympathy generated by resentment played that role), but it enabled or facilitated that transformation of a passion into a legal system. The utility of punishment was known long after the passion of resentment had diminished, and in numerous ways the public interest was as much the product of utility as it was of resentment. Nevertheless, none of this required an expressly foundational role for utility.⁷

Smith also clearly distinguished justice from the other virtues by conceiving it as a negative virtue, satisfied by doing nothing, and requiring that others are not harmed. This characterization, linked to the derivation of justice from resentment, enabled Smith to dismiss all other aspects of justice except for commutative justice.

Finally, unlike Hume, particularly in the *Enquiry*, Smith did not link justice (and utility) in a direct way with pleasure and pain, and did not appear to have to deal with the problem of how so painful a system as justice could nonetheless generate so much pleasure and happiness. Nevertheless, in a famous letter to Smith on this point, Hume objected to Smith's failure to establish that sympathy always is agreeable or pleasurable: 'This is the Hinge of your System, and yet you only mention the Matter cursorily.'⁸ If sympathy with resentment reflects the original passion, it will also embody the pain of resentment. But Smith sought to make resentment the basis of a system of justice and indeed of civilization,

which the impartial spectator would view with approbation and pleasure. Hume solved the problem by making utility the foundation of justice and expressly arguing that utility gave pleasure. What was important for Hume in the *Enquiry*, as opposed to the *Treatise*, was not the passion or motive for justice but its justification in an agreeable utility (see section 5, ‘Why Utility Pleases’). Smith seemed to accept Hume’s emphasis on utility in part, but he omitted, according to Hume, to show how sympathy with resentment was sufficiently pleasurable to generate a regard for justice. Smith’s reply was to add a footnote to the second edition (Smith I.iii.1.9, 1982c: 46n), where he admitted that the sentiment of approbation was always pleasurable. Within this sentiment, however, there were two elements: (a) the sympathetic passion of the spectator; and (b) the emotion which arose in the spectator in seeing ‘the perfect coincidence’ between the sympathetic passion and the original passion in the agent. In the second ‘the sentiment of approbation properly consists’ and is always pleasurable. The first will be either pleasurable or painful, depending on the original passion. In other words, when I observe the passion of resentment in another person, I sympathize with this person, and feel the same pain as he or she feels. On its own I might not sympathize with the pain, but be repelled by it. If that were the case, it is unlikely that sympathy with resentment could ever lead to the creation of a generally acceptable system of justice. Smith agreed but then argued that I would find pleasurable my approval of my sympathy with the original passion of resentment. That is to say, if Mary resents Richard’s assault on her, I feel Mary’s pain, and, additionally, the pleasure of sympathizing with Mary’s pain. This pleasure is what Smith’s principle of approbation ‘properly consists’. Although Smith provided an answer to Hume’s objection, one wonders if a distinction actually exists between the always pleasurable principle of approbation of Smith and the always pleasurable principle of utility in Hume.⁹

Smith on utility: illusion and reality

Besides the account of justice in which utility plays a crucial role, Smith’s second main discussion of utility appears in Part IV, entitled ‘Of the Effect of Utility upon the Sentiment of Approbation’. Of the two chapters which comprise Part IV, the first might be depicted as Smith’s original contribution to Hume’s argument, while the second constitutes a critique of the applicability of Hume’s position. We shall examine these in turn.

In the first chapter Smith credited Hume for his argument that ‘the utility of any object ... pleases ... by perpetually suggesting ... the pleasure or convenience which it is fitted to promote’ (Smith IV.1.2, 1982c: 179). Smith planned to take this argument in a novel direction by noting:

this fitness, this happy contrivance of any production of art, should often be more valued, than the very end for which it was intended; and that the exact adjustment of the means for attaining any convenience or

pleasure, should frequently be more regarded, than that very convenience or pleasure, in the attainment of which their whole merit would seem to consist.

(Smith IV.1.3, 1982c: 179–80)

According to Smith, this point ‘has not, so far as I know, been yet taken notice of by any body’ (Smith IV.1.3, 1982c: 180). He began with a few commonplace examples illustrating his point that we often value the means to an end more than the end itself. In the first example, a person walks into a room to rest and sees chairs gathered together in the centre in a disordered state. He takes great pains to rearrange the chairs, e.g. putting their backs to the wall, which leaves the floor uncluttered and the room more attractively furnished. At the end he sits down, which he could have done when he first walked into the room. But the reason he did not just sit down and rest was that he received greater satisfaction from rearranging the chairs – the order gave pleasure and satisfaction from the utility of the uncluttered arrangement and this satisfaction became more important than the end in view – sitting on the chair in the room. Smith continued with several more examples in the same vein, which suggested that we admire an ingeniously constructed machine for itself and its convenience more than for the object it is intended to achieve.

From these commonplace examples Smith then signalled the importance of his principle: ‘it is often the secret motive of the most serious and important pursuits of both private and public life’ (Smith IV.1.7, 1982c: 181). He explained himself by taking the example of a poor man’s son who admired the condition of the rich. He wanted a larger and more luxurious house, a carriage, and other conveniences, and imagined that if he had these trappings of wealth, he would be content and enjoy this good life in peace and tranquillity. So he set out on a life of labour and care to acquire these conveniences:

Through the whole of his life he pursues the idea of a certain artificial and elegant repose which he may never arrive at, for which he sacrifices a real tranquillity that is at all times in his power, and which, if in the extremity of old age he should at last attain to it, he will find to be in no respect preferable to that humble security and contentment which he had abandoned for it. It is then, in the last dregs of life, his body wasted with toil and diseases, his mind galled and ruffled by the memory of a thousand injuries and disappointments which he imagines he has met with from the injustice of his enemies, or from the perfidy and ingratitude of his friends, that he begins at last to find that wealth and greatness are mere trinkets of frivolous utility.

(Smith IV.1.8, 1982c: 181)

Thus, the life of toil did not bring happiness and contentment, and this hard-working man who acquired great riches was probably less happy than a poor

man who lived in a rude condition. Power and riches, observed Smith, could produce some ‘trifling conveniences’ which ‘keep off the summer shower, not the winter storm, but leave him always as much, and sometimes more exposed than before, to anxiety, to fear, and to sorrow; to diseases, to danger, and to death’ (Smith IV.1.8, 1982c: 182–3). These ‘trifling conveniences’ – the grand house, carriages, servants, etc. – that wealth and power can acquire are simply means to the end of happiness and tranquillity. What the poor man’s son admired was the apparent utility of the conveniences to produce the end of happiness. Nevertheless, the conveniences soon became ends in themselves. He laboured throughout his life to purchase the most commodious house, the latest design of the most comfortable carriage, etc. It seems, in Smith’s view, that all of this toil was illusory, a waste of one’s life; the pleasures of utility led one away from true happiness.

Curiously, Smith hesitated to reach this conclusion, and referred instead to ‘this splenetic philosophy, which in time of sickness or low spirits is familiar to every man, thus entirely depreciates those great objects of human desire, when in better health and in better humour, we never fail to regard them under a more agreeable aspect’ (Smith IV.1.9, 1982c: 183). Does Smith mean that if one thinks that all this toil for the conveniences of life is based on an illusion, one should quickly reach for the scotch whisky or the anti-depressants? Will a brighter outlook on life make the illusion appear as happy and comfortable reality? Will the poor man’s son, now grown rich, look back and say that it was all worth-while? Smith did not deny that this toil was based on an illusion, but suggested that only those who considered the problem ‘in this abstract and philosophical light’ will see it in this way (Smith IV.1.9., 1982c: 183). The rest of society would be somewhat confused and would mix up means and ends. As Smith put it:

We naturally confound it in our imagination with the order, the regular and harmonious movement of the system, the machine or oeconomy by means of which it is produced. The pleasures of wealth and greatness, when considered in this complex view, strike the imagination as something grand and beautiful and noble, of which the attainment is well worth all the toil and anxiety which we are so apt to bestow upon it.

(Smith IV.1.9, 1982c: 183)

Smith not only accepted that most people lived and worked within this world of illusion, but he reckoned that it was also a good thing they did so: ‘it is well that nature imposes upon us in this manner. It is this deception which rouses and keeps in continual motion the industry of mankind’ (Smith IV.1.10, 1982c: 183). Smith then offered a brief account of the way ‘this deception’ led humans to cultivate the earth, build houses, cities, and countries, invent the arts and sciences, develop agriculture, and use technology to improve communication and trade throughout the world. At the same time an underlying equality persisted among mankind. However great the rich man’s desires and achievements might

be, his stomach was not larger than that of the humble peasant. Although the rich might have had the most attractive and tasty foods, they consumed no more than the poor whom they were obliged to employ and maintain in nearly the same condition as themselves. Thus, according to Smith, this deception not only led to economic development but also (and contrary to Rousseau's argument in the second *Discourse*) to a continuing natural equality among mankind. In a famous passage Smith asserted that 'they are led by an invisible hand to make nearly the same distribution of the necessities of life, which would have been made, had the earth been divided into equal portions among all its inhabitants' (Smith IV.1.10, 1982c: 184–5). In addition, with regard to the 'real happiness of human life', Smith pointed out that 'the beggar, who suns himself by the side of the highway, possesses that security which kings are fighting for' (Smith IV.1.10, 1982c: 185).

Smith's brief account of the development of modern society not only ran counter to Rousseau's theory of the origin of inequality, but it also resolved a difficulty regarding justice which Smith inherited from Hume. When Hume conceived the virtue of justice in terms of security of property, he left open the question of the justice of any particular distribution of property. Although Smith was aware of the imperfections of any existing legal system with respect to justice (Smith VII.iv.36–7, 1982c: 340–2), he explicitly stated (Smith VII.ii.1.10, 1982c: 269) that his own theory of justice was confined to commutative justice only, and he simply acknowledged the existence of the other forms known to Aristotle and the Schoolmen. Nevertheless, in this account of the development of modern society, Smith showed that traditional problems associated with distributive justice could be resolved. From one perspective great wealth and power were generated by the pursuit of the illusion generated by utility whereby the means were taken for the ends, and men toiled to obtain these conveniences of life which were shared unequally. From another perspective equality was maintained, partly by the 'invisible hand', and partly by Smith's acceptance of a basic equality of all humans, based on the size of one's stomach and an equal access to happiness. The problem of distributive justice was thus shown by Smith to be itself illusory, though the reality he invoked against it was also based ultimately on an illusion concerning utility and the ghostly spectre of an 'invisible hand' (see also the discussion of the 'invisible hand' in chapter 6 of this book).

It is tempting to argue that Smith simply abandoned traditional notions of distributive justice and replaced them with the mechanisms of a market-oriented society. As Winch has written:

Smith shares this restriction [to commutative as opposed to distributive justice] with Hume, and one is entitled to infer that Hume's reasons for not treating our notions of relative desert as between individuals and groups – however natural and 'agreeable' such notions might be – as capable of being enforced, as applying to Smith as well. This accords with Smith's defense of a society of ranks based on visible distinctions

of wealth ... (*TMS* VI.ii.2.16). Redistribution of income and wealth through positive intervention is another case where beneficent laws could infringe liberty and justice.

(Winch 1992: 110; see also Hont and Ignatieff 1983: 23–5; Griswold 1999: 229, 250–1)

We have already seen how Smith and Hume restricted the scope of justice to commutative justice (for Smith) and to security of property (for Hume), but we have not yet considered the conceptions of distributive justice which they appeared to have abandoned or replaced. These are of two kinds: the first derived from Aristotle and the Schoolmen, and the second, from modern writers such as Grotius, Pufendorf and writers of the Scottish Enlightenment.

The meaning and scope of distributive justice in Aristotle has never been very clear, and the doctrine was for the most part merely repeated by Aquinas without dealing with this lack of clarity (see Rosen 1975: 228–240; Aquinas 1988: 164–70). For example, Aristotle never spelled out what was to be distributed. It seems to have been public goods which have never been distributed before, such as items taken in battle, and, although he never discussed the matter, Aristotle would appear to exclude from distributive justice the redistribution of wealth raised by the taxation of private wealth, which is the subject of most discussions of distributive justice today (see Acton 1993: 215–43). Furthermore, Aristotle never determined precise criteria for distribution, such as need, merit, desert, etc., but seemed to rely on the nature of the constitution of the *polis* to determine the terms of the geometrical proportion that governed distributive justice. For example, in an oligarchy distribution would be on the basis of wealth (with the rich taking a larger proportion than the poor), and in a democracy, on the basis of equality. While these conceptions of distributive justice made some sense in the context of the ancient *polis*, it would be difficult to apply them either in modern commercial monarchies or in republics.

The more modern idea of justice was developed first by Grotius in his distinction between *iustitia expletrix* and *iustitia attributrix* (see Grotius 1853: i.6–8; Smith VII.ii.1.10, 1982c: 269–70). The distinction roughly covered spheres which were not too distant from Aristotle's corrective and distributive justice, but Grotius established his distinction on a foundation of rights which made his categories more applicable to the modern world. In developing this foundation Grotius distinguished between perfect and imperfect rights. A perfect right arose where others were under a strict obligation, enforceable by law, not to violate the right. Justice was for the most part conceived as a matter of perfect rights, the violation of which created an injury for which a remedy, enforceable in the courts, might be sought.

Imperfect rights were not based on strict obligations, and however important such rights might be, were not enforceable by law. But Grotius associated the realm of imperfect rights with a law or rule of love which everyone was expected to observe (see Schneewind 1998: 79–80). Imperfect rights were concerned with

generosity, compassion, and doing good to others, and these unenforceable rights were the concern of *iustitia attributrix* or distributive justice. The development of this theory and its numerous mutations has been much discussed by scholars,¹⁰ and no attempt will be made here to follow this winding road, except to say that its influence on Smith's limitation of justice to the realm of perfect rights, enforceable by law, was one example, as was his abandonment of distributive justice as a clear category of justice. But such an abandonment had already been anticipated in two respects: first, by the perceived irrelevance of the Scholastic doctrine of distributive justice to modern states, and second, by the distinction between perfect and imperfect rights, which allowed strict limits to be placed on the scope of justice.

During the eighteenth century and, in particular, among writers of the Scottish Enlightenment, the distinction between perfect and imperfect rights in relation to justice was frequently discussed. For example, Thomas Reid was critical of the use of the distinction in undermining an enforceable system of morality (Reid 1977: 393–4). Reid was especially critical of Hume's system, which combined in his opinion Epicurean elements with the limited theory of justice and virtue (Reid 1977: 410ff). Francis Hutcheson also employed the distinction between perfect and imperfect rights, but he added another category, that of 'external' rights which allowed one to override imperfect rights where necessary for the sake of the public good (Hutcheson 1994: 112–13, 163–4; Hope 1989: 33–4).

When Smith restricted justice to the realm of commutative justice, his move was not as bold as one might think. The idea of distributive justice did not then include in either the Scholastic or the Grotian tradition a clear idea of enforceable claims, based on identifiable criteria, such as need or merit, for the redistribution of wealth. What was so important about Smith was that he saw (following Hume) that a system of justice limited to the protection of persons and property could provide the framework for prosperity that would also include a fair distribution of wealth and goods. In rejecting inadequate notions of distributive justice, Smith opened up a sphere for utility which not even Hume appreciated.

Smith also argued that institutions of government and other institutions and practices designed to advance public welfare were as much based on a regard for 'the beauty of order, of art, and contrivance' as on pure sympathy or regard for those who were going to benefit from the practices. 'It is not commonly from a fellow-feeling with carriers and wagners', he observed, 'that a public-spirited man encourages the mending of high roads' (Smith IV.1.11, 1982c: 185). It is our admiration of the useful means rather than the ultimate end which seems to count:

The perfection of police, the extension of trade and manufactures, are noble and magnificent objects. The contemplation of them pleases us, and we are interested in whatever can tend to advance them. They

make part of the great system of government, and the wheels of the political machine seem to move with more harmony and ease by means of them.

(Smith IV.1.11, 1982c: 185)

Just as we admire a complex and ingeniously constructed clock for its attractiveness as a well-ordered system, that is to say, for its utility, we also admire a political system or a system of mended roads for the same reason. Our public-spiritedness is often based less on our regard for easing the pain of suffering humanity and more on the enhancement of the attractiveness of a system and its perfection. Smith did not hesitate to apply his reasoning to the constitution itself:

All constitutions of government, however, are valued only in proportion as they tend to promote the happiness of those who live under them. This is their sole use and end. From a certain spirit of system, however, from a certain love of art and contrivance, we sometimes seem to value the means more than the end, and to be eager to promote the happiness of our fellow-creatures, rather from a view to perfect and improve a certain beautiful and orderly system, than from any immediate sense or feeling of what they either suffer or enjoy.

(Smith IV.1.11, 1982c: 185)

Smith's account of the role of utility was at first glance highly paradoxical. On the one hand, it was the pursuit of an illusion; on the other hand, it was the basis of human striving in numerous fields of endeavour without which civilization would be impossible. At this point we must be satisfied with a recognition of this potential paradox, and see if Smith attempted to resolve it. From the perspective of the agent, no paradox would be apparent. One might never see that happiness was in one's grasp without any toil at all. Such blindness would not reflect any failing, as the happiness generated by a life of public service might be ample compensation for the toil. The utility of the system might shine so brightly that the equal contentment of the beggar and the king would appear as a star invisible to the naked eye. Smith suggested that modern civilization, based on various economic, legal, and social systems, was itself so attractive by its utility that we would want to pursue power and wealth to enable us to participate fully in it. Only the philosopher, and a pessimistic one at that, might see that such toil would be based on an illusion.

To resolve Smith's paradox one need only appreciate that he was not resting his moral theory on absolute principles, but was simply providing an account of how we came to believe that power and riches were worthy of pursuit. That we did so was also the product of the society that such endeavours helped to create. We came to admire, even to love, systems, because such systems were the means by which we now obtained that which we sought, and we sought to improve

them in ways which could only be understood in terms of an admiration of their utility. In this first chapter Smith has shown Hume that utility, though apparently not the basis of justice and other social virtues, had a role to play in the development of modern societies and its virtues which was far more important and extensive than even he seemed to have imagined.

If the first chapter of Part IV was devoted to the discussion of the idea of utility in order to resolve problems Hume failed to resolve and to show the promise of utility in other spheres, the second was a brief critique of Hume's argument regarding the role of utility as the foundation of morality. Smith began by apparently accepting Hume's view that the beauty generated by utility was the basis of many judgements concerning our approbation of virtue and disapprobation of vice. 'And Nature, indeed, seems to have so happily adjusted our sentiments of approbation and disapprobation, to the conveniency both of the individual and of the society, that after the strictest examination it will be found, I believe, that this is universally the case' (Smith IV.2.3, 1982c: 188). Nevertheless, he believed that perceptions of beauty or deformity generated by utility and its opposite were not 'the first or principal source' of approbation or disapprobation (Smith IV.2.3, 1982c: 188). He presented and developed two arguments to support his case. The first is that the approval of virtue must be different from the approval we give to a well-designed building, and that the reasons for praising a man must be different from the reasons we give in praising a chest of drawers (Smith IV.2.4, 1982c: 188). Hume, of course, had attempted to reply to this sort of criticism in a footnote added to section 5 of the *Enquiry* (Hume 1998: 5.1n). His argument was simply that the sentiments produced by utility in animate and inanimate objects are different, even though we sometimes ascribe to inanimate objects (e.g. we speak of the virtues of herbs) certain characteristics that we usually apply to animate objects. But such use of language is purely metaphorical and no obstacle to careful reasoning.

Smith did not dwell on this point but moved on to a second, that the utility of a mental disposition was rarely the first ground of approbation, and our sentiment of approbation was usually distinct from our approval of its utility. He examined this first in connection with self-regarding virtues. Superior reasoning and understanding were seldom approved initially for their utility, but as 'just and right and accurate' (Smith IV.2.7, 1982c: 189). In pure science and mathematics, for example, discoveries were usually admired for their own sakes rather than for their utility, and their utility was only invoked in response to criticisms from those who said that such work was useless. The qualities involved in this reasoning may have included the capacity to grasp remote consequences of actions and to perceive advantages and disadvantages, much credited in what is now known as utilitarianism, but, for Smith, this capacity was not initially approved for its utility. Similarly, the capacity for exercising self-restraint in postponing the gratification of our appetites for greater enjoyment in the future, also much admired by later utilitarians, was as much approved of for its propriety as its utility. Those who practised frugality, industry, and self-restraint were admired

as worthy not only by themselves but also by spectators. Indeed, consciousness of this admiration and general esteem by others in society often enabled the individual to sacrifice present gratification to future enjoyment over a long period.

Smith then developed a similar argument with the other-regarding virtues, such as humanity, justice, generosity, and public spiritedness. In each case and especially in cases where one expects that utility might be involved, he argued that we approve of these virtuous actions for other reasons, especially for their propriety, and not initially for their utility.

How then did Smith account for utility in the approbation of human actions? At the close of this chapter he made three related points which established utility as a secondary principle rather than one that had a primary role in moral approbation and judgement. First, he suggested that utility bestowed on moral actions that we already found appealing 'a new beauty' and this new beauty 'further recommends them to our approbation'. Second, he stated that this new beauty might not be perceived by everyone, and certainly would not be what first recommended these actions to 'the bulk of mankind'. For Smith, mainly 'men of reflection and speculation' would perceive the beauty generated by utility (Smith IV.2.11, 1982c: 192). Finally he made the point that the perception of the beauty of utility had no connection with the sentiments of others (Smith IV.2.12, 1982c: 192). Someone raised without contact with others might develop a sense of the beauty of prudence, moderation, and good conduct, just as one might admire a well-conceived machine. But such perceptions would not be strong and would become insignificant when this person came into contact with others from whom he or she would acquire sentiments of approval and disapproval, which were connected to propriety or impropriety or merit and demerit, but not necessarily to utility.

The reader of Part IV is apt to feel somewhat bemused by Smith's conclusion. In the first chapter he referred to utility as 'often the secret motive of the most serious and important pursuits of both private and public life' (Smith IV.1.7, 1982c: 181). It was the basis of the 'deception which rouses and keeps in continual motion the industry of mankind' (Smith IV.1.10, 1982c: 183). But in the second chapter Smith seemed to diminish the role of utility to a secondary source of approbation, appreciated mainly by the philosopher, and hardly the spring of human industry.

Is there a contradiction in Smith's argument? Let us return to the example of the poor man's son who desired to acquire the comforts and luxuries of the rich. What sustained him in his long journey of toil and self-sacrifice might have been the social and individual approval of self-restraint as a virtue rather than his own approval of the utility of the objects he ultimately sought. But he might not have undertaken this journey at all without the attractive allure of the large house and carriage, which, through their convenience and utility, led him to think that the journey was worth the effort. Furthermore, once it was generally established that happiness consisted in the acquisition of the house and carriage, the economic system that generated these goods became a source of approbation. The ques-

tion then arises as to what Smith meant by an ‘original’ principle of approbation. The poor man’s son might well be moved to undertake the life of self-restraint due to the attraction of the useful conveniences he seeks. Only subsequently might he find that the social approval of the virtue was a sustaining factor. If so, it would appear that utility in this case was the ‘original’ principle of approbation.

The issue of the status of the principle of utility has raised, as we have seen, both philosophical and practical questions, which by the end of Part IV (on utility) are not fully answered. There is little doubt, however, that utility played a crucial role in numerous aspects of Smith’s moral philosophy. Furthermore, the recognition of the importance of utility is not a matter of reading something into Smith’s theory from a different context. Its importance was fully appreciated in the eighteenth century by Dugald Stewart, for example, who wrote:

I before hinted, that Mr. Smith does not reject entirely from his system that principle of *utility*, of which the perception in any action or character constitutes, according to Mr. Hume, the sentiment of moral approbation. That no qualities of the mind are approved of as virtues, but such as are useful or agreeable, either to the person himself or to others, he admits to be a proposition that holds universally; and he also admits, that the sentiment of approbation with which we regard virtue, is enlivened by the perception of this utility, or, as he explains the fact, it is enlivened by our sympathy with the happiness of those to whom the utility extends: But still he insists, that it is not the view of this utility which is either the first or principal source of approbation.

(Smith 1982a: 289)

Smith, Hume, and philosophical systems

Smith devoted the final section (Part VII) of *TMS* to a lengthy discussion entitled ‘Of Systems of Moral Philosophy’ in which we might look for a resolution to the problem of the status of utility within his system. The discussion revealed an impressive acquaintance with ancient and modern authors whom he discussed in a special manner. He assumed at the outset that his account of virtue and its approbation agreed with some parts of the numerous systems of philosophy. Where they disagreed was due to what he saw as a partial or imperfect account in these authors (Smith VII.1.1, 1982c: 265). This approach did not lead Smith to place himself clearly in one or another established ‘school’ of philosophy, ancient or modern, and his discussion of these various systems led less to a clearer definition of his system and more to a survey of the extent to which other thinkers shared his views.

But behind this approach, for both Hume and Smith, may be found what Rothschild has called ‘an extended colloquium with Roman philosophy, and especially with Cicero’ (Rothschild 2001: 131; see Moore 2002). Here, for the

discerning reader, one might see in remarks on prudence, the desire for a quiet life, the emphasis on decency, and, particularly, the emphasis on tranquillity as part of life and virtue, an inclination to Epicureanism (Rothschild 2001: 131–2, 302–3; see also Vivenza 2001). One might also find a scepticism about Stoic ideas, not only, as we shall see in chapter 6, about the idea of a providential order but also about an indifference to consequences, the view of evil, and Stoic apathy (Rothschild 2001: 132). As Rothschild (2001: 304) points out, ‘Stoicism had the function, in England and France in the eighteenth century, as a substitute for religion; a deism for the pious, or a demonstration of respect for virtue.’ While Smith worked within this framework, as Rothschild notes, ‘his descriptions of the sentiments of friendship, of sympathy with our friends’ pain, of guilt, of affection for places and things, are distinctively Epicurean’ (Rothschild 2001: 304). The precise mix of Stoic and Epicurean ideas in Smith’s philosophy is difficult to determine with any exactness (see Vivenza 2001), but the view that he was mainly attracted to a Stoic philosophy in contrast with Hume is clearly false (see, for example, Waszek 1998: 92).

Smith did not provide an extensive analysis of any particular school of thought based on the principle of utility. Nevertheless, he referred briefly in a few odd paragraphs to a distinct system which located the basis of virtue in utility, and he invariably linked this system with Hume (though, as we have seen, not explicitly by name). Three passages are worth further consideration for the light they shed on Smith’s earlier analysis of utility.

The first appears at the end of a lengthy discussion of accounts of virtue in various systems of moral philosophy (Smith VII.ii.3.21, 1982c: 305–6). Smith distinguished three approaches to virtue: (a) consisting of the proper governance of all affections, that is to say, of propriety; (b) consisting of the proper direction of self-interest, that is, of prudence; and (c) consisting of benevolence. Much of this first section was taken up with a lengthy discussion of Stoicism, with which Smith did not identify his own position, though he treated it with great respect. The second examined sympathetically the system of Epicurus, for whom, according to Smith, pleasure and pains of the mind were reduced to those of the body, and all was reduced to matter in motion. Virtue became a species of prudence and justice, ‘no more than discreet and prudent conduct with regard to our neighbours’ (Smith VII.ii.2.11, 1982c: 297). While Smith did not embrace the system of Epicurus, and he advanced a number of criticisms of the reduction of virtue to prudence, his account of pleasure and pain was remarkably neutral. He noted that the sensation of pain was more ‘pungent’ than that of pleasure, a point he had made on several occasions earlier in the treatise. The theory of Epicurus, he added, did not embrace the active search for pleasure, but mainly sought to avoid pain.¹¹

The systems which made virtue consist of benevolence were ascribed to a number of writers, but especially to Hutcheson. Smith presented this system as one which would nourish the noblest of affections, that of beneficence, but was somewhat limited in not being able to provide an account of ‘the inferior virtues

of prudence, vigilance, circumspection, temperance, constancy, firmness' (Smith VII.ii.3.15, 1982c: 304). Smith, however, was willing to grant that while beneficence or a regard for 'the welfare of society' was not the only virtuous motive to action, 'in any competition, it ought to cast the balance against all other motives' (Smith VII.ii.3.17, 1982c: 304–5).¹²

Having set out the three approaches, Smith claimed that they were the three main accounts of virtue, to which he added that 'to one or other of them, all the other descriptions of virtue, how different soever they may appear, are easily reducible' (Smith VII.ii.3.19, 1982c: 305). Having made these remarks, he then turned in two brief paragraphs to consider two additional accounts of virtue. The first placed virtue in obedience to the will of the Deity. Smith quickly showed that if submission was due to the hope of future rewards and the avoidance of future punishments, the motive was one of prudence. If obedience was based on a fitness or congruity between a creature and its creator, the motive was one of propriety.

The second account placed virtue in utility, and Smith linked this with propriety, or the proper governance of the affections. The utility of an affection was determined in relation to moderation, and if the affection went beyond this moderation, it no longer possessed utility. 'The only difference between it and that which I have been endeavouring to establish', he wrote, 'is, that it makes utility, and not sympathy, or the correspondent affection of the spectator; the natural and original measure of this proper degree' (Smith VII.ii.3.21, 1982c: 306). In other words, our perception of utility dictates the moderation of the affection necessary for virtue. If utility dictates, for example, that one should live moderately in order to accumulate wealth and possessions, then the virtuous person would be neither a spendthrift nor a miser, but would save diligently in order to secure a life of comfort and happiness. Smith would not, I suspect, find such an approach to virtue unacceptable in practice, but he might insist that it did not sufficiently account for the origin of virtue in human sympathy. Nevertheless, despite his criticism of the role of utility in his account of morality in Part IV, he does not seem too far from accepting its central role here.

The second passage occurred in the context of Smith's discussion of the origin or basis of the principle of approbation which has been placed by various writers in self-love, reason, and sentiment (Smith VII.iii.intro.2, 1982c: 315). Before considering these in turn, Smith noted that unlike the material on virtue in this discussion, 'though of the greatest importance in speculation, is of none in practice' (Smith VII.iii.intro.3, 1982c: 315). This continual distinction between philosophical speculation and practice, which appeared ubiquitously throughout the treatise, particularly where the theme of utility was raised, should alert us to an important discussion to follow. Smith turned first to self-love, which he associated with Hobbes and his followers, including Pufendorf and Mandeville. According to Smith, these writers saw self-love as the basis of those virtuous actions which establish and sustain society. Smith argued that when viewed 'in a certain abstract and philosophical light', human society 'appears like

a great, an immense machine, whose regular and harmonious movements produce a thousand agreeable effects' (Smith VII.iii.1.2, 1982c: 316). What made the movements of machines 'smooth and easy' would be considered beautiful, and virtue, 'the fine polish to the wheels of society', would generally please (Smith VII.iii.1.2, 1982c: 316). In so far as Hobbes and his followers saw society as a well-run machine which appealed to self-interest, their account covers the same ground as that which considered the appeal of the beauty of utility as the source of approbation. This latter account, however, need not be based on self-love. Our response to the beauty of utility of societal arrangements is based instead on sympathy, as we have already seen.

After considering systems which make reason the basis of moral approbation, which he identified with the writings of Cudworth, Smith turned to the third category associated with Hutcheson, which found the basis of approbation in sentiment. After discussing Hutcheson's approach, Smith conceded that there was no distinct and separate moral sense that could account for virtue. The term 'moral sense', he noted, 'is of very late formation', and the term 'approbation' had only been used for a few years in this special way (see Smith VII.iii.3.15, 1982c: 326). He rejected the notion of conscience playing the role of what had been called a moral sense, because conscience was not usually linked to a moral quality of approval and disapproval.

Smith then postulated that there are at least four sources of approbation. The first might be found in our sympathy with the motives of an agent. The second was based on our sympathy with the gratitude of others who received benefits from the agent. Third, we see that the agent's conduct has been in agreement with the general rules by which the two sympathies operated. Finally,

when we consider such actions as making a part of a system of behaviour which tends to promote the happiness either of the individual or of the society, they appear to derive a beauty from this utility, not unlike that which we ascribe to any well-contrived machine.

(Smith VII.iii.3.16, 1982c: 326)

Smith then argued that if there was anything left over after these four sources of approbation were deducted, he would be happy to ascribe this to a moral sense. But he made clear that he did not believe that there would be anything not covered by these four categories. It is also clear that for Smith utility played a crucial role in moral approbation, though it was not its sole basis.

Smith then went directly on to a third passage (Smith VII.iii.3.17, 1982c: 327) in which he rejected the idea that sympathy with the happiness of those who were affected by a useful act or institution was the basis of virtue. This theory, associated with Hume and utility, was based, he believed, on a different sort of sympathy from those favoured by Smith, namely that associated with the motives of the agent and that associated with gratitude felt by those affected by the agent. This sympathy, Smith continued, was the same as that which we feel

towards the benefits that emerge from a well-contrived machine. For Smith, therefore, Hume's attempt to base morality and especially virtue on utility was valid, but it failed to account for all of virtue, which includes other conceptions of sympathy and approbation.

To ask if Smith is a utilitarian is to ask if he was a follower of Hume. We have seen how he adopted and revised Hume's theory of justice, and then how he used Hume's emphasis on the importance of utility to show that when considered in relation to economic and political systems, it was more important than Hume himself credited. But Smith rejected the idea of utility or even the sympathy generated by utility as the sole foundation of morality, and if later thinkers, such as Bentham, thought that such a foundation could be found, they did not give Smith much credit for anticipating such a discovery.

Smith and Bentham

Let us return briefly to Smith as a forerunner of Bentham's utilitarianism. There were numerous ideas in *TMS* which also appeared in Bentham's writings: the emphasis on sympathy as well as on self-love as motives; the use of pleasure and pain; the emphasis on avoiding pain; the concern for consequences; the avoidance of narrow self-interest; the account of virtue; the emphasis on systems; the pursuit of public utility; and even the idea of a foundation to morals and legislation based on a 'principle of approbation'. But Bentham could have found many of these ideas in Hume or in other writers of the eighteenth century. Where Bentham fully appreciated Smith was in the latter's *WN* which, unlike *TMS*, he cited frequently throughout his writings, and provided ample evidence of a detailed knowledge of this work. Early in his career Bentham recognized that *WN* was a work of great importance with a conception of utility at its heart. That he wrote *Defence of Usury* (Bentham 1952-4: i.123-207) as a critique of Smith's failure to extend his theory to favour a free market in money was evidence that he regarded Smith's book as moving in the right direction, though flawed in certain respects. In *TMS* we have seen the argument which takes Hume's idea of utility into the economic sphere, and if Bentham failed to appreciate *TMS*, he made up for his failure by his enthusiasm for many of the doctrines of *WN*. Perhaps further research in the Bentham papers will unearth the evidence that Bentham did appreciate Smith's argument regarding utility in the first chapter of Part IV of *TMS*. If he did, it is doubtful that he would have adopted or approved of the scepticism one finds in Hume and Smith. Although Bentham was equally sceptical with respect to religion and metaphysics, he did not adopt the view that human endeavour was ultimately a matter of chasing after 'trinkets' or illusions. Bentham also subscribed fully to the importance of competitive markets, but the 'invisible hand' became a vast number of visible hands in an economic system and lacked 'a good smack of cynicism' one perhaps finds in Smith (see Macfie 1967: 54).

One might also note that Bentham firmly rejected the idea of moral sentiments as the foundation of morals. As Schneewind writes:

Sentimentalism has never gotten a more sophisticated exposition than Smith gave it. After Smith, indeed, it received no major reformulations at all. That kind of theory ceased to be influential.

(Schneewind 1998: 388)

One reason for its lack of influence might have been Bentham's rejection of it. Bentham seemed to be far more interested in the restatement of the importance of pleasure and pain. The role that Bentham gave to pleasure and pain allowed him to see sentiments in a less rigid and universal manner. For example, in chapter VI of *IPML* on the 'Circumstances Influencing Sensibility', Bentham stated in passing: 'From the same injury, for instance, one man may feel the same quantity of grief and resentment together as another man: but one of them shall feel a greater share of grief than of resentment: the other, a greater share of resentment than of grief' (Bentham 1996: 51). Where Smith based justice on the sentiment of resentment, Bentham insisted that different people feel greater or less amounts of resentment depending on numerous psychological and social factors, and an account of pleasure and pain must take these into consideration. If this was so, it would be difficult to found justice simply on the unsocial passions and particularly on resentment, as grief is not necessarily an unsocial passion. What distinguished Bentham from Smith was that Bentham attempted to develop a more sophisticated account of human motivation, if only because such an account was essential if legal and political reform was to take place.¹³ Furthermore, Bentham paid greater attention to the political and ideological uses of language than did Smith or Hume, and was far more critical of the use of many common ethical terms to maintain the status quo and the ascendancy of established political and religious elites in the face of public utility.¹⁴ Smith and Hume were more content to use language to reflect current moral feelings and contemporary usage. If what is commonly called 'Benthamite' utilitarianism differed from the ideas of utility employed by Smith and Hume, it was in these respects and not at all because the former was more hedonistic, individualistic, or mechanistic. In spite of these differences, they shared much in common and shared in a common tradition. One need only reflect on the passage on prisons and palaces in Part I of *TMS* (Smith I.ii.3.4, 1982c: 35), quoted at the beginning of this chapter, to see that it could have formed a preamble to Bentham's panopticon project.

HELVÉTIUS, THE SCOTTISH ENLIGHTENMENT, AND BENTHAM'S IDEA OF UTILITY

Until one considers Claude Adrien Helvétius one might be tempted to think of classical utilitarianism as essentially a British, or, more precisely with regard to its origins, a Scottish doctrine, associated with Hume and developed by Smith and Bentham. Helvétius represents a different approach to moral and political philosophy, one not derived from Hume, though drawing on sources with which Hume and Smith were familiar such as the discussion of pleasure and pain in Locke, the psychology of Hobbes and Mandeville, and the association of ideas found in Hartley. In discussing Smith's *TMS*, I have argued that when he invoked the idea of utility, he was referring to the thought of Hume. But when Helvétius employed the idea of utility, he was not referring specifically to Hume, but to various elements in a tradition they shared.

The chronology is relevant. *De l'esprit* appeared in 1758, just seven years after Hume's *Enquiry concerning the Principles of Morals* and a year before Smith's *TMS*. Hume and Smith were aware of Helvétius's work, and Helvétius knew the writings of Hume. When Bentham published *A Fragment on Government* in 1776, it would have been natural for him to refer to Hume and Helvétius in the same sentence, as both had developed accounts of the foundation of virtue in utility (Bentham 1988: 51n). Bentham drew together the theories developed by Hume and Helvétius respectively and created what is now called classical utilitarianism. He did not assume that the accounts were similar, and when one reads Hume's *Enquiry* and Smith's *TMS* on the one hand, and Helvétius's *De l'esprit* and the posthumously published *De l'homme* (1776) on the other, they seem very different texts.

My object in this chapter is to suggest the basis for this difference. Contrary to some commentators, it will be argued that it consisted less in the importance they gave to the utility principle or whether or not they grounded that principle in materialist doctrines of pleasure and pain and self-interest, and more in their respective conceptions of humanity.¹ It is also based on the power Helvétius ascribed to the legislator to turn against humanity for the sake of virtue (Cf. Wisener 1997: 45–6; Burns 1967).

As for the eighteenth century context, it will be assumed that there was no specific utilitarian tradition followed by Hume and Helvétius, but that the idea of

utility and related ideas were in the air, so to speak, partly due to the continuing influence of the revival of Epicureanism in the seventeenth and early eighteenth centuries and partly due to the vast number of theories available from which Hume, Helvétius, Smith, and Bentham felt comfortable in adopting various elements for their own purposes. Reading Hume and Helvétius side by side suggests that the origins of classical utilitarianism were not a matter of clear derivation and the simple influence of one thinker on another. Both Hume and Helvétius used the idea of utility but used it differently, and there is no single source from which they could have derived it in the forms it appears in their writings.

Hume, Smith, and Helvétius

Although Helvétius occasionally cited Hume in *De l'esprit*² and wished to be more closely associated with him (Hume 1932: i.301–3, ii.348), he disagreed with the way Hume separated the principle of utility from individual self-interest. He especially disagreed with the passage in Hume's *Enquiry* (section 5, 'Why Utility Pleases'), where Hume wrote that we bestow praise on virtuous actions of people in the remote past and in other countries without considering self-interest (Hume 1998: 5.7–13). Helvétius argued that virtue and vice ultimately depended on physical sensibility, so that the experience of pleasure and pain generated (as a psychological law) interests which could then be moulded by law to serve the public interest. Similarly, public esteem for a talent or achievement depended on its utility, and this utility ultimately depended on self-interested individuals experiencing pleasure and pain (see Helvétius 1984: 258–60). Hume and then Smith had absorbed enough of the moral sense doctrine of Hutcheson to avoid linking moral approval directly with self-interest, and both were opponents of the reductive and paradoxical doctrines of Hobbes and Mandeville, which were based on forms of psychological egoism. For both, approval of the utility of actions or laws could be clearly distinguished from a psychology based on self-interest, and to prove that this was so, Hume used the example of sympathy with and approval of the utility of actions of characters in remote periods, where self-interest was not at stake. This difference of opinion may have been what Hume had in mind when he wrote to Smith recommending that he read *De l'esprit*: 'It is worth your Reading, not for its Philosophy, which I do not highly value, but for its agreeable Composition' (Smith 1987: 34). As for his personal regard for Helvétius, Hume was highly favourable. In a letter written a few weeks earlier to William Robertson, he noted that Helvétius 'is a very fine genius, and has the character of a very worthy man' (Hume 1932: i.301).

What Hume and Smith on the one hand and Helvétius on the other shared was the belief that justice should be connected with law, law based on utility, and utility based on the individual experience of pleasure and pain. These doctrines were part of the Epicurean tradition. It was no accident that the title page of *De l'esprit* (Helvétius 1988) contained a reference to that important Epicurean text,

Lucretius's *De Rerum Natura*. Nevertheless, there seems to be a major difference between Helvétius and other French writers on the one hand and Hume on the other. Lester Crocker has written:

Hume considers Utility the standard of all ethical values, in virtue of the fact that this is what the impartial benevolent spectator would approve; but he is referring to the general utility rather than self-interest. Like Voltaire, he endeavours to avoid moral skepticism by claiming an empirical basis for the preference of social virtues. Unlike most of the French philosophers, he attributes our approval of utility not to self-interest, but rather to disinterested benevolence, or the desire for the happiness of society, a feeling which is innate in all human beings. But Hume holds utility to be superior to justice, and in fact, its only basis.

(Crocker 1963: 258)

For Crocker, it is worth adding that 'the most thorough-going and systematic utilitarian, and the most influential, was Helvétius' (Crocker 1963: 262). But the differences between Hume and Smith on the one hand and Helvétius on the other might not depend so much on the extent to which Helvétius emphasized self-interest as the basis of morality. Let us consider an example of a historical figure, mentioned by Hume, Smith, and Helvétius, whose virtue was not necessarily linked to self-interest: the founder of the Roman Republic, Lucius Junius Brutus, who led the Romans in the expulsion of Tarquinius Superbus. According to tradition, he condemned his two sons to death for later conspiring to restore the rule of the Tarquins. Helvétius admitted that Brutus's action represented a conflict between two passions, a love of his sons and a love of his country, and that Brutus was moved more strongly by the latter. He also admitted that 'certain virtuous societies indeed frequently appear to lay aside their own interest to judge the actions of men, in conformity to the interest of the public' (Helvétius II.V, 1988: 77; 1809: 57). But he ascribed this apparent love of virtue to an 'enlightened pride', for 'it is as impossible to love virtue for the sake of virtue as to love vice for the sake of vice' (Helvétius II.V, 1988: 77; 1809: 57). He also seemed to dismiss Brutus somewhat as an isolated and extreme example. Hume, however, treated the example of Brutus differently in showing how his action could animate a whole society and be influential in succeeding generations ('the human mind is of a very imitative character') (Hume 1985: 202, 203). According to Smith, Brutus might have been expected to favour his sons, but he viewed them not from the perspective of a father but from that of a Roman citizen. Like Hume he thought that Brutus so entered into the sentiments of being a Roman citizen that he would have considered saving his sons as being contemptible. Unlike Helvétius, Smith did not find Brutus's devotion to Rome so unusual and believed that it reflected that generosity of spirit which was not uncommon in most countries in times of war (Smith IV.2.11, 1982c: 191–2).

In comparing Helvétius with both Hume and Smith it would be tempting to see the difference between them in terms of Helvétius's insistence that self-interested passions (in this case pride or love of glory or honour) lay behind Brutus's generous sacrifice of his sons. It is true that Helvétius started with self-interest and an action such as that of Brutus represented a conjunction between his own interest and the public interest. At one point he explained this connection as follows:

Interest presents objects to us only with such aspects as appear useful to us on our perceiving them. When we judge of them as conformable to the public interest, we are not so properly to do honour to a just manner of thinking, or to our love of justice, as to being accidentally placed in such a situation as makes it our interest to see objects in the same light as the public.

(Helvétius II.VII, 1988: 92n; 1809: 70n)

In other words, though we do not love virtue for its own sake, we often act justly in the public interest, for example, because we perceive such actions to be right and useful for society as well as for us. At another point, when referring to the virtue of the Greeks and Romans, Helvétius wrote:

Whoever considers the virtuous actions history has transmitted of these people [Greeks and Romans], and would discover the cause, they will find that it proceeded from the address with which the legislators of those nations united private and public interest.

(Helvétius III.XXII, 1988: 364; 1809: 316)

To this passage Helvétius added a note: 'In this union consists the true spirit of the laws' (Helvétius 1988: 364n; 1809: 316n). This union of private and public interest meant, for Brutus, that his enlightened pride, his love of glory and honour corresponded with a love of the republic that animated the whole of Rome. According to Helvétius, Brutus did not calculate if his sacrifice was in his interest. That sort of calculation, if made at all, was made by the legislator when the laws were established. The laws and not Brutus joined private to public interest.

As we look more closely at Helvétius, the differences between his account and that of Smith diminish. Smith admitted that if Brutus had considered self-interest ('consulted his breast only'), he would have saved his sons. 'Brutus ought naturally to have felt much more for the death of his own sons', he wrote, suggesting, like Helvétius, that there was a natural self-regard underlying human actions (Smith IV.2.11, 1982c: 192). But being a Roman citizen was more important and led him to pay no attention to self-interest. Helvétius would not have disagreed with this analysis. Both may simply have been saying that being a

Roman citizen was the stronger passion, and both Helvétius and Smith acknowledged that the example of Brutus was unusual.

Smith denied that utility was the basis of such an action. Brutus did not establish the usefulness of his sacrifice to Rome; he simply acted as a Roman citizen. But utility was not, for Smith, wholly irrelevant. When we think about the usefulness of Brutus to Rome, his unusual sacrifice acquires a new lustre. In other words, we first sympathize with such a noble sacrifice by this great Roman, but are then capable of seeing an additional beauty in the utility of Brutus's action for the future of Rome and the success of the republic. Smith took pains to point out that not everyone would be aware of the beauty of utility, and utility would not be what recommended the story of Brutus 'to the natural sentiments of the bulk of mankind'. Nevertheless, 'men of reflection and speculation' would perceive this additional beauty generated by the usefulness of Brutus to Rome (Smith IV.2.11, 1982c: 192).

Even the perspective of the legislator, much in evidence in Helvétius, was not wholly absent in Smith. For Helvétius, the legislator of Rome united public and private interest via the laws. In so far as Brutus was willing to sacrifice his sons for justice and the laws, he would clearly reflect the utility of the legislator in devising laws that could animate such a noble gesture. Smith's belief that the beauty of utility of Brutus's action was only to be appreciated by a few reflected a perspective, not too distant from the legislator, whereby one admired not only Brutus's sacrifice but also its utility to Rome and its laws.

The role of the legislator

This detailed consideration of the example of Brutus has suggested that there was little at issue between Helvétius and Hume and Smith. It seems as though they were all baking the same cake, though they were mixing the ingredients in a different order. If one begins with the individual experience of pleasure and pain and ends with a standard of public utility, or if one begins with public utility and shows how this must bring pleasure and pain to individuals, the arguments may differ, but the overall result is similar.

There is, however, one consequence of Helvétius's emphasis on self-interest that reveals a substantial difference between his position and those of Hume and Smith. If one adopts psychological egoism, the task of the legislator or sovereign has to be considerably greater in order for public utility to become the standard for politics, law, and virtue. This standard might also require a greater sacrifice by self-interested individuals in order to advance the public good. It is arguable that Helvétius took the theme of sacrifice further than Hume or Smith would have contemplated, as in the following passage:

Public humanity is sometimes void of pity for individuals. When a vessel is surprised by long calms, and famine has, with an imperious voice, commanded the mariners to draw lots for the unfortunate victim

who is to serve as a repast to his companions, they kill him without remorse; the vessel is the emblem of the nation; every thing becomes lawful, and even virtuous, that procures the public safety.

(Helvétius II.VI, 1988: 84; 1809: 63)³

What seems missing from this example of human cannibalism under severe conditions is any conception of sympathy, much employed by Hume and Smith, which may be shared by the mariners or which affects us. Do they kill the unfortunate person who draws the short straw without any remorse? Do we reflect on this terrible sacrifice without a feeling of horror? Helvétius then, as we see, made the connection between this act of barbarism, however necessary, and the nation where 'everything becomes lawful, and even virtuous, that procures the public safety'.

Both Hume and Smith were aware that the enforcement of justice was a most unpleasant enterprise, made slightly more pleasant by the fact that a system of justice could be justified by its utility. Both realized that one key task of government was to secure lives and property and to use the system of justice (courts, police, prisons, etc.) to do so. Justice is a virtue and its ultimate justification would be, in Helvétius's words, 'public safety'. But they would have some difficulty with Helvétius's paradoxical remark that 'every thing becomes lawful', assuming by lawful whatever the laws happen to be. Such a remark ignored the established conventions in a society which set limits to what laws might be enacted. They might also have difficulty with this passage from Helvétius which precedes the one quoted above concerning the marooned mariners:

We ought then, in order to be virtuous, to blend the light of knowledge with greatness of soul. Whoever assembles within himself these different gifts of nature, always directs his course by the compass of the public utility. This utility is the principle on which all human virtues are founded, and the basis of all legislations. It ought to inspire the legislator with the resolution to force the people to submit to his laws; to this principle, in short, he ought to sacrifice all his sentiments, and even those of humanity itself.

(Helvétius II.VI, 1988: 83–4; 1809: 62–3)

It is important to appreciate that the hypothetical legislator seems to possess virtue and knowledge and is guided by public utility. His laws, based on the public good, demand great sacrifices, much as those of Rome might have demanded that Brutus put the safety of Rome before the lives of his two sons. If we respond to Brutus's actions as exhibiting a lack of humanity, it is worth noting that neither Hume nor Smith expressed such reservations. But there is a sense in which Helvétius was willing to turn against humanity itself to establish a regime of virtue. To put it in a more provocative manner, yet without ignoring historical context, we might say that Helvétius ignored the one characteristic Bentham said

he learned from Hume. According to Bentham, Hume had established that, with a few exceptions, 'the foundations of all *virtue* are laid in *utility*' and that 'the cause of the people [is] the cause of virtue' (Bentham 1988: 51n). Virtue for Hume could not be divorced from the experience of humanity, and this may distinguish his more conservative position from that of Helvétius, whose legislator might turn against humanity itself to establish a regime of virtue.

Utility and virtue

Let us explore further Helvétius's conception of virtue to shed light on what appears to be the licence held by the legislator to turn against humanity on the grounds of utility when the public safety requires it. At one point he distinguished his idea of virtue from those of Plato and Montaigne. According to Plato virtue consisted of order, harmony, and beauty, but was unrelated to human history; according to Montaigne, virtue meant one thing in the north and another in the south, so that it was apparently arbitrary. Helvétius rejected this kind of relativism. Virtue, for Helvétius, was:

a desire of the general happiness; that, consequently, the public welfare is the object of virtue; and that the actions it enjoins, are the means it makes use of to accomplish that end; and that, therefore, the idea of virtue is not arbitrary; that, in different ages and countries, all men, at least those who live in society, ought to form the same idea of it; and, in short, if the people represent it under different forms, it is because they take for virtue the various means they employ to accomplish the ends.

(Helvétius II.XIII, 1988: 128; 1809: 102–3)

Virtue was thus linked to happiness and utility; it was not arbitrary and was the same everywhere. He granted, however, that the same acts could be considered successively virtuous and vicious presumably in so far as they advanced or failed to advance the happiness of mankind. If Brutus had condemned his sons to death over a minor issue of private morality, he might have been considered vicious rather than a virtuous citizen of Rome. Or if Brutus had condemned his sons, when there was no hope of the Tarquins returning to power, the same act, for which he was considered an exemplar of virtue, might be considered vicious.

Helvétius then distinguished between 'prejudicial' and 'true virtues' with the former *called* virtue in various societies, but not contributing to public happiness. He proceeded to relate a number of tales of cruelty and stupidity of distant people who thought that certain acts, usually involving maiming or death, were virtuous. For example (and this example is among the milder stories told):

In the kingdom of Martemban, it is an act of virtue, on the day when the idol is brought out, for the people to throw themselves under the wheels of his chariot, or to cut their throats as he passes by.

(Helvétius II.XIV, 1988: 136–7; 1809: 110)

It is clear that what the people at any given time might believe to be virtuous might not be so, as such virtue does not advance the public interest. Helvétius thus had a problem of false consciousness concerning interests, utility, and virtue. Someone or some body of people would have to decide whether or not acts that were considered virtuous were in fact virtuous. Such enlightenment could not come simply from the writings of moralists and philosophers, because the virtues and vices of a whole people, in Helvétius's view, depended on their laws. As he put it, 'if philosophers would be of use to the world, they should survey objects from the same point of view as the legislator' (Helvétius II.XV, 1988: 152; 1809: 125). This point of view would obviously consist of a profound study of the laws and specific proposals for change which the legislator might directly enact into law. It would also contain a deep understanding of the passions which moved the people to virtuous action. The tasks of the sovereign legislator were clear:

It is then by weakening the stupid veneration of the people for ancient laws and customs, that sovereigns would be enabled to purge the earth of most of the evils that lay it waste, and be furnished with the means of securing the possession of their crowns.

(Helvétius II.XVII, 1988: 158–9; 1809: 130)

Nevertheless, the legislator was not free to do as he or she pleased. Not only was arbitrariness foreign to the tasks of the legislator, but also the laws had to be consistent with each other and, in addition, all based on the principle of utility:

It is, however, on the uniformity of the legislator's views, and the dependence of these laws on each other, that their excellence consists. But, in order to establish this dependence, it would be necessary to refer them all to one simple principle, such as that of the public utility [*l'utilité du public*]; or, that of the greatest number of men [*du plus grand nombre d'hommes*], subject to the same form of government: a principle more extensive and more fruitful than imagination can conceive: a principle that includes all the morality and all the legislations, of which many men discourse without understanding them, and of which the legislators themselves have yet but a very superficial idea, at least if we may judge from the unhappiness of almost all the nations upon earth.

(Helvétius II.XVII, 1988: 163–4; 1809: 135)

The principle of utility was, therefore, the guiding light for Helvetius's legislator, moralist, and philosopher. But Helvétius realized that in most nations 'the

foundations of an useful morality' were obscured by religious doctrines and false morality (Helvétius II.XXIV, 1988: 211; 1809: 179). These foundations consisted of sensations of pleasure and pain, and self-love was closely related to them:

men ... are neither good nor bad, but ready to be either, according as a common interest unites or divides them; that self-love, a sensation necessary to the preservation of the species, is engraved by Nature in a manner not to be erased; that a physical sensibility has produced in us a love of pleasure and a hatred of pain; that pleasure and pain have at length produced and opened in all hearts the buds of self-love, which by unfolding themselves give birth to the passions, whence spring all our virtues and vices.

(Helvétius II.XXIV, 1988: 217–18; 1809: 185–6)

The starting point for Helvétius's account of virtue and public utility were our sensations of pleasure and pain, which in turn stimulated our passions and our interest in ourselves and our happiness. This beginning point was important, as it rejected religious accounts of the basis of virtue and philosophical beliefs in innate ideas. In a typical passage he traced this development as follows:

I see that men, without a sensibility of pain and natural pleasure, without desires, without passions, and equally indifferent with respect to every thing, would not have known a personal interest: that without personal interest they would not have united in society, would not have entered into conventions among themselves, and would not have had a general interest; consequently there would have been no actions, either just or unjust; and that thus natural sensibility and personal interest have been the authors of all justice.

(Helvétius III.IV, 1988: 250–1; 1809: 213)

Helvétius did not dwell on pleasure and pain to the extent that Bentham did in *IPML*. Bentham later complained in the 'Article on Utilitarianism' that 'scanty was still the stock of denominations devised by the French philosopher for the purpose of giving expression to the various universally-experienced modifications of pain and pleasure' (Bentham 1983b: 290). If Bentham listed fourteen simple pleasures and twelve simple pains (Bentham 1996: 42–50), Helvétius mentioned only two pleasures and two corresponding pains, which were not clearly spelled out, but which seemed to be the pleasures and pains of sense and those of expectation, or, perhaps, those directly experienced and those imagined with the latter ultimately dependent on the former (Helvétius III.XIII and XIV, 1988: 313, 322; 1809: 268, 278). Helvétius concentrated more on the passions, a term Bentham later studiously avoided.⁴ He admitted that human beings tended to seek repose, but were moved to action by two powers: strong passions and lassitude (a fear of inaction), and these were prompted in turn by the experience

of pleasure and pain. But passions were the crucial moving force. 'Passions are in the moral', he wrote, 'what motion is in the natural world' (Helvétius III.VI, 1988: 268; 1809: 229). Even genius and greatness depended on strong passions. Although ordinary people tended to admire those exhibiting common sense, we depended far more on those with strong passions who could rescue us from sloth and give us the attention which was productive of superior intellects. Without passion, according to Helvétius, we would be reduced to 'absolute stupidity', and he referred to Sampson's hair as a symbol of passion (Helvétius III.VIII, 1988: 284, 287–8; 1809: 243, 246–7). When it was cut off, he became an ordinary person. Our advances in the arts and sciences and other achievements also depended on strong passions.

Helvétius admitted, however, that the same passion that led to the love and practice of virtue in one age or society might produce vice in another. The link between the passions and public utility was not straight-forward. Murderers as well as geniuses might have strong passions (Helvétius III.XVI, 1988: 335; 1809: 286). Helvétius fully accepted this problem, though he insisted that the route to public utility did not rest with the sacrifice of pleasure and strong passions. He argued instead that the passions, and especially the strong ones, must be made to conform to the public interest without losing their strength, and this was the task of the legislator. His means were the laws and his immediate tools, reward and punishment. 'The virtues and vices of a nation', he confirmed, 'are always necessary effects of its legislation' (Helvétius III.XXII, 1988: 365; 1809: 317).

Despite giving what appears to be great power to the legislator, it did not follow that Helvétius intended the legislator to be a despot, either enlightened or not. And between republics and despotisms, he clearly favoured republics, where no one was above the law (see Helvétius III.XVII, 1988: 342 and n; 1809: 295 and n). He also praised the right of the people to possess freedom of expression and criticism, including freedom of the press (Helvétius III.XVIII, 1988: 348–9; 1809: 301–2). He praised the separation of powers in England, and in his discussion of government, he seemed indebted to Montesquieu. But he rejected Montesquieu's emphasis on the importance of climate to explain differences between states (placing greater emphasis on the laws and legislator), and, unlike Montesquieu, he seemed to praise republics as the repositories of virtue and greatness (Helvétius III.XXIII, XXX, 1988: 368ff, 414; 1809: 320, 358).

Helvétius did not believe that the legislator could simply enact a new set of laws and initiate the reign of virtue, much as Lycurgus supposedly did at Sparta. He criticized sovereigns who acted too hastily:

Sovereigns are apt to think, that by a word, or by a law, they can suddenly change the spirit of a nation, and, for instance, render a cowardly and indolent people, courageous and active. They are ignorant that diseases in the state, which are long contracting, require much

time in curing; and that in the body politic, as well as in the human, the impatience of the prince and the sick persons often oppose the cure.

(Helvétius III.XXX, 1988: 412n; 1809: 356n)

Helvétius and Bentham

This analysis of virtue suggests that there is no reason to believe that Helvétius's concept of the legislator was intended to act as a despotic force in society. Nevertheless, we are bound to return to the problem raised and then set aside earlier as to whether or not the legislator's reign of virtue was imposed on the people for their own good, and where necessary, the legislator might turn against humanity itself. I am inclined to believe that this is a characteristic of Helvétius's theory, but one that is difficult to substantiate. Although he seemed to take this position, he also qualified his approach so that the power of the legislator was somewhat circumscribed. We might gain some insight into Helvétius's position by comparing it with that of Bentham, where Bentham avoided the conclusions of Helvétius with regard to the role of the legislator despite his use of the same metaphor.

Both Hume and Smith used the concept of sympathy to identify and employ the idea of humanity as an important constituent of virtue. They did not deal with a legislator in the same sense, as their theories described politics and morality and carried few explicit prescriptions. Although Bentham rejected sympathy as the foundation of virtue, it is arguable that he retained the importance of the idea of humanity in various ways, and attempted to integrate it into the more prescriptive approach he took from Helvétius. For example, in his chapter on 'sanctions' in *IPML* Bentham began, like Helvétius, by stating that the principle of utility, rooted in pleasure and pain, was the sole end to be advanced by the legislator, and that the individual should be '*made* to fashion his behavior' according to this principle (Bentham 1996: 34). This statement should leave one in no doubt concerning the power of the legislator. Nevertheless, of the four sanctions, the physical, political, moral or popular, and religious, only the political sanction (and, to an extent, the natural sanction) was specifically linked to the legislator so that the enforcement of the conjunction of individual interest and public utility did not depend solely on the figure of the legislator. The important sanction, variously called the moral or popular, was associated with an active and critical public opinion (Bentham 1996: 35 and n). The moral sanction bore not only on ethics but also on legislation and politics, and at one point Bentham warned the 'political magistrate' not to ignore either the moral or the religious sanction in his work: 'he will be sure almost to find himself mistaken in the result' (Bentham 1996: 37).

Bentham also devoted considerable attention to the division of authority between legislation and ethics in the final chapter of *IPML* with remarks such as the following:

It is a standing topic of complaint, that a man knows too little of himself. Be it so: but is it so certain that the legislator must know more? It is plain, that of individuals the legislator can know nothing: concerning those points of conduct which depend upon the particular circumstances of each individual, it is plain, therefore, that he can determine nothing to advantage. It is only with respect to those broad lines of conduct in which all persons ... may be in a way to engage, that he can have any pretence for interfering; and even here the propriety of his interference will, in most instances, lie very open to dispute.

(Bentham 1996: 290)⁵

Although Helvétius apparently opposed despotic power, 'where property, life, and liberty, depend on the caprice and arbitrary will of one man' (Helvétius III.XIX, 1988: 351; 1809: 304), he did not in fact dwell on the necessary limits of the power of the legislator and the importance of an autonomous realm of ethics where legislation was inappropriate. Perhaps more than Bentham, Helvétius saw the legislator as working with the passions to create a reign of virtue. Bentham, on the other hand, saw morality as both part of legislation and potentially opposed to it, as each tended to have separate, though overlapping, spheres. This opposition was reflected most strongly in his later constitutional writings which include a strong popular element in the emphasis on universal suffrage, the removal from office of government officials following a petition and vote, and the most powerful institution of all, the public opinion tribunal (see Rosen 1983: 19–40). But even in his earlier writings, such as *IPML* and *A Fragment on Government*, he gave considerable attention to the limits of legislation and the importance of established conventions in a way that reminded one of the influence of Hume. One doubts if Bentham could have written in answer to the question, why do moralists fail to change the morals of the people, what Helvétius wrote: 'It is because the vices of a people ... always lie at the bottom of its legislation' (Helvétius II.XV, 1988: 147; 1809: 120). While legislation and the constitution were important for Bentham, a sphere of morality remained in spite of legislation. That sphere corresponded to a realm of humanity beyond the control of the legislator.

De l'homme

In *De l'homme* Helvétius explored further the extent to which the legislator might transform society, particularly in the economic sphere, where, despite differences in wealth between rich and poor, he believed that all might be equally happy (Helvétius Sect. 8, Chs. I–II, 1773: ii.163ff; 1777: ii.194ff).⁶ He recognized that in modern societies most people, rich and poor, were unhappy. The poor suffered from want and were forced to work long hours at arduous tasks in order to survive. The rich languished in discontent (*l'ennui*), able to gratify immediately all their wants, but suffering from *l'ennui*, regarded by Helvétius as a disorder of

the mind. The solution was a complex one, because in most societies it was widely believed that the rich were happy and the poor would become happy if they could acquire the wealth of the rich. For Helvétius, however, nothing could be farther from the truth.

A key assumption in his analysis was that ordinary labour need not be painful, and it was only arduous labour over long periods that was considered burdensome (Helvétius Sect. 8, Chs. II–III, 1773: ii.166–70; 1777: ii.198–202). Artisans who were habituated to work felt no great pain in performing tasks and often continued to work even when they became wealthy or reached an advanced age. If ordinary workmen could acquire the necessities of life with moderate labour over an eight-hour period, Helvétius believed that they would be happy. Pleasure, for Helvétius, came in two forms: by direct sensation and through expectation. The workmen might not experience great pleasure through work (though moderate labour was not necessarily painful), but they had the advantage of the pleasures of expectation in that they looked forward to remuneration and the various pleasures to be obtained through reward. The rich possessed no pleasures of expectation, because they could have everything they desired, and this was one source of the debilitating *ennui*. If the rich were poorer and had to undertake modest work to maintain their way of life, they would be happier. Instead, they rushed about from activity to activity like squirrels on treadmills, but without satisfaction.

A simple redistribution of wealth from rich to poor would not solve the problem of happiness, because people would still admire the idle rich and think them happy (Helvétius Sect. 8, Ch. V, 1773: ii.172–3; 1777: ii.205–6). The political solution to the problem of establishing equal happiness was in fact a familiar one, that of providing a society where people felt sufficiently secure in their lives, liberties, and properties that they did not need to acquire great amounts of wealth. Where this security did not exist, opulence was considered the only means to protect oneself from injustice. Such opulence led the strong and wealthy to express contempt for the plight of the weak and poor. Where everyone was secure, no one needed to acquire great wealth.

Helvétius believed, as we have seen, that he had made a great discovery and was the first person to prove that there could be an equal distribution of happiness among individuals in society. He did not, however, advocate a revolution to achieve this happiness, partly because of the importance of changing attitudes to appreciate work and moderate fortunes rather than the continual acquisition of wealth by those who were already rich, and partly because the security necessary to initiate the transformation would preclude such revolutionary action. His proposals were fairly modest, for example, in forcing a family which had decreased in size to cede part of its land to a neighbouring family which had increased in numbers (Helvétius Sect. 9, Ch. II, 1773: ii.234n; 1777: ii.276n). Where there were few proprietors in a nation in relation to the number of inhabitants, a tax might be used to purchase small amounts of land so that more inhabitants might become proprietors (Helvétius Sect. 9, Ch. II, 1773: ii.234n;

1777: ii.276n–7n). He also opposed luxury as adding to the misery of the poor and not enhancing the happiness of the rich, and questioned the widely held view that an increasing population was a sign of happiness, when such an increase might well mean an increase in misery (Helvétius Sect. 9, Ch. II, 1773: ii.234n; 1777: ii.277n). Perhaps his most radical proposal, though not an unfamiliar one in the eighteenth century, was to split France into thirty republics, but organized under the same laws so that none would be inclined to enslave the others (Helvétius Sect. 9, Ch. II, 1773: ii.236 and n; 1777: ii.278–9 and n). These suggestions were meant to be illustrations only and the means by which the movement from a state of misery to a state of happiness would take place would differ from society to society (Helvétius Sect. 9, Ch. I, 1773: ii.230–1; 1777: ii.272–3). But the main force in this transformation was the recognition of the effect of *envie* on the rich and a re-evaluation of the meaning of labour. As for the latter, he wrote:

To regard the necessity of labour as the consequence of an original sin, and a punishment from God, is an absurdity. This necessity is, on the contrary, a favour from heaven.

(Helvétius Sect. 9, Ch. II, 1773: ii.239n; 1777: ii.282n)

When Helvétius considered political institutions and their foundations, he rejected Montesquieu's division of governments into three forms (despotic, monarchical, and republican), each animated by a different passion (Helvétius Sect. 4, Ch. XI, 1773: i.257ff; 1777: i.304ff). He saw a love of power animating all governments which led him to favour a republican regime where no one could attain power over another, and the greatest happiness could be advanced. Government by all rather than by one or a few meant 'the happiness of the greatest number [*le bien du plus grand nombre*] ... [E]very action conformable to the interest of the greatest number is just and virtuous' (Helvétius Sect. 4, Ch. XI, 1773: i.261; 1777: i.308).

Conclusion

Bentham's indebtedness to Helvétius was considerable. He learned that the principle of utility could be employed in a prescriptive manner to transform legal systems and societies. He was taught by Helvétius to see the importance of pleasure and pain and interests as tools of legislation. Bentham would subsequently refine and apply these tools in so profound a manner as to leave Helvétius behind with a reputation as a minor *philosophe* and early utilitarian. But Bentham did not follow Helvétius in several crucial areas (cf. Berlin 2002: 20). He did not accept the doctrine that the sphere of the legislator was nearly unlimited so that he was authorized paradoxically to turn against humanity for the sake of the public interest. He retained an emphasis on humanity and an autonomous sphere of private morality in which the legislator should not intervene. Although

he favoured equality as a principle second to security, he never regarded an appreciation of the pleasures of unforced labour as the key to an equal happiness in society. He remained much more closely linked to classical economics, where no one doubted that, if left to their own devices, most people would imitate the idle rich. Nevertheless, Bentham retained a sufficiently strong belief in equality to include political equality (in the sense of near-universal suffrage) in his radical agenda, and he believed that a gradually increasing economic equality would be a major source of increased happiness.

THE IDEA OF UTILITY IN SMITH'S *WEALTH OF NATIONS*

Unlike *TMS*, *WN* contains no chapter or section explicitly devoted to utility, and utility does not seem to form an obvious theme running through the text. Nevertheless, neither Smith nor his interpreters have emphasized a conflict between the two works, despite a recognition of differences of focus (see O'Brien 1975: 31). If, as I have argued, utility plays a crucial role in *TMS*, it must also be shown to have an important presence in *WN*, despite the absence of explicit discussion.

In chapter 4 on *TMS* I contended that whenever Smith discussed utility, he was invoking Hume and commenting on Hume's ideas. While most commentators acknowledge close connections between Hume and Smith, they often differ with regard to the role of utility and seldom extend any link with utility to *WN*. Cropsey is unusual in suggesting that in general 'a thorough study of the relation between the doctrines of Smith and Hume would disclose in full the connection between liberal capitalism and the "sceptical" or "scientific" principles upon which Hume wished to found all philosophy' (Cropsey 2001: 120). Robbins is more specific with regard to utility when he argues that the idea of utility is crucial to classical political economy (Robbins 1978: 178). On the other hand, other commentators have argued differently. According to Hundert, while Smith followed Hume in many respects, it was precisely to avoid Hume's 'starker utilitarian conclusions, and their obvious Mandevillian overtones' that Smith developed his theories as he did (Hundert 1994: 223). Rothschild has noted close connections between Hume and Smith with regard to religion, their use of irony, and their 'extended colloquium with Roman philosophy'. But when she acknowledges that, for Hume, 'utility, or the "pleasure of utility" is the principle of moral judgment', 'at this point', she continues, 'Smith rejects even Hume's system' (Rothschild 2001: 130–1, 301, 230–1; see also Rivers 2000: 260).

Many of the differences seen by these scholars with regard to Smith's inheritance from Hume have already been discussed in relation to *TMS*. With regard to *WN* we need first to see where utility emerges as an important concept. In the 'diamonds and water paradox' it would appear that utility was dismissed as a 'determinant of value' (O'Brien 1975: 79–80). Water has great utility, but little value due to its abundance, while diamonds, with little utility, are regarded every-

where as possessing great value. O'Brien uses Smith's paradox to argue that Smith differs from other classical economists in using utility in an objective sense and rejecting its subjective use in relation to pleasure and happiness. Diamonds seem to give great pleasure but have little utility (O'Brien 1975: 79–80). Although O'Brien is correct in noting that 'utility' appears in the writings of all the classical economists, and often in a variety of ways, he fails to see that for most writers on utility there are both objective and subjective elements involved (O'Brien 1975: 97–8). In his commentary on *WN*, McCulloch proposed that to avoid confusion in the definition of value, it would be useful to confine value to mean 'exchangeable worth' or 'value in exchange'; utility, then, would be confined to the 'power or capacity of an article to satisfy our wants or gratify our desires' (Smith 1828: iv.84). McCulloch believed that Say, for example, had confused the two ideas in believing that utility was a source of exchange value (Smith 1828: iv.79–80).

It is not necessary to separate the two terms to clarify the various ideas associated with 'value' and 'utility'. Indeed, the very attempt to make such a distinction seems fraught with confusion, because the idea of utility inevitably appears in accounts of economic exchange. Hollander approaches the 'paradox of value' in a different manner and then reaffirms the role of utility in Smith's account of exchange value:

The 'paradox of value' was not formulated as a *problem* requiring a *solution*; it was rather a statement regarding the irrelevance for exchange value of the physical (biological or cultural) properties of commodities. Smith did not reject utility in the economist's sense of the term as a necessary condition of exchange value; on the contrary he accounted for the latter in terms of utility and scarcity in the traditional manner.

(Hollander 1973: 137)

If, for Smith, utility was part of value, just what role in Smith's system did it play? The general answer, which will be advanced in this chapter, is that utility played a distributive role in the allocation of goods and services throughout society. It operated on numerous levels from the practical mechanisms of the market to the operations of the 'invisible hand'. Utility, through a theory of liberty, replaced distributive justice with a way of allocating the means to life and its comforts that theoretically brought satisfaction and happiness to all in society. Robbins understands the importance of utility to classical economics when he depicts its role in economic policy as follows:

A theory of economic policy, in the sense of a body of precepts for action, must take its ultimate criterion from outside economics.

This criterion the English Classical Economists found in the principle of utility, the principle that the test of policy is to be its effect on human happiness. All action, all laws and institutions were to be judged

by this test. If their consequences were such as promote more happiness (or eliminate more unhappiness) than was conceivable from other actions, laws, or institutions, they were good; if not, then they were bad.

This attitude is common to all the English Classical Economists.

(Robbins 1978: 177)

It may be tempting to marginalize utility by consigning it to the realm of policy as opposed to theory (see O'Brien 1975: 25). Nevertheless, when Robbins writes of utility in relation to economic policy, it becomes part of the theory – as the ultimate criterion of economic practice. Economic theory explains how an economy works, and utility provides a criterion for assessing the value of such work. The criterion stands outside economic theory in its technical sense, and draws on ultimate principles of ethics and politics, e.g. happiness, pain and pleasure, and the principles governing their distribution in society. We shall begin to see utility more clearly for Smith's economics when we examine the operation of this criterion in a number of contexts.

The 'invisible hand'

So far as is known, Smith invoked the notion of the 'invisible hand' on three occasions in his writings: in the little known and apparently early 'History of Astronomy', *TMS*, and *WN*. The reference in the 'History of Astronomy', though not directly relevant to an understanding of the role of utility in *WN*, deserves some attention (see Smith 1982a: 49–50). It appears in a brief account of the origin of philosophy in which Smith ascribed the pre-philosophical reaction to irregular occurrences in nature ('thunder and lightning, storms and sunshine') to the 'invisible hand' of Jupiter. In polytheistic religions and among the superstitious, while the gods were never invoked to explain regular occurrences (e.g. 'fire burns, and water refreshes; heavy bodies descend, and lighter substances fly upwards'), such events as a sudden storm might be ascribed to Jupiter's 'anger', and the subsequent sunshine, to his 'favour'.

Philosophy arose, according to Smith, to replace this and other superstitions, by showing that the occurrences were in fact regular and fully explainable. But first there must be established order, security (i.e. liberty), and a degree of prosperity, so that there could be leisure to investigate such questions. For Smith, this evolution to civilized society first took place in Greece and the Greek colonies, which gave birth to two schools: the first founded by Thales and the second by Pythagoras. In a few paragraphs he traced the development of philosophy to Socrates, Plato, and Aristotle, where 'Philosophy first received that form, which introduced her, if one may say so, to the general acquaintance of the world' (Smith 1982a: 53). Having made this point, Smith then added a further concluding paragraph, which at first glance might well have appeared prior to the discussion of Socrates, Plato, and Aristotle. What makes it fit into the chapter, as it is, is the last phrase in the paragraph which refers to Epicurus:

There was still another school of philosophy, earlier than Plato, from which, however, he was so far from borrowing any thing, that he seems to have bent the whole force of his reason to discredit and expose its principles. This was the Philosophy of Leucippus, Democritus, and Protagoras, which accordingly seems to have submitted to his eloquence, to have lain dormant, and to have been almost forgotten for some generations, till it was afterwards more successfully revived by Epicurus.

(Smith 1982a: 53)

In another essay ('Of the External Senses') Smith returned to the philosophy of Leucippus, Democritus, and Epicurus, as 'revived by Gassendi' and 'adopted by Newton', to assert that it was considered 'the established system, or as the system that is most in fashion, and most approved of by the greater part of the philosophers of Europe' (Smith 1982a: 140). He then alluded to an opposing doctrine vaguely depicted as 'drawn from that species of metaphysics which confounds every thing and explains nothing' (Smith 1982a: 140).

Before turning to the uses Smith made of the 'invisible hand' in *WN* and *TMS*, it may be worth considering somewhat further what it is. Commentators have not found it easy to explain Smith's intentions or meaning. Haakonssen links the 'invisible hand' to the operation of 'taste and vanity' (Haakonssen 1981: 183). Rothschild notes that Smith's references were 'cursory' and that he 'does not seem to have attached great importance' to the idea (Rothschild 2001: 117–18). She notes at another point that 'it is possible, therefore, that he used *words* which were to him slightly comical, or slightly unpleasant ... to describe an *idea* which was of profound importance to his theoretical system' (Rothschild 2001: 121). But she gives the idea a perfectly pleasant and uncomical depiction:

It [the invisible hand] consists, in the *Wealth of Nations* and the *Theory of Moral Sentiments*, in three main notions: that the actions of individuals have unintended consequences, that there is order or coherence in events, and that the unintended consequences of individual actions sometimes promote the interest of societies. This idea (or set of ideas) recurs, in different forms, at several points in Smith's work.

(Rothschild 2001: 121)

While these three ideas are important components of Smith's system, one may nonetheless question if they capture all that is important in the idea of the 'invisible hand'. Rothschild is surely correct in resisting the idea that the 'invisible hand' was somehow linked to a Stoic idea of providential order (Rothschild 2001: 132; see O'Brien 1975: 30; Macfie 1967: 101–25). Such a view would require an acceptance for Smith of metaphysics which 'confounds every thing and explains nothing'.

Smith invoked the 'invisible hand' in the *WN* in the following passage:

As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestick to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

(Smith IV.ii.9, 1981: i.456)

The reason why the idea of unintended consequences is invoked here is fairly obvious. Smith was concerned with intentions and the ends aimed at by those who formed their intentions. But the idea of unintended consequences does not seem to exhaust Smith's meaning, if only because it is false to assert as a matter of fact that 'every individual necessarily labours to render the annual revenue of the society as great as he can'. Consider the individual who labours to cut down and destroy the apple tree in order to eat the best apple located at the top, or the person who treads on and destroys a row of lettuces to reach some other vegetable. Or the person who labours to produce goods from which he or she profits but which fall apart soon after they are sold. Or the person who produces goods from which he or she profits, but which poison and pollute the environment. In none of these instances does the individual labour to increase the annual revenue of society.

Smith, however, would not disagree, but he might argue that the 'invisible hand' is concerned with something else, that is to say, with actions and intentions which are initially of utility in the long run to the individual within the larger context of society. Here utility has a special meaning, and allows the 'invisible hand' to turn the individual's intention to benefit only himself into public benefit.

But why did Smith insist that this public benefit would necessarily occur, and why employ the metaphor of the 'invisible hand'? We can obtain answers to these questions by examining the earlier discussion in *TMS*. In *TMS* the 'invisible hand' was employed as a way of distributing the necessities of life, and Smith used the metaphor to make the point that whatever might be the desires of the rich, their stomachs were roughly the same size as those of the poor. Even though the rich intentionally would seek to gratify their every desire, they ended up distributing (by an 'invisible hand') these necessities in roughly the same manner as if they had made an equal distribution. Without intending to do so,

they 'advance the interest of society' (Smith IV.1.10, 1982c: 184–5). This invocation of the 'invisible hand' appeared in Book IV, concerned with utility, where Smith showed how one bestowed great labour on activities that might not be pleasant and valuable in themselves but which acquired a pleasing beauty by their utility. This aesthetic appreciation of utility was seen by Smith as highly significant, even though he denied that utility was the foundation of morals generally. He then developed this idea in the context of the poor man's son who struggled and toiled throughout his life to acquire riches and power which were supposed to give him great happiness and security. At the end of a life of toil, however, he found himself exhausted by his work, abandoned by friends, and surrounded by potential pleasures which could not provide any satisfaction. Despite his riches and the comforts of a great house, carriage, and servants, he was no more (and possibly less) protected from anxiety, fear, sorrow, diseases, danger, and death than the poor man who never worked very hard and enjoyed the pleasures of life (see Smith IV.1.8–10, 1982c: 181–3).

Nevertheless, because of the way we have tended to regard systems and their utility, we admire the rich and their productions as something grand and noble, even though the struggles to achieve wealth and security are but a cruel 'deception' and despite the fact that this deception has served the important end which 'rouses and keeps in continual motion the industry of mankind' (Smith IV.1.10, 1982c: 183). In other words, the system by which we are deceived into admiring wealth and all of its trappings, is nonetheless and paradoxically highly useful in generating the wealth of nations.

The 'invisible hand' metaphor did not appear here to show how the poor man's son was deceived into contributing to the development of agriculture and cities, the invention of the arts and sciences, etc. by his efforts to achieve wealth and power. The metaphor appeared a few lines later referring not to production but to distribution, and it is important not to interpret the 'invisible hand' as being concerned with maximizing the creation of wealth (see Raphael 1985: 71–2; Smith 1982c: 183n–4n). The 'invisible hand' allowed 'the beggar, who suns himself by the side of the highway, [to possess] that security which kings are fighting for' (Smith IV.1.10, 1982c: 185). The 'invisible hand' created, in effect, an equality in 'the real happiness of human life' unintentionally and despite the inequality produced by the deception that led people intentionally to pursue inequalities of wealth and power (Smith IV.1.10, 1982c: 185). Indeed, without such a pursuit, the beggar might not have received much in the way of distribution. The idea of utility, therefore, was crucial to this original impetus to create and distribute wealth and, indeed, virtue (see Cropsey 2001: 161).

The idea of deception, linked to that of the 'invisible hand', seems to have troubled a number of commentators (see Davis 1990: 346–50; Griswold 1999: 263). It is important to clear away some confusions. First, in *TMS* and *WN* Smith is discussing mainly intentions with regard to the 'invisible hand', and the theme of motives appears only in *TMS* in relation to deception. What moves or motivates us to labour and struggle is a love of ordered systems, which seem to offer

great benefits from participation in them. From the point of view of the philosopher these systems may be based on deception, but only because the philosopher might act on different motives. From the point of view of ordinary people, there is no deception involved. If we see opportunities to earn and secure our wealth and property, and to be admired and appreciated by friends and the community, we work hard and are highly motivated to achieve these ends. Even if we eventually realize that these achievements amount in fact to little, we might still believe that those who succeed nonetheless have a greater means to achieve happiness. Economic, political, and educational systems in a society are not deceptive to those who participate in them. They motivate us to endure long hours of toil and unhappiness to achieve success. Through these systems we establish the worth of things and determine the moral character of people. These systems provide an orderly means to generate utility, and Smith makes this point abundantly clear in *TMS*. Only the philosopher, who stands outside the system, can appreciate the deception, but even he can see that the utility of the system, however invisible, is as real as anything else.

Second, Griswold is mistaken when he writes that in both *TMS* and *WN* 'Smith is recommending a society devoted to the improvement of the human lot but governed by a systematic self-deception' (Griswold 1999: 263). The reason that deception is not a theme in *WN* is that its appearance in *TMS* was intended only to show the task of utility in relation to systems. The usefulness of the economic system overcomes the sense of betrayal that people might feel if they came to believe that they were deceived about their efforts. For Smith, when we feel ill or depressed about our lives, we may feel the reality of this deception, but it fades once we recover our health or good spirits. We cease to dwell on our own problems, abandon what Smith called 'this splenetic philosophy', and participate more fully in the world and its systems (see Smith IV.1.9, 1982c: 183). Griswold's suggestion that 'the failure of the pursuit of happiness on the part of the great mass of individuals in modern commercial society is known to the philosopher at the outset' (Griswold 1999: 263) is not one that Smith would have accepted. For Smith, the great mass of individuals in commercial society would be happy. Participation in the systems would bring employment, wealth, leisure, education, comfort, and health for most individuals, even for philosophers. Smith saw no link between deception and any continuing unhappiness in society.

Third, the role of the philosopher in the deception thesis is not entirely clear. The philosopher knows that the systems in which most people (including the philosopher) participate are mere inventions or fabrications, and at times the struggle for trinkets and baubles seems ridiculous, self-indulgent, and vain. But such ludicrous struggles for self-importance (and even the sober academic world is not free of them) are tied to a natural reality at several key points. As Griswold points out, Smith believed that 'the desire of bettering our condition ... comes with us from the womb, and never leaves us till we go into the grave' (Griswold 1999: 262–3, quoting Smith II.iii.28, 1981: i.341). Thus we are naturally inclined to participate in systems which promise an orderly process of self-

improvement. In addition, we naturally seek pleasure and attempt to avoid pain. As long as the systems generate such a foundation for happiness, they are naturally attractive, and we are motivated to participate in them. Finally, we are attracted to systems by their beauty, that is to say, they have an aesthetic appeal, like the orderly arrangement of chairs in a room. Thus, there is more to the philosopher's understanding of systems than an insight into deception. Connections with reality also pervade such 'deception'.

Fourth, there is a connection between Jupiter's 'invisible hand' and the 'invisible hand' of *TMS* and *WN*. Jupiter's invisibility is made visible, so to speak, by the provision of an Epicurean explanation of an irregular occurrence such as lightning in terms of atoms and the void, Newtonian physics, or Franklin's electricity. Lightning need not frighten us and we no longer look for an 'invisible hand' hurling lightning bolts behind it. The 'invisible hand' in *TMS* and *WN* is governed by the utility embedded in systems to distribute happiness where no such distribution was intended. We form our intentions mainly to benefit ourselves, but utility directs the action to serve the interests of others or to society as a whole.

As we have seen in chapter 2, utility initially became important as a distributive concept in Epicurean philosophy. In the philosophical sense there is nothing invisible about it; it is only invisible to those who form their intentions and act within economic and political systems for their own rather than the public good, and without any regard for the ultimate principles on which such systems rest. Furthermore, some of Smith's contemporaries would have considered the invocation of utility, as the foundation of such systems, to lack reality. It seemed to rest important aspects of life on the shifting sands of expediency, when they might be guided more substantially though still invisibly by nature or God's will. For Smith, such notions were 'drawn from that species of metaphysics which confounds every thing and explains nothing'. Smith used utility rather than other such 'invisible' ideas, because utility possessed a '*hand*' to act practically to effect the *distribution* in society. In this sense there may be a comical element in Smith's terminology. To the student of modern philosophy in its Epicurean form, however, the 'invisible hand' of utility is no more mysterious than Jupiter's 'invisible hand' has become, and no less real than a bolt of lightning.

Unintended consequences and the division of labour

The idea of the 'invisible hand' presupposed two other ideas which were crucial to Smith's economic system. The first, as we have seen, was the idea of unintended consequences, and the second, that of the division of labour. Smith invoked the notion of unintended consequences to account for major improvements in society which occurred despite that fact that no one had set out to make these improvements. For example, the development of the division of labour, which occasioned the wealth of mankind, was originally an unintended consequence of the human tendency to 'truck, barter, and exchange' (Smith I.ii.1,

1981: i.25). That part of the separation of powers, which divided power between the executive and judiciary, and produced one of the cornerstones of the system of justice, was an unintended consequence of too much work for the executive branch of government (Smith Vi.b.24, 1981: ii.722). Another striking example appeared where Smith described the way the great landlords unintentionally surrendered their enormous power in the countryside and their tendency to exercise that power in frequent wars by being seduced by merchants and manufacturers from the towns to spend their money on their products rather than on the support of large armies. Smith wrote:

A revolution of the greatest importance to the publick happiness, was in this manner brought about by two different orders of people, who had not the least intention to serve the publick. To gratify the most childish vanity was the sole motive of the great proprietors. The merchants and artificers, much less ridiculous, acted merely from a view to their own interest, in pursuing their pedlar principle of turning a penny wherever a penny was to be got. Neither of them had either knowledge or foresight of that great revolution which the folly of the one, and the industry of the other was gradually bringing about.

(Smith III.iv.17, 1981: i.422)

The great landlords sold their birthright 'not like Esau for a mess of pottage in time of hunger and necessity, but in the wantonness of plenty, for trinkets and baubles, fitter to be the play-things of children than the serious pursuits of men' (Smith III.iv.15, 1981: i.421). According to Smith, the landlords became 'as insignificant as any substantial burgher or tradesman in a city', with the effect that 'a regular government was established in the country as in the city' (Smith III.iv.15, 1981: i.421). Thus, without any express intention by either the manufacturers and merchants on the one side or the landowners on the other, order and good government were gradually distributed throughout the country 'and with them, liberty and security of individuals, among the inhabitants of the country' (Smith III.iv.4, 1981: i.412).

The 'invisible hand' was important in relation to the operation of unintended consequences to suggest how self-interested actions, often based on motives founded on a modest amount of rationality, could be distributed in order to generate public happiness which was then secured to everyone. In this case, however, the 'invisible hand' was not explicitly invoked. The merchant was selling diamonds to earn his living; the landlord who purchased the diamonds with the produce of the land could no longer raise an army to fight another landlord. Gradually, civil order came to exist, and with it individual liberty and security. These were unintended consequences of great importance for the wealth of nations. When he actually used the 'invisible hand' metaphor, Smith was suggesting how this outcome was achieved and everyone benefited.

The division of labour was as much a theory concerned with liberty as with the generation of wealth. If one set out in life to become secure and free, one might be tempted to pursue 'the good life' by becoming self-sufficient and providing wholly for oneself. One would then not have to depend on others and be vulnerable to abuses of liberty due to this dependence. The ancient Greeks regarded liberty (*eleutheria*) as being connected to this independence. The division of labour required that one give up that liberty based on independence and self-sufficiency in order to participate in a grand economic system, in which by the operation of the 'invisible hand' a great increase in wealth was brought to everyone. With the division of labour people needed various goods from others in order to live and to produce goods themselves. The division of labour thus tended to encourage saving and the accumulation of capital to purchase the means to create wealth, and this in turn led to a further division of labour (Smith II.1–3, 1981: i.276–7). Not all of the effects of the division of labour were beneficial, and Smith famously called attention to the increasing stupidity which spread throughout the classes of manual workers who devoted their working lives to the performance of a few simple operations (Smith V.i.f.50, 1981: ii.782). His remedy, in so far as it was a remedy, was for the state to invest in education for the lower classes (see Smith V.i.f.54–5, 1981: ii.785). But Smith, nonetheless, placed great emphasis on liberty, and saw in the security introduced into modern society following the achievement of civil peace and the division of labour, which in turn produced great wealth, a different kind of liberty, no less important than the one linked to self-sufficiency and more appropriate to a modern commercial society. Having now shown the relevance of utility as a distributive principle to the operation of unintended consequences and the division of labour, it is necessary to examine the relevance of Smith's conception of liberty to this process.

Liberty

Liberty is a complex notion in Smith's theory and in the distinction between its various senses, and particularly those senses connected with justice, its relationship with utility will become more evident. At one point in an evocation of Montesquieu's doctrine of the separation of powers, he wrote:

But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent from that power.

(Smith V.i.b.25, 1981: ii.722–3)

Following Montesquieu, Smith linked individual liberty with security, and the security was that which the impartial administration of justice provided (see Rosen 1992: 25–58). He claimed a good deal for this security, as when he wrote:

That security which the laws in Great Britain give to every man that he shall enjoy the fruits of his own labour, is alone sufficient to make any country flourish, notwithstanding these and twenty other absurd regulations of commerce; ... The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often incumber its operations; though the effect of these obstructions is always more or less either to encroach upon its freedom, or to diminish its security. In Great Britain industry is perfectly secure; and though it is far from being perfectly free, it is as free or freer than in any other part of Europe.

(Smith IV.v.b.43, 1981: i.540)

By security both Montesquieu and Smith meant liberty under law, that is to say, legal rights to protection from arbitrary interference by other individuals and from government. This enabled a person to enjoy the fruits of his or her own labour in security, though it did not determine just how bounteous these fruits might be.

As for Hobbes, Locke, Montesquieu, and Hume, security was not for Smith primarily an economic concept, but jurisprudential in aiming at civil peace, whatever the economic circumstances. In the longer Aristotelian tradition of conceptions of justice it might be connected with commutative or corrective justice, or, in Grotius, to *justitia expletrix*, abstaining from taking what belongs to another and, therefore, doing one's duty in not harming others. For Grotius, one possessed 'perfect' rights (grounded in law) to security.

Although liberty as security was not primarily an economic concept, Smith went farther than most earlier writers to link it with economic growth. In a country with 'tolerable security' people would either invest or consume their capital rather than hide it away to deal with violence and other disasters (Smith II.i.30, 1981: i.284–5). Where no security existed, people were more content with bare subsistence, and to accumulate and invest might only 'tempt the injustice of their oppressors' (Smith III.iii.12, 1981: i.405). Smith often referred to 'that equal and impartial administration of justice which renders the rights of the meanest British subject respectable to the greatest, and which, by securing to every man the fruits of his own industry, gives the greatest and most effectual encouragement to every sort of industry' (Smith IV.vii.c.54, 1981: ii.610).

A second conception of liberty was connected with distributive justice. This idea began with the division of labour and labour as the source of value, though

it depended ultimately on liberty as security. As Mandeville (1988: ii.284) pointed out, once security was established, it seemed that the division and subdivision of labour in society would inevitably follow (see Smith I.i, 1981: i.13n–14n). From the division of labour a general opulence spread throughout society, leading Smith to state in a famous passage that an ‘industrious and frugal peasant’ lived more like a European prince, and his living standards greatly exceeded those of an African king (Smith I.i.11, 1981: i.24). Smith pointed to several reasons why the poor should prosper. One was that productive labour was the key to prosperity, and that the useful labour of the poor provided the basis of the opulence of the nation. That the division of labour would lead to the increasing opulence of the poor was recognized by Smith as a subject for debate, though he had no doubts concerning the outcome:

Is this improvement in the circumstances of the lower ranks of the people to be regarded as an advantage or as an inconveniency to the society? The answer seems at first sight abundantly plain. Servants, labourers, and workmen of different kinds, make up the far greater part of every great political society. But what improves the circumstances of the greater part can never be regarded as an inconveniency to the whole. No society can surely be flourishing and happy, of which the far greater number are poor and miserable. It is but equity, besides, that they who feed, cloath and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, cloathed and lodged.

(Smith I.viii.36, 1981: i.96)

Besides the vague reference to ‘equity’ no argument is presented here to explain why the poor should or would necessarily share in the increasing opulence of society. The beggar might have had enough to eat and fewer problems than a king, but he was still a beggar, and the industrious and frugal peasant did not automatically seek to become rich. Smith was aware of the tendency among masters to prefer their workmen humble and dependent, and that they believed that when provisions were expensive and the workers consequently poor, they seemed to work harder (see Smith I.viii.45–8, 1981: i.100–1). Smith rejected this view and argued that in years of dearth workers were more commonly sick and less productive, and where they were overworked, there was the risk of injury and death. ‘It will be found, I believe, in every sort of trade, that the man who works so moderately, as to be able to work constantly, not only preserves his health the longest, but, in the course of the year, executes the greatest quantity of work’ (Smith I.viii.44, 1981: i.100). Numerous other references throughout *WN* testify to Smith’s tendency to favour the productive workman as the source of value and prosperity and not someone who should be exploited or abused.

Nevertheless, Smith’s attitude towards the workman in relation to the master

was not the key to his arguments in favour of the increasing opulence of the poor in society. Behind these arguments rested another conception, that of 'perfect liberty', which tended to drive the whole system forward. Although he frequently used the term, Smith never provided a definition of what perfect liberty meant (see Smith I.vii.6, 1981: i.73; I.vii.30, 1981: i.79; I.x.a.1, 1981: i.116; I.x.c.1, 1981: i.135; IV.vii.c.44, 1981: ii.606; IV.ix.17, 1981: ii.669; IV.ix.27, 1981: ii.673; IV.ix.38, 1981: ii.678; IV.ix.51, 1981: ii.687–8). At times he might vary the phrase and write of 'natural liberty' (Smith IV.ix.51, 1981: ii.687) or 'perfect freedom' (Smith IV.ix.20, 1981: ii.670). He linked 'perfect liberty' with related phrases such as 'perfect justice' and 'perfect equality', as when he wrote concerning proprietors, cultivators and the class of merchants, artificers, and manufacturers that 'the establishment of perfect justice, of perfect liberty, and of perfect equality, is the very simple secret which most effectually secures the highest degree of prosperity to all the three classes' (Smith IV.ix.17, 1981: ii.669). Despite no attempt at formal definition, the meaning of perfect liberty was fairly clear. It referred to an ideal situation where a person was not impeded by laws, regulations, customs, and practices, and was able to work, produce, compete, and trade. The meaning of 'perfect liberty' varied from one context to another. In the case of prices, perfect liberty would lead to the market price of goods being the same as the natural price (see Smith I.vii.30, 1981: i.79). Where corporations had exclusive privileges, statutes of employment restricted apprenticeships, and various monopolies restricted trade, the market price might be far above the natural price. The natural price, however, was not easy to determine with any precision, as it might vary with the natural rates of its component parts – wages, profits, and rents – with the state of society with regard to riches and poverty and whether or not the society was advancing, declining, or stationary (Smith I.vii.33, 1981: i.80). Perfect liberty was also seen by Smith to be restrained by restricting competition in some employment and obstructing the free circulation of labour and capital (Smith I.x.c.1, 1981: i.135). Perfect liberty was, of course, opposed by the 'mercantile system', and Smith favoured a gradual relaxation of the laws giving Britain an exclusive right to trade with its colonies in favour of free trade (Smith IV.vii.c.44, 1981: ii.606; see O'Brien 1975: 35). He also emphasized the way the system of natural or perfect liberty would operate spontaneously wherever security and justice existed and wherever a person was 'left perfectly free to pursue his own interest in his own way, and to bring both his industry and capital into competition with those of any other men, or order of men' (Smith IV.ix.51, 1981: ii.687). In this respect the role of government was restricted in a famous passage to protecting society from invasion and each member from the violence of others, and erecting and maintaining a number of public works and institutions which were necessary but could only be established at public expense (Smith IV.ix.51, 1981: ii.687–8).

Following this emphasis on individual liberty Robbins depicts the emphasis on liberty throughout classical economics as follows:

They were both individualists as regards ends and (with due reservation) individualists as regards means. For them, an organization of production, based, in the main, on private property and the market, was an essential complement to a system of freedom of choice as regards consumption and provision for the future. They believed that, within an appropriate framework of law, such an organization could be made to work harmoniously. They believed that it would work better than alternative practicable systems. They, therefore, believed it to be justified on utilitarian and individualist criteria.

(Robbins 1978: 187)

Although Robbins correctly emphasizes the importance of liberty (and utility) to classical economics, he does not bring out clearly which aspects of liberty emerge from the theory of classical economics and which are derived from policy recommendations which may or may not be derived from that theory. Raphael, however, distinguishes between the model of the economy and various policy recommendations such as 'free trade and *laissez-faire* generally', which are linked to the model via the theme of economic growth (Raphael 1985: 46). The analysis of liberty presented here and linked to utility is derived from the model of the economy and not from policy recommendations which are only contingently related to it.

The system of perfect liberty, though a theoretical abstraction, led Smith to write of a related perfect equality, in so far as everyone would be free to use labour and stock equally to the fullest (see Smith I.x.a.1, 1981: i.116). Furthermore, Smith could also connect perfect liberty and equality to a 'natural distribution', against which the existing production and distribution of society might be measured (see Smith IV.ix.27, 1981: ii.673). What sort of equality did Smith believe would follow perfect liberty? As perfect liberty was a theoretical idea, so perfect equality would be a similar concept, and in its perfect sense an exact equality between people in similar circumstances where their liberty was not impaired. In a practical sense Smith could refer to 'the higgling and bargaining of the market, according to that sort of rough equality which, though not exact, is sufficient for carrying on the business of common life' (Smith I.v.4, 1981: i.49). But perfect equality was not of the rough sort, though in any actual example of policy it might have to be fairly 'rough'.

Labour, liberty, and the progressive state

One important distinction which Smith developed in *WN* was that between productive and unproductive labour:

There is one sort of labour which adds to the value of the subject upon which it is bestowed: There is another which has no such effect. The

former, as it produces a value, may be called productive; the latter, unproductive labour.

(Smith II.iii.1, 1981: i.330)

Productive labour was involved in the creation and sale of commodities (including agriculture), where the return on capital covered the cost of employing the labour plus a profit. Unproductive labour produced no such return and unproductive labourers in society ranged from menial servants to the sovereign, the officers of the government, the whole of the army and navy, churchmen, lawyers, physicians, men of letters, players, buffoons, musicians, opera-singers, and dancers (see Smith II.iii.2, 1981: i.330–1). Some labour, Smith conceded, was useful, though unproductive, but the source of wealth remained with the employment of capital in productive labour. Furthermore, the proportion between the employment of productive as opposed to unproductive labour determined in every society ‘the general character of the inhabitants as to industry or idleness’ (Smith II.iii.12, 1981: i.335). Smith illustrated his point in the following example:

In mercantile and manufacturing towns, where the inferior ranks of people are chiefly maintained by the employment of capital, they are in general industrious, sober, and thriving; as in many English, and in most Dutch towns. In those towns which are principally supported by the constant or occasional residence of a court, and in which the inferior ranks of people are chiefly maintained by the spending of revenue, they are in general idle, dissolute, and poor; as at Rome, Versailles, Compègne, and Fontainebleau.

(Smith II.iii.12, 1981: i.335)

The presence of capital and the employment of productive labour thus had an important effect on character, but the income from capital did not depend on industry but rather on frugality and parsimony. Without saving and storing up capital the fund could not increase, and Smith drew a sharp contrast between the frugal and the prodigal: ‘If the prodigality of some was not compensated by the frugality of others, the conduct of every prodigal, by feeding the idle with the bread of the industrious, tends not only to beggar himself, but to impoverish his country’ (Smith II.iii.20, 1981: i.339). A little later, Smith put it even more strongly: ‘every prodigal appears to be a public enemy, and every frugal man a public benefactor’ (Smith II.iii.25, 1981: i.340). Frugality (as well as prodigality) was a deeply held natural principle: ‘the desire of bettering our condition, a desire which though generally calm and dispassionate, comes with us from the womb, and never leaves us till we go to the grave’ (Smith II.iii.28, 1981: i.341).

Although Smith’s distinction between productive and unproductive labour was meant to correct the earlier Physiocratic position linking productive labour to agriculture, economists following Smith were uneasy with his formulation (see

O'Brien 1975: 232–4). McCulloch, for example, could not accept that those who established and enforced security of property (court officials, magistrates, military forces, etc.) on which the creation of wealth depended were engaged in unproductive labour (Smith 1828: ii.96n). Similarly, he argued that without so-called unproductive servants assisting the manufacturer, merchant, and banker, the latter would have to perform all chores and would soon be reduced to poverty (Smith 1828: ii.96n–7n). McCulloch also believed that Smith's distinction was inconsistent with the idea of the division of labour, whereby various kinds of labour must combine to produce value (Smith 1828: ii.97n). Say took the view that any labour which produced utility was productive (O'Brien 1975: 233). Nevertheless, most classical economists followed Smith in an emphasis on productive labour in some form and, perhaps more importantly, linked the creation of wealth to economic growth rather than to the mercantilist view that it consisted in a trade surplus (O'Brien 1975: 34). The contrast with mercantilism may be extended by noting that Smith's concern with growth was directed at GNP per head rather than simply with the total amount of wealth in the state (O'Brien 1975: 206).

In emphasizing frugality and the productive use of capital, Smith argued that the improvement of the condition of the poorer classes depended not on how rich the society was, but on how quickly national wealth was increasing (Smith I.viii.22, 1981: i.87). In the American colonies wages were higher than in England, even though the colonies were poorer. England was wealthier but not growing, and hence wages were low. China, however, was Smith's main example of the stationary state. Even though it was 'one of the most fertile, best cultivated, most industrious, and most populous nations in the world', China had long remained stationary. Wages were low, children were exposed to death, and 'the poverty of the lower ranks of people in China far surpasses that of the most beggarly nations in Europe' (Smith I.viii.24, 1981: i.89).

Smith took the state of wages of ordinary workers to reflect the condition of society. If they were high, national wealth was increasing, if low and the poor were starving, wealth was declining, and if the labouring poor were scantily fed and clothed, the state was stationary. Smith wrote of these various conditions, the progressive, stationary, and declining states, as earlier writers had described various constitutional regimes such as monarchy, aristocracy, oligarchy, and democracy, as in the following passage:

It deserves to be remarked, perhaps, that it is the progressive state, while society is advancing to the further acquisition, rather than when it has acquired its full complement of riches, that the condition of the labouring poor, of the great body of the people seems to be the happiest and the most comfortable. It is hard in the stationary, and miserable in the declining state. The progressive state is in reality the

cheerful and hearty state to all different orders of society. The stationary is dull; the declining, melancholy.

(Smith I.viii.43, 1981: i.99)

Even though Smith accepted that economic growth might eventually stagnate, the key factor in identifying a good regime was that it was increasing in wealth through frugality and investment in productive enterprises. When combined with security and increasing liberty, the progressive state might be said to approach the ideal state of earlier writers.

The progressive state, therefore, was, for Smith, the best state, just as monarchy or aristocracy was for Aristotle or the mixed constitution for later writers. One might be tempted to link an older typology to Smith's distinctions with the declining state (China) linked to despotism, the stationary state (England), a mixed monarchy, and the progressive state (American colonies) to a form of republic. But Smith emphasized, as we have seen, that virtue (in this case industriousness and frugality) depended on the people rather than the rulers, except in two respects. First, the rulers must provide a regime of increasing liberty in numerous areas so that the industrious and frugal could compete and succeed. Second, the rulers must secure to the individual the fruits of his or her efforts, so that the regime which aimed at perfect liberty would have a secure base. Perfect liberty generated perfect equality and the two would provide the basis of a version of *distributive* justice. If it was not distributive justice in its traditional meaning, it was a kind of distribution that would rank as just and be more appropriate to a commercial society. But it was liberty which was important and which generated this version of justice. The speculations concerning political regimes does not seem to have survived the impact of Malthus in political economy, and J.S. Mill's reflections on the 'stationary state' contain few echoes of Smith's emphasis on the progressive state and its virtues (see Mill IV.vi, 1965: ii.752-7; Schwartz 1972: 210ff).

We have already seen that in the Epicurean tradition justice was based on utility. In *WN* Smith developed two conceptions of liberty which were closely linked to justice in the sense of civil liberty (with rights to person and property secured by law) and a liberty (perfect liberty) to compete and trade on a level playing field (perfect equality) so long as one did not harm others. The second kind of liberty, like the first, was the offspring of justice, or, to put it more clearly, operated within a framework created by law and justice. The idea of liberty as security of persons and property was already a familiar one in what I have called the Epicurean tradition, but the conception of perfect liberty represented an important development within that tradition, which enabled the doctrine of distributive justice to become fully a doctrine of liberty. In this development Smith also provided a foundation for the creation of the wealth of nations and a picture of a society which might be widely admired and provide happiness for its members.

BENTHAM AND SMITH ON LIBERTY

It is well-known that Jeremy Bentham was both an early disciple of Adam Smith and also an early and effective critic of Smith's defence of existing laws concerning usury. Furthermore, Bentham's *Defence of Usury (DU)* has tended to be consigned to a footnote to classical economics, devoted to the correction of a point of policy regarding the usury laws.¹ To a certain extent Bentham was a victim of his own success. So comprehensively did he argue that a free market in money was an essential condition of a prosperous commercial society (contrary to the view of Smith) that he changed the character of the debate over the usury laws from one concerned largely with the interpretation of scripture (see, for example, Hay 1774) to one focused on the value of such laws in a modern commercial society. Even his opponents in the early nineteenth century conceded his crucial importance in the debate. One critic wrote:

Mr. Bentham has been the pioneer and instructor of all those, who since his publication appeared, have been the most forward in the cause, either on paper or in parliament. The late Sir Francis Baring declared his work 'perfectly unanswerable.' Professor Stewart confirmed this high praise; and, coming from such quarters, it has been, as might be expected, echoed back by a thousand voices.

(Anon 1825: 4–5)

Another commented:

And as the 'Defence of Usury' has been the magazine whence our modern writers and Legislators have drawn their arguments; so I may be allowed for the present to pass over them, as over shadows, and proceed to the doctrines of their Author [i.e. Bentham].

(Hannay 1823: 28)

Later in the century John Stuart Mill also reflected contemporary opinion when he declared in his *Principles of Political Economy* that Bentham's work 'may still be

referred to as the best extant writing on the subject' of the usury laws (Mill 1965: ii.923; see also O'Brien 1970: 311–12).

Bentham's success in writing the crucial work against usury laws has tended to lead to the compartmentalization of the work, and few recent scholars have raised the question of Bentham's other objects in writing this early and highly successful work. In this chapter I shall argue that Bentham was mainly concerned with establishing two important principles concerning individual liberty. The first, more familiar nowadays, perhaps, in J.S. Mill's *On Liberty*, also appeared in *DU*:

To prevent our doing mischief to one another, it is but too necessary to put bridles into all our mouths: it is necessary to the tranquillity and very being of society: but that the tacking of leading-strings upon the backs of grown persons, in order to prevent their doing themselves a mischief, is not necessary either to the being or tranquillity of society, however conducive to its well-being, I think, cannot be disputed. Such paternal, or, if you please, maternal care, may be a good work, but it certainly is but a work of supererogation.

(Bentham 1952–4: i.133–4)

In other words, while one might be constrained from harming others, mature persons should be free to act as they please, even where they do themselves harm and even where such acts might not advance the happiness of society.

The second principle advanced by Bentham concerned legislative paternalism, and he argued that the legislator could not have the knowledge and insight possessed by the individual regarding his own interests:

It is not often that one man is a better judge for another, than that other is for himself, even in cases where the adviser will take the trouble to make himself master of as many of the materials for judging, as are within the reach of the person to be advised. But the legislator is not, can not be, in the possession of any one of these materials. – What private can be equal to such public folly?

(Bentham 1952–4: i.140; see also i.178)

These two principles concerned with liberty stood at the heart of Bentham's argument. As we shall see, some contemporaries were well aware of their existence and their potentially revolutionary significance. Furthermore, beneath Bentham's principles of liberty was another foundation, which linked liberty to both justice and utility. Before exploring these principles, however, and the foundations on which they stand, it is worth surveying some contributions to this debate about usury to see if others appreciated its importance as a testing ground for these political ideas.

The opposition to Bentham

Among those who entered into the debate against Bentham over the usury laws in the early nineteenth century, there was a strong feeling that what was at stake was not something so slight as an issue of economic policy but one of the important pillars of the British constitution itself. As Francis Neale wrote against Bentham:

It is not the correction of any abuse, or the extended application of any of those maxims on which our laws rest, that is demanded; but an utter and scornful rejection of a principle, which has formed an important part of the British constitution, from the days of its foundation until now.

(Neale 1826: 92)

What principle was Bentham subjecting to ‘utter and scornful rejection’? The evils the usury laws were supposed to prevent were numerous and Neale mentioned many of them. There was a relationship of deceit and secrecy, because the borrower could pretend to have more wealth than he actually did, and if the enterprise failed, bitterness and mutual distrust flourished (Neale 1826: 12–14). There was a loss of patriotism, as money-lending enabled foreigners to acquire great wealth in the country (Neale 1826: 25). Money-lending, according to Neale, allowed people to escape from moral duties to look after the poor, and the destruction of local ties followed (Neale 1826: 30–1, 34ff). The development of a money-lending class led to the inordinate growth of towns which served as an encouragement to vice (Neale 1826: 36–7). Money-lending encouraged gambling with money, and ordinary frugality as a source of wealth was despised as being too ‘slow and mean and spiritless’ (Neale 1826: 47). Money-lending stimulated great envy in society, an envy that was not stimulated by mere differences in rank: ‘Regal or baronial splendour’, wrote Neale, ‘are only painful to the eye when aped by the successful swindler or the desperate gamester’ (Neale 1826: 49).

These arguments (in so far as they were arguments and not the simple expression of prejudice) were deficient in several respects. First, they played into Bentham’s more precise arguments concerning the legal imposition of a maximum rate of interest, then at 5 per cent, by opposing any sort of money-lending, and, indeed, in certain respects, by opposing commercial activity itself beyond that dominated by agriculture. Another critic, also opposing the abolition of the usury laws, fulminated against ‘the rapacious and impetuous course which the stream of avarice will uninterruptedly pursue, followed in its train by all the evils of disappointment, ruin, beggary, despair, and madness, producing crimes of the blackest and most horrible dye, and striking at the root of every moral and religious obligation’ (Anon 1824: 34). Such remarks were too extensive and failed to set out why loans at 7, 10, or 20 per cent, so long as mutually

agreed by the participants, were so much more threatening to ‘every moral and religious obligation’ than loans at 5 per cent.

Second, the arguments presented did not always reveal why it was believed that the abolition of the usury laws specifically would undermine the British constitution and the very fabric of society. One answer was provided in the following comment:

It will therefore turn out ... that the estates of the nobility and gentry will, in a short time, become the property of the great capitalists, from which circumstance the most disastrous consequences would arise to the country at large, for, in a great commercial state like England, (its government and constitution being framed as ours most happily is,) it is a truly-important object to keep the landed and funded interests as separate as the nature of circumstances will permit; the one being, as it were, the counterbalancing medium of the other, – and thus preserving that just equilibrium which renders the wealth and resources of this country so far superior to those of any other nation in the world.

(Anon 1824: 11)

This critic wrote as if alongside the mixed constitution of king, lords and commons, and the supposed separation of legislative, executive, and judicial power, there was an economic and political equilibrium between landed and commercial interests supported by the usury laws. Without these laws the capitalists would soon possess the landed estates and the equilibrium would be destroyed. The mixed constitution itself would then be in peril, in so far as the landed interest was integral at least to monarchy and aristocracy and to a sizeable number of seats in the House of Commons.

By the time the above lines in favour of the preservation of an equilibrium in the British constitution were written in 1824, Bentham himself had become an implacable opponent of the mixed constitution of monarchy, aristocracy, the separation of powers, and such conceptions of government that referred to a balance between landed and non-landed interests, and was strongly in favour of radical reform, near universal suffrage for men and women, and representative democracy. For Bentham, therefore, these sentiments expressed a false and misleading view of the British constitution. However, when he wrote *DU* in 1787, he may well have been still attached to some of these doctrines, as there is no clear evidence of his writing in favour of major constitutional reform prior to 1789, though the attack on Blackstone in 1776 might be taken as an early statement of a nascent radicalism.

The principle that Bentham was rejecting in 1787 was not that of the British constitution itself, but one which might be regarded as a pillar which supported it. James Grahame referred to it in the following passage:

Mr. Bentham is disposed to question the right of a lawgiver, to exert himself for the protection of the imprudent borrower. He observes, that, although the preventing men from injuring one another be a legitimate object of the legislator, it may well be doubted whether he is as much called on to interpose between a man and himself (supposing the person meant to be protected has attained the years of discretion), and to defend him against his own folly and imprudence.

(Grahame 1817: 24)

The principle that Bentham opposed was that of paternalism. According to those who supported the usury laws, their abolition would place many vulnerable people at serious risk. Young men who might expect to inherit large estates in due course would be tempted to gratify themselves in advance and fall prey to avaricious money lenders who would at first appear reasonable and generous and then eventually take control of the estates (Anon 1824: 16–17). Tradesmen needing credit might place at risk their entire fortunes and reputations. Gentlemen of ‘sensitive honour’ who had run into financial difficulties and faced possible imprisonment would also face the money-lenders with intense ‘agitation’, ‘dread’, ‘despair of heart’, ‘utter helplessness’, and ‘unnatural abjectness of spirit’ (Anon 1825: 10–11). These and many other people, it was argued, needed the protection from money-lenders that the usury laws (however imperfect) provided. To abolish the laws, argued Bentham’s critics, would be to conduct ‘a dangerous and uncertain experiment’ with numerous lives (Anon 1825: 42).

Defence of Usury and Bentham’s other writings

Unlike *A Fragment on Government* (1776) and *IPML* (1789), *DU* (1787), though arguably among Bentham’s most popular and influential works (passing through numerous editions in many countries and widely cited), failed to maintain its prominence as a work of Bentham once the issue of the status of the usury laws ceased to be an important one (see Bentham 1952–4: i.21–36). Yet, it surely ranks with the *Fragment* and *IPML* as a major contribution to Bentham’s jurisprudential philosophy and needs to be read in conjunction with those works as well as part of the corpus of his ‘Economic Writings’.

There are obvious connections with both the *Fragment* and *IPML*. *DU* resembles the *Fragment* in being a short work subjecting to minute examination a brief passage from a major author and text. The connection between Bentham’s earlier analysis of Blackstone in the *Fragment* was emphasized in *DU* where Bentham used the analogy of horse-dealing, employed by Blackstone, to establish the opposite view, that just as horse-dealing should not be governed by law, so money-dealing should also be free (Bentham 1952–4: i.153–6). In Bentham’s very conception of liberty (Bentham 1952–4: i.133–4), he continued the allusion to Blackstone and objected to putting ‘bridles into all our mouths’ and ‘tacking

of leading-strings upon the backs of grown persons'. In criticizing Smith, therefore, Bentham adopted something of the form and substance of the earlier *Fragment*. Nevertheless, *DU* seems to lack the attempts at formal definition and analysis that one finds in the *Fragment*. For example, there is no formal statement of the principle of utility which one finds in both the *Fragment* and *IPML*. Furthermore, the use of the epistolary format in *DU* suggests an informal style more suited to a pamphlet than to a philosophical work. This format may have been due to Bentham's writing the work in Russia or may have been an attempt to experiment with a novel format for a novel topic and argument. Whatever the reason and however much Bentham omitted a formal structure of analysis, there is no denying the depth and profundity of his discussion. His rhetoric was designed to tackle not only the logic of the argument, but also 'the hold which the opinion I am combating has obtained on the imaginations and passions of mankind' (Bentham 1952–4: i.130). Bentham needed to show that certain deeply-held beliefs were wholly without foundation, yet were even adopted by one of the most important thinkers of the age, of whose views in general Bentham was apparently a disciple. Furthermore, for Bentham's argument to succeed he needed to persuade his readers not only that Smith (and, indeed, Blackstone, Paley, Aristotle, and others) had provided the wrong approach to the usury laws, but also that they must begin to see the relationship between lender and borrower in a completely different light. As Bentham put it in a striking passage:

Now, I question, whether among all the instances in which a borrower and a lender of money have been brought together upon the stage, from the days of Thespis to the present, there ever was one, in which the former was not recommended to favour in some shape or other, either to admiration, or to love, or to pity, or to all three; and the other, the man of thrift, consigned to infamy.

(Bentham 1952–4: i161)

Bentham's object was to show that the money-lender was the man of frugality, thrift, and prudence, virtues celebrated by Smith and others as some of those which drove commercial society forward. The borrower might be either an entrepreneur or a prodigal, but was regarded as someone who was able to stand on his or her own two feet and make the best bargain available. The borrower needed no more admiration, love, or pity than any other person buying and selling goods or land. To challenge deeply held views concerning evil money-lenders on the one hand and borrowers who needed special protection from the law on the other, Bentham's task was a formidable one, and perhaps the form the work took reflected in some way his perception of this rhetorical task.

The connection between *DU* and *IPML* is equally important, if only because *IPML* provided the jurisprudential structure for some of Bentham's most important arguments. It is worth recalling that *IPML* had been printed in 1780 but not

published until 1789, and it is arguable, though at this point pure speculation, that the successful appearance of *DU* in 1787 might have encouraged Bentham (as much as any supposed rivalry with Paley) to publish *IPML*. In the preface to *IPML*, written just prior to publication, Bentham referred to *DU* and the connection with the analysis of offences in chapter XVI of *IPML*.² In this reference Bentham directly questioned the status of usury as a genuine offence:

Usury, which if it must be an offence, is an offence committed with consent, that is, with the consent of the party supposed to be injured, cannot merit a place in the catalogue of offences, unless the consent were either unfairly obtained or unfreely: in the first case, it coincides with defraudment; in the other, with extortion.

(Bentham 1996: 231n)

In the important chapter in *IPML* entitled ‘Cases Unmeet for Punishment’ (chapter XIII), Bentham would have placed the supposed offences governed by the usury laws under the heading of ‘groundless’ punishments. Here he especially distinguished those acts based on free consent as occasions for groundlessness. He wrote:

This consent, provided it be free, and fairly obtained, is the best proof that can be produced, that, to the person who gives it, no mischief, at least no immediate mischief, upon the whole, is done. For no man can be so good a judge as the man himself, what it is gives him pleasure or displeasure.

(Bentham 1996: 159)

Bentham’s indebtedness to *IPML* extended beyond the proposed exclusion of usury from the classification of offences. In *DU* he called attention to the fact that whenever usury laws were enforced, the punishment was wholly out of proportion to the offence: ‘Then comes absolute perdition: loss of character, and forfeiture, not of three times the extra-interest, which formed the profit of the offence, but of three times the principal, which gave occasion to it’ (Bentham 1952–4: i.146). Building on hints in Montesquieu and Beccaria that punishment should be in proportion to crime, Bentham had developed in *IPML* an impressive series of rules that attempted, among other achievements, to relate punishments to the severity of crimes. Too little punishment would allow the criminal to ‘profit’ from the offence; too great a punishment might lead to a failure to enforce the law (see Bentham 1996: lxiv–lxix, 165–74; Draper 1997: 218–60). Montesquieu (XII.4, 1989: 189) had earlier connected such a proportion to liberty, as punishment would be linked to ‘the particular nature of the crime’ and not to ‘the legislator’s capriciousness’. Bentham clearly regarded the existing punishment for usury (however seldom inflicted) as too severe a punishment, which might then lead to evasion, dishonesty, blackmail, and fraud. The

existing punishment could in fact lead to more crime than it was attempting to prevent.

It was no accident that the term ‘liberty’ appeared three times in the opening paragraph of *DU*, because Bentham’s technique was to use liberty to undermine long-held conventions and laws. His appreciation of the importance of liberty, especially in this context where Smith had failed to grasp its obvious efficacy, supplied an ingredient which had hitherto been missing from Bentham’s writings. Liberty played no great role in the *Fragment* and *IPML*, and although security (liberty secured by law) was a key theme in Bentham’s civil law writings (see Kelly 1990: 71–103), there were few references to liberty as an important value or as a way of transforming other values. At the end of *IPML*, however, Bentham brought together the realms of ethics and legislation where the problem of the usury laws might be placed. As we have seen, he had already argued that laws, like those concerning usury, when based on freely-given consent between adults, should not give rise to punishment and, indeed, should not be laws. Here, he argued that if legislation was groundless, then private ethics would also be groundless, because there was no evil in the actions (Bentham 1996: 286). In so far as ethics was relevant (prudence, probity, and beneficence are the relevant virtues), the virtue of prudence (governing a person’s duty to his or her self and happiness) would be most relevant to bargains between borrowers and lenders. In the realm of prudence, however, Bentham argued that the role of law is least applicable:

It may be observed, that with regard to this branch of duty, legislators have, in general, been disposed to carry their interference full as far as is expedient. The great difficulty here is, to persuade them to confine themselves within bounds. A thousand little passions and prejudices have led them to narrow the liberty of the subject in this line, in cases in which the punishment is either attended with no profit at all, or with none that will make up for the expense.

(Bentham 1996: 290–1)

Bentham’s emphasis on liberty and on restricting the role of the state in private life was implicit in the *Fragment* and *IPML*, largely because he was concerned there with the exercise of the power of the state through law and punishment. *DU* made explicit what was implicit in these related writings and enabled him to emphasize the importance of individual liberty and the dangers of legislative paternalism.

Bentham’s critique of Smith

The discussion thus far has raised two further questions. First, why did Bentham feel it necessary to make the brief discussion of interest rates in Smith’s *WN* the focus of his assault on the usury laws, when he might have criticized any number

of writers who supported them. Second, why did he choose the highly provocative title, *Defence of Usury*? We shall consider these questions in this and the next section.

The passage in *WN* on which Bentham lavished so much attention might have been passed over by most readers as part of the general discussion of the level of interest rates in relation to the quantity of gold and silver available, which built on the earlier work of Hume's essay 'Of Interest' (Hume 1985: 295–307). The text is as follows:

The legal rate, it is to be observed, though it ought to be somewhat above, ought not to be much above the lowest market rate. If the legal rate of interest in Great Britain, for example, was fixed so high as eight or ten per cent., the greater part of the money which was to be lent, would be lent to prodigals and projectors, who alone would be willing to give this high interest. Sober people, who will give for the use of money no more than a part of what they are likely to make by the use of it, would not venture into competition. A great part of the capital of the country would thus be kept out of the hands which were most likely to make a profitable and advantageous use of it, and thrown into those which were most likely to waste and destroy it. Where the legal rate of interest, on the contrary, is fixed but a very little above the lowest market rate, sober people are universally preferred as borrowers, to prodigals and projectors. The person who lends money gets nearly as much interest from the former as he dares to take from the latter, and his money is much safer in the hands of the one set of people, than in those of the other. A great part of the capital of the country is thus thrown into the hands in which it is most likely to be employed with advantage.

(Smith II.iv.15, 1981: i.357)

It is worth noting that the term 'usury' does not appear in the passage in question, and where Smith used the term later in the treatise, it was applied to an earlier period when it would have been considered highly 'disgraceful' and prohibited by law for a gentleman to lend money at any rate of interest (Smith VIII.1, 1981: ii.908). Nor does the passage contain an explicit discussion of liberty, though Bentham was sufficiently clever to see in Smith's acceptance of the law setting a legal rate of interest a possible conflict with Smith's own conception of liberty. Furthermore, in referring to 'prodigals and projectors' and to 'sober people' in the passage, Bentham was able to juxtapose a different moral psychology, which might be regarded as an important critique of Smith's whole economic system. That Bentham seemed anxious to gain Smith's approval of the argument regarding the usury laws has tended to obscure the fact that had Smith given such approval, he would not only have corrected a minor error but eventually might have had to revise important aspects of his whole system.

Smith's argument was concerned with the relationship between the market and legal rates of interest. If the legal rate was too far above the market rate, unwelcome consequences would follow, and Smith reckoned that a legal rate of 8 to 10 per cent would be too high (at the time the legal rate was 5 per cent). Bentham was interested in this example, as it brought together the idea of a free market in relation to law. While one might accept that a legal system was necessary if a market was to operate (e.g. to enforce contracts and resolve disputes), Smith was making here two odd claims regarding law in relation to markets. On the one hand, he was asserting that the law was inefficacious against free markets, if an attempt was made to lower interest rates *below* the market rate. In effect, Smith was saying that one could not 'buck the market', and if it was attempted, there would be widespread evasion, and money would still be lent at the higher market rate of interest. On the other hand, he was claiming great efficacy for a legal rate set just above the market rate. Bentham, however, showed that in numerous ways the legal rate of 5 per cent was constantly being evaded and that this was usually accomplished by legal means (Bentham 1952-4: i.147ff). He also referred to the use of discounts to raise the rate of interest, as well as established legal practices such as pawnbroking, bottomry, and respondentia. He claimed that the interest rate in pawnbroking was at least 12 per cent, and for bottomry and respondentia, the use of commissions and insurance also led to high rates of interest (see Bentham 1952-4: i.150-3). Yet Smith believed that a legal rate fixed just above the market rate would apparently not be evaded and, additionally, would bring forth the virtuous, sober people to borrow rather than the prodigals and projectors. In other words the law would direct virtue as well as protect the public against those who would prey on the weak and vulnerable.

Bentham argued first that Smith failed to show that the legal rate could not be less than the market rate. The only example which he provided was of the attempt in France in 1766 to reduce the legal rate from 5 to 4 per cent, when money continued to be lent at 5 per cent (see Smith II.iv.16, 1981: i.357-8). For Bentham, this example showed only that there was widespread evasion. Smith did not consider if the law was poorly drafted or enforced, nor did he establish that no law could be efficacious in relation to lowering the market rate. But Bentham believed that if setting the legal rate below the market rate would be widely evaded, so would setting it just above the market rate, and he supplied plenty of evidence to show that this was the case in England. In Russia (where he was writing the work) he found money lent at many different rates, commonly at up to 10 per cent, despite a legal rate of 5 per cent (Bentham 1952-4: i.150). Bentham, of course, favoured leaving interest rates between consenting adults entirely to the market, and thought that Smith had contradicted himself on this crucial issue concerned with law and free markets.

The reason that Smith fell into this confusion went to the heart of his moral psychology. In the first place he failed to understand the psychological relationship between lender and borrower. He seemed to accept the prevailing prejudice

that lenders were usually predatory characters from whom the public needed protection. Bentham clearly linked the value of frugality (much admired by Smith) with the lender. Without frugality, the lender (including the usurer) would have nothing to lend. For Bentham, one reason for the general hostility towards money-lenders was the envy stimulated by their frugality (Bentham 1952–4: i.160). The lender was like the child at a birthday party who still possessed his or her piece of cake after the other children had eaten their own portions (Bentham 1952–4: i.159). For a brief period, however, the lender was seen as kind and benevolent, as money was handed over to the borrower, but as the borrower spent the money and the day of reckoning approached, the lender was soon regarded as an evil tyrant. Furthermore, those surrounding the prodigal borrower, those who gained from his liberality – tradesmen, business associates, friends, and acquaintances – loved him and admired his generosity. As Bentham wrote:

The lustre, which the display of borrowed wealth has diffused over his character, awes men, during the season of his prosperity, into a submission to his insolence: and when the hand of adversity has overtaken him at last, the recollection of the height, from which he has fallen, throws the veil of compassion over his injustice.

(Bentham 1952–4: i.160)

The thrifty person, on the contrary, received none of the affection which was bestowed on the prodigal. No one seemed to share in his or her wealth, because the pleasures attending it were postponed to a future period which might or might not arrive. Bentham compared the thrifty to the insolvent who could pay his bills (i.e. bills based on the greed and envy of those who surrounded him), but who had no excuse (other than thrift) for not doing so. If thrift and frugality characterized the lender and the prudent borrower, it was partly due to an orientation towards the future and towards future economic development, which made it possible for both to receive a return from the transaction. Bentham regarded the projector (i.e. the person with projects requiring investment and development) as not only a frugal person, but also the key to economic growth. The projector was usually a borrower, and, as such, was constrained by the usury laws from borrowing money at above the legal rate. Of crucial importance to Bentham's argument was the fact that Smith linked projectors with prodigals, as in the passage Bentham attacked, where both were depicted as being willing to borrow at rates so high that 'sober people' would be deterred from borrowing. For Bentham, the projector was usually one of the 'sober people', or else would have been unlikely to persuade a lender as to the viability of the project. But the projector would suffer under the burden of the usury laws, which fell equally on projectors and prodigals, and the impact on the projectors had important consequences for economic development:

It falls ... upon all such persons, as, in the pursuit of wealth, or even of any other object, endeavour, by the assistance of wealth, to strike into any channel of invention. It falls upon all such persons, as, in the cultivation of any of those arts which have been by way of eminence termed *useful*, to direct their endeavours to any of those departments in which their utility shines most conspicuous and indubitable; upon all such persons as, in the line of any of their pursuits, aim at any thing that can be called *improvement*; whether it consist in the production of any new article adapted to man's use, or in the meliorating the quality, or diminishing the expence, of any of those which are already known to us. It falls, in short, upon every application of the human powers, in which ingenuity stands in need of wealth for its assistant.

(Bentham 1952–4: i.170)

This lengthy passage reveals the full importance Bentham gave to projectors, and the reasons behind his objection to the way Smith linked projectors with prodigals. Contrary to Smith, Bentham placed his emphasis on creativity and application. '[F]or think, Sir', he wrote to Smith, 'let me beg of you, whether whatever is now the *routine* of trade was not, at its commencement, *project*? Whether whatever is now *establishment*, was not, at one time, innovation?' (Bentham 1952–4: i.172). Although Smith believed in human progress, he clearly thought that this was achieved by not risking and destroying capital, and the usury laws were instrumental in keeping projectors sober by not allowing them to take risks based on loans at high rates of interest. Bentham turned Smith's argument around and took progress out of the realm of unintended consequences and placed it directly with human agency.

It is worth noting that Bentham linked projectors and future progress with utility. If Smith was giving an account of how wealth had been created, and using that account to recommend the preservation or abolition of certain practices (such as the usury laws), Bentham combined with this approach a distinctive orientation towards the future. Bentham's essay was about liberty, that is to say, liberty in relation to hope, risk, and expectation in the future. He described the act of money-lending so that 'putting money out at interest, is exchanging present money for future' (Bentham 1952–4: i.132). When he referred to the example of the children who still had their birthday cake after the others had eaten theirs, he noted that 'those who have the resolution to sacrifice the present to future, are natural objects of envy to those who have sacrificed the future to the present' (Bentham 1952–4: i.159). At the end of his work Bentham even hinted at the role of government in assisting projectors ('the race of those with which the womb of futurity is still pregnant' (Bentham 1952–4: i.180) to gather and acquire information on past projects. For Bentham, therefore, not only did the projector hold the key to human progress, but his defence of projectors and a free market in money contained a special emphasis on an orientation towards the future. Furthermore, in the passage where Bentham invoked the idea of

utility, he linked such utility to the projectors' aim at improvement in the future in producing new articles, reducing expense, meliorating existing practices, etc.

In the Epicurean tradition, utility was generally related to justice, and, in effect, justice meant not harming others. This principle was secured by the social contract or conventions and its utility was recognized in retrospect by the security and civil peace which such a principle provided. In *DU* Bentham replaced an emphasis on justice with a similar emphasis on liberty, and the utility of liberty was recognized in the way it allowed people, in this case, projectors, to plan for the future and for future happiness. The orientation of utility changed when it was related first to justice and then to liberty, and that change was recognized by Bentham and played an important role in his argument.

Smith also recognized the importance of the future, which can be seen in a famous passage in *TMS* where he linked prudence, frugality, and the impartial spectator:

In the steadiness of his industry and frugality, in his steadily sacrificing the ease and enjoyment of the present moment for the probable expectation of the still greater ease and enjoyment of a more distant but more lasting period of time, the prudent man is always both supported and rewarded by the entire approbation of the impartial spectator, and of the representative of the impartial spectator, the man within the breast.

(Smith VI.i.11, 1982c: 215)

For Smith, the impartial spectator regarded the present and the future in the same manner, and could applaud those who sacrificed present comfort and ease to achieve a greater ease in the future. As one can see in the passage just quoted, prudence was closely linked with frugality, self-command, parsimony, and sacrifice – all of which were supposed to lead gradually to greater enjoyment and happiness in the future.

Smith described the prudent person at length and distinguished between the superior wisdom and judiciousness that represented (with other virtues) the prudence of the great statesmen and legislators (as presented by Plato and Aristotle) from an inferior prudence which he found depicted in the Epicurean tradition (Smith VI.i.15, 1982c: 216). If the superior prudence combined all the moral and intellectual virtues, the inferior prudence seemed to act differently. The person of prudence in this more limited sense lived within his or her income and was content with his or her situation. Through frugality, small accumulations were made, and 'ease and enjoyment' gradually increased. 'He has no anxiety to change so comfortable a situation', Smith continued, 'and does not go in quest of new enterprises and adventures which might endanger ... the secure tranquillity.' He is not wholly adverse to new enterprises, but 'if he enters into any new projects and enterprises, they are likely to be well concerted and well prepared' (Smith VI.i.12, 1982c: 215). 'In the bottom of his heart', Smith

concluded his picture of the man of prudence in this inferior form, 'he would prefer the undisturbed enjoyment of secure tranquillity, not only to all the vain splendour of successful ambition, but to the real and solid glory of performing the greatest and most magnanimous actions' (Smith VI.i.13, 1982c: 216; see also Vivenza 2001: 54–7).

For Bentham prudence consisted of discharging one's duties to oneself and was distinguished from probity and beneficence, the two virtues concerned with duties to others. Of these probity was concerned with not harming others and beneficence was concerned more positively with doing them good (see Bentham 1996: 284). In making these distinctions, Bentham was clearly attempting to construct a fairly simple and neutral account of the virtues. Unlike Smith, for example, his account of prudence did not include references to frugality or sacrifice, but simply to the idea that prudence was concerned with duties to oneself. He was also aware of other senses in which prudence was used (such as a synonym for intellectual virtue or practical wisdom (Bentham 1983b: 127n)) and could be treated as an extra-regarding as well as a self-regarding quality (Bentham 1983b: 187–8).

Bentham's key point regarding prudence was its connection with the principle of utility and thus with pleasure and pain. The future orientation of prudence might well require the sacrifice of immediate satisfaction in the hope of greater future pleasure or the relief of pain. If no attempt was made to promote the future happiness of the agent, the result was 'asceticism' – 'the offspring of delusion: the very opposite of prudence' (Bentham 1983b: 188). Utility (and Bentham refers here to Horace and the Epicurean tradition) meant 'the property of producing pleasure or preventing pain' (Bentham 1983b: 188). Bentham was also aware that a good deal of human happiness depended on one's expectations of happiness in the future, and that a good part of the civil law was concerned with securing future expectations. One reason for securing property to the proprietor rather than making a different distribution according to some other principle (such as merit or equality) was that pleasures acquired via the redistribution could never match (except in a few circumstances) the pain of disappointment in losing the property one possessed (see Bentham 1983b: 188–90).

Bentham had two arguments against Smith's attempt to link prudence, frugality and the future. The first was that he came close to adopting asceticism, so that the life of prudent self-denial – for oneself and especially for others – seemed good in itself. Even though Smith insisted that the sacrifices of the present moment were intended to lead to greater ease and enjoyment, the prudent man did not admire or approve of the person who was 'a bustling in business', who managed other people's affairs, and who listened 'to the voice even of noble and great ambition' (Smith VI.i.13, 1982c: 215–16). His virtue of prudence in the Epicurean tradition (the inferior form) was not considered 'the most endearing' or 'the most ennobling' of the virtues (Smith VI.i.14, 1982c: 216). If Smith thought that future happiness rather than asceticism should be the

object of this prudence, he seemed to exclude the happiness and particularly the future happiness of the projector who seemed to be portrayed as the one who most threatened to disturb the quiet enjoyment of the future by the frugal and prudent individual.

The second argument is based on the first in that, unlike Smith, Bentham did not link frugality to the acquisition of wealth. The frugal and parsimonious person, saving and building up his or her capital, was not the key to economic growth and the wealth of nations. For Bentham, the term 'frugality', like 'economy', was concerned with the preservation of wealth rather than with its acquisition (Bentham 1983b: 104). The prudent person in Smith's conception was in fact the child who still possessed his or her piece of birthday cake after the others had eaten theirs, and although this piece of cake might represent wealth preserved, it was not wealth acquired. Bentham challenged Smith to revise his conception of the acquisition of wealth. He realized that such a revision would have to be extensive and at the outset would include the abolition of the usury laws and a modest celebration of the role of the projector.

Did Bentham's critics in the early nineteenth century grasp this distinction between Smith and himself? I have found no evidence thus far that they did, but their arguments against Bentham clearly put them on Smith's side. On the whole, projectors who borrowed large sums of money for their enterprises were regarded as gamblers. As one writer asked concerning the proposed abolition of the usury laws:

Would it not also be the means of promoting a dangerous species of gambling and speculation amongst the very sanguine part of the community, who having formed some air-brained schemes, would borrow money at any price, rather than not have it at all, for the purpose of prosecuting their plans? In some few cases success might follow, but, generally speaking, these chimerical adventures terminate in the ruin of all parties concerned.

(Anon 1824: 32)

Maugham argued that only very few projectors were 'the ingenious inventors and discoverers in art and science', while most were ambitious 'adventurers' with 'little to lose, and every thing to gain' (Maugham 1824: 35–6). While the lender usually recovered his money from such disastrous ventures, many other creditors drawn into the various schemes were unable to do so. Maugham also doubted if many projects were ever prevented by the usury laws and asserted that there was plenty of capital available for such projects (Maugham 1824: 37–8). Maugham was clearly on the side of the saving and frugal man and felt that his life would be undermined by the abolition of the usury laws (Maugham 1824: 42–3). Neale also emphasized the importance of frugality (Neale 1826: 47). Another author also thought that abolition would lead to the introduction of 'a spirit of gambling in trade' and would undermine manufacturing and shopkeeping

because it would destroy frugality (Anon 1825: 100). These criticisms of Bentham's views of the usury laws may have supported those of Smith, but there is no indication that the writers were aware of other significant differences between the two writers or that Bentham was mounting a deeper criticism of Smith's economic theory than was indicated on the surface. In a sense Bentham was highly successful, as his rhetoric was focused on the incoherence of the usury laws themselves with the further object of showing how Smith might be consistent with himself, if he adopted Bentham's argument. Bentham attempted to avoid a direct confrontation with Smith, because, when it came to liberty, Smith and Bentham were mainly on the same side. That we can see Bentham's deeper object in challenging a good deal of Smithian economics as well as the usury laws in the name of liberty is a reflection of the success of his rhetorical project.

Bentham's title

The second question, which was posed earlier in the chapter, was why Bentham adopted such a provocative title for his work. In one sense his object was clear. He was not only proposing the abolition of the usury laws but was also, more positively, providing a *defence* of the very practice which supposedly formed the rationale for those laws. The usury laws were not to be revised or improved, but abolished, because the practice of lending money at market rates of interest was crucial to economic development and the wealth of nations. Bentham provided such a defence on Epicurean lines, and it was based on a different account of human psychology than that presented by Smith and others who defended the laws. However much Smith attempted to base his system on the pursuit of pleasure and avoidance of pain, he seemed equally attracted to Stoic conceptions of the value of human self-denial and the moral purpose of law. That he could not see the projector (or in modern terms, the entrepreneur) as hero was mainly due to his belief that projectors were like prodigals and were mainly gambling away the hard-earned savings of others which would be lost when the various projects collapsed.

Bentham gave a different account of prodigals – one that explained why we tended to be in awe of them, and showed how their spendthrift ways were much admired and appreciated by those who surrounded them. Nevertheless, Bentham did not link projectors with prodigals, and showed how, in fact, the usurer and the projector should be regarded as thrifty people who were investing in the future rather than spending in the present. It was the element of futurity in the attitude of lenders and projectors that made sense of what they were undertaking to achieve. They were risk-takers but not idle gamblers and gamblers undermining the fabric of society. Their virtue of prudence was connected with estimating the costs (pains) of the risks they were taking with regard to the future, and not fixated on conceptions of frugality and sacrifice. Prudence, for Bentham, was mainly (though not wholly) based on duties to

oneself. Furthermore, the cultivation of prudence, he believed, should not be limited and directed by law. Such paternalism was not efficacious and would, in fact, lead people not to cultivate the virtue. Bentham believed ‘no man of ripe years and of sound mind, acting freely and with his eyes open’ (Bentham 1952–4: i.129) should be prevented from making whatever bargain he wished to obtain money.

In this argument Bentham combined liberty with the idea of utility (based on the pursuit of pleasure, the avoidance of pain, and a general opposition to asceticism). He followed the move made by Smith to take economic affairs out of the traditional realm of justice (where it was placed by Aristotle and the Schoolmen) and into the realm of liberty. Bentham might have entitled his book, *Defence of Liberty*. Such a title would have more to commend it today, and it might more clearly have been seen as a work developing and criticizing the decisive move made earlier by Smith. Perhaps Bentham did not want to call attention to the imperfections of that move, and by concentrating on the usury laws, he was able to make his point without rejecting Smith. Bentham was aware of both the value of liberty and threats to its existence, even from its friends.

WILLIAM PALEY AS A UTILITARIAN

Though little-read today, William Paley was an important theologian and writer in the late eighteenth century whose *Principles of Moral and Political Philosophy* (1785) became a widely read textbook at Cambridge University and was frequently reprinted throughout the nineteenth century. Schneewind (1977: 122) writes that ‘utilitarianism first became widely known in England through the work of William Paley’. This view is correct if what is meant is simply that Paley’s writings were often reprinted (Rivers 2000: 336 notes that there were fifteen editions of the *Principles* in his lifetime), and that he was widely read, particularly at Cambridge. Schneewind (1977: 122–3) compares the popularity of the *Principles* with two other avowedly utilitarian works written at approximately the same time: Bentham’s *IPML* (printed in 1780, published in 1789) and William Godwin’s *Enquiry concerning Political Justice* (1793). The first, he notes, remained obscure for decades, and while Godwin’s book received ‘immediate acclaim’ and ‘was at the centre of heated popular controversy’ for a number of years, it soon became an obscure and peripheral work.

The difficulty with this estimation of Paley is that it projects on to his work the idea of ‘utilitarianism’, which in fact became established in the sense of a popular doctrine only later in the nineteenth century with the publication of Mill’s *Utilitarianism* (1861). What is striking about most of the writers in Britain in the late-eighteenth century who invoked the idea of utility is that they were consciously working within a longer Epicurean tradition and, particularly, were under the spell of Hume. Thus, the importance of utility in moral and political thought had already been well-established prior to Paley, and Paley’s actual influence on the course of utilitarian thought may well be less significant than is generally thought. In theological controversy, however, his position is important in so far as he was the main representative of the religious or theological utilitarians, and much of the attack on utilitarianism in the late eighteenth and nineteenth centuries by other religious writers was aimed at Paley.

According to Crimmins (1998: 7), the most prominent of the religious or theological utilitarians were John Gay (1699–1745), John Brown (1715–66), Soame Jenyns (1704–87), Edmund Law (1703–87), Abraham Tucker (1705–74), and Paley (1743–1805). All except Tucker (who was an Oxford-educated lawyer)

were educated at Cambridge and were ordained clergy.¹ Crimmins (1998: 9) stresses the importance of Locke's *Essay concerning Human Understanding* as the source for their emphasis on pleasure and pain, and general happiness as the standard of virtue. He notes also that they tended to be consequentialists and defined right and wrong in terms of benefits accruing to society. Rivers also stresses the importance of Locke in her account of the Cambridge theologians:

Here the dominant tradition from mid-eighteenth to the early nineteenth century was Lockean. In theology this meant reliance on Scripture and avoidance of what were considered matters of indifference, together with the deliberate doctrinal caution Locke had displayed in *The Reasonableness of Christianity*; it did not necessarily imply heterodoxy of an Arian or Unitarian kind. In ethics (where Locke's influence was perhaps more significant) it meant the rejection of the Shaftesburian moral sense tradition and the insistence on the will of God as the foundation of morals with a concomitant emphasis on happiness as the end and utility as the measure of virtue.

(Rivers 2000: 332–3; see also Green 1799: 19)

While Paley's theology may have remained Lockean, his moral and political philosophy was more prominently Humean. Like Bentham and Godwin, for example, Paley followed Hume in rejecting the doctrine of the social contract (see Schofield 1996: 106–7). Like Hume, he also gave utility a more foundational role in his ethics than it had been given by Locke. Rivers (2000: 338–9) observes:

The method of coming at the will of God by the light of nature is to enquire into the tendency of actions to promote or diminish that happiness, i.e. their Utility. This was the keystone of Paley's argument. Ironically, as his critics were to point out, this aspect of his theory linked him with Hume.

One contemporary critic (Pearson 1800: 56 and n) commented that at least Paley made utility only the rule of virtue, while for Hume it was the '*ground* of virtue'. For Pearson, however, both were erroneous concerning the basis of virtue (1800: 152; see also Gisborne 1798: 13–15).

Paley has often been compared with Bentham, as when Leslie Stephen wrote that 'Bentham is Paley *minus* a belief in hell-fire' (Stephen 1962: ii.106). In other words both were utilitarians, but Bentham's moral philosophy, concerned with this world rather than the next, did not include a doctrine of rewards and punishments after death. Bentham treated Paley differently, though not without some confusion and ambiguity. It is commonly believed, on the basis of a letter (24 September 1786) from his friend, George Wilson (Bentham 1971: 490–1), that Bentham might have agreed to publish *IPML*, because he was persuaded that Paley's book might eclipse his own, as an

avowed work based on the principle of utility. From Bentham's response in December 1786, however, Paley's work seems to have led him to delay the publication of *IPML* (see Bentham 1971: 513–14). Bentham also seemed to think that his own use of the principle in the *Fragment on Government* (1776) preceded that of Paley and that Paley might have taken it from him, just as he had taken it from Hume (Bentham 2000: 149). Bentham's point was that Paley used the utility principle to show what ought to be (following Bentham) rather than 'to account for that which *is*', which he ascribed to Hume. Bentham might have alluded to Beccaria or Helvétius as sources from whom Paley could also have taken a more active, normative principle, but Paley seems to have neglected not only Bentham but also Helvétius, and only referred to Beccaria in the context of his own theory of punishment.

Bentham was well aware of the use of the principle of utility by theologians and at one point referred to Brown, Paley, Priestley, and Law as theologians who employed the idea of utility (Bentham 1983b: 52 and n). Nevertheless, he was on the whole dismissive of its use by theologians. He thought that it could not be used consistently and tended to become absorbed into or qualified by 'the will of God'. He suggested that for the theologian, the utility principle, based on pleasure and pain, was 'too hot for his mind'. Although Jesus, he argued, was not an ascetic, many followers were, and they hated 'the flesh and the world as well as the devil'. He also regarded the use of the utility principle by theologians as a rhetorical ploy, which could be used especially against those advocating 'moral sense' (Bentham 1983b: 53). On the whole Bentham was grudging and dismissive. He was also mistaken in believing that Paley adopted the utility principle but did not link it to happiness and pleasure, presumably because he felt that no theologian could do so consistently (see Bentham 1983b: 328).

Paley, however, was a hedonist, and as early as 1765 in his Member's Prize essay, written at Cambridge, he took the side of Epicurean philosophy over that of the Stoics, though in the end he preferred Christianity to both (Barker 1948: 199, 230; Clarke 1974: 10). When William Whewell prepared an edition of Butler's sermons in the 1840s, having first distinguished between Paley as the moralist of utility and Butler as the moralist of conscience (Butler 1848: xi), he wrote: 'That Paley is the successor of the Epicurean, as Butler is the adherent of the Stoic school ... is a view which probably he would not himself have repudiated' (Butler 1848: xxxvi). The association of Paley, as well as Hume and Bentham, with a sympathy for Epicureanism might provide an important link between the three writers, and, as we shall see, enable us to look elsewhere for an account of the differences between Hume and Bentham on the one hand and Paley on the other. It will be argued in this chapter that this difference lay more with an inattention to individual liberty in Paley's thought (as opposed to that of Hume and Bentham) and especially to the varying ways that individuals perceived pleasure and pain. Unlike many writers in the modern Epicurean tradition from Hume to Mill, Paley did not fully accept the links between utility, justice and liberty. In place of an emphasis on individual liberty, and the

perspective of pleasure and pain from the point of view of the individual, Paley turned to God's will.

Utility

Like Bentham and other writers in the Epicurean/utilitarian tradition, Paley insisted on the importance of happiness and linked happiness to an excess of pleasure over pain (Paley I.VI, 1819: i.16–17). Pleasures were to be estimated only on the basis of duration and intensity (Paley I.VI, 1819: i.18). Nevertheless, he then proceeded to deny that many commonly accepted pleasures, such as those derived from the senses, were pleasures at all, that happiness did not consist in exemption from pain, and that happiness did not consist in greatness, rank, and elevated station (Paley I.VI, 1819: 18–31). He posited instead a number of sources of happiness including: (a) the exercise of the social and domestic affections; (b) the exercise of bodily and/or mental functions ‘in the pursuit of some engaging end’, such as writing a book, building a house, raising a tulip or cucumber; (c) ‘the prudent constitution of the habits’; and (d) living a simple, healthy life, which he linked to ‘tranquillity, firmness, and alacrity of mind’. On the basis of this somewhat idiosyncratic view of pleasure, he concluded that happiness was equally distributed amongst the different orders of society and that vice had no advantage over virtue with regard to happiness (Paley I.VI, 1819: i.24ff). Although Paley based the happiness of society on the aggregation of the happiness of individuals (there was no happiness in society apart from that possessed by individuals), he did not, as we shall consider later, discuss happiness in terms of each individual's perception of pleasure. But he was led to argue that the amount of happiness in a given society or district depended upon the number of inhabitants living there (Paley VI.XI, 1819: ii.60). As he put it, ‘a larger portion of happiness is enjoyed amongst *ten* persons, possessing the means of healthy subsistence, than can be produced by *five* persons, under every advantage of power, affluence, and luxury’ (Paley VI.XI, 1819: ii.61). A more numerous population, he believed in this pre-Malthusian period, was a sign of a happy people.

Actions, for Paley, were to be assessed or estimated in terms of their *tendency* (a term also used by Bentham in *IPML* (see Bentham 1996: 12)) to promote general happiness, and the agent was to be regarded as virtuous or vicious according to his *design* or intention (Paley II.VI, 1819: i.54n). As an example, Paley considered the relief of common beggars by arguing that one must determine if this was right or wrong in terms of an estimation of the tendency of such actions to increase public happiness. The virtue of the person relieving the suffering of beggars must be assessed in terms of his or her design – does the liberality spring from charity or ostentation? For the most part, however, Paley was concerned with assessing rules rather than acts: ‘It is the utility of any moral rule alone, which constitutes the obligation of it’ (Paley II.VI, 1819: i.54). He granted that particular acts, such as killing a tyrant, robbing a miser to give the money to the

poor, and obtaining a seat in parliament through bribery and using it to serve the public interest, might appear to advance utility, but from the point of view of existing moral rules they would not do so and would constitute murder, robbery, and bribery respectively (Paley II.VI, 1819: i.54–5). ‘[G]eneral rules’, he wrote, ‘are necessary to moral government’ (Paley II.VII, 1819: i.57). ‘An attention to general rules, therefore, is included in the very idea of reward and punishment’, and this would include the expectation of future rewards and punishments after death (Paley II.VII, 1819: i.57–8).

Paley’s emphasis on rules pervaded the whole of his text, and linked the will of God to the rightness and wrongness of individual actions. He believed that the principle of utility was able to embrace this vast sphere of the human and divine. At the level of the human, he wrote:

‘Whatever is expedient is right.’ But then it must be expedient on the whole, at the long run, in all its effects collateral and remote, as well as in those which are immediate and direct; as it is obvious, that, in computing consequences, it makes no difference in what way or at what distance they ensue.

(Paley II.VIII, 1819: i.60)

He criticized ‘ancient moralists’ for introducing ‘*honestum*’ alongside ‘*utile*’ for dealing with cases where a violation of a general rule had good consequences (Paley II.VIII, 1819: i.62). For Paley, one should stick with the general maxim not to violate general rules for the sake of particular consequences. In all of this he was confident that God too was a rule utilitarian: ‘whatever reason there is to expect future reward and punishment at the hand of God, there is the same reason to believe, that he will proceed in the distribution of it by general rules’ (Paley II.VII, 1819: i.58).

Paley also asserted that utility was the basis of obligations, and obligations were the source of rights (Paley II.IX, 1819: i.63). In a complex analysis of duties and rights he distinguished between natural and adventitious, alienable and inalienable, and perfect and imperfect rights, as well as what he called the ‘general rights of mankind’ (Paley II.X, XI, 1819: i.65–71, 71ff). The latter seemed to be three in number: (a) rights to the fruits or vegetables of the earth; (b) rights to the flesh of animals; and (c) rights to food, clothes, and shelter when in extreme necessity. These rights were not set out to challenge existing practices, that is to say, to give the individual strong claims against the society or state. Furthermore, they were justified in different ways. The right to the fruits and vegetables of the earth could be justified, he claimed, by the ‘light of nature’, but not the right to the flesh of animals, as theoretically we might all become vegetarians. The latter he based firstly on scripture (Genesis ix.1,2,3) but then qualified this right by insisting that cruelty to animals was wrong. The third general right – to food, clothes, and shelter in extreme necessity – did not lead to any doctrine which threatened existing systems of property, and was qualified by

the insistence that restitution, where possible, was due once the emergency was over.

Ernest Barker has referred to Paley, together with Bentham and Blackstone, as 'codifiers'. Bentham attempted to codify all law, Blackstone, the common law, and Paley was located somewhere between the two, as a codifier of thought (Barker 1948: 193). As one reads Paley's text, one sees most ideas employed by moralists and theologians in the seventeenth and eighteenth centuries, especially those we associate with the Enlightenment, finding a place in his system, albeit not necessarily the place the authors originally gave them. Paley was also gifted in putting these complex ideas together in a way that was plausible and persuasive by his reconciliation of doctrine to existing practice, even though one might not agree with the doctrine or with existing practice.

Consider, for example, the doctrine of property built on the apparently Lockean foundation of a general right residing in mankind to the fruits and vegetables of the earth. Paley used this right to consider a number of cases where people did not have a right to exclude others from what they took to be their property. If the products of the earth were meant by God to sustain human life, then such practices as that of William the Conqueror in turning twenty manors into hunting lodges, or others, in leaving land barren or allowing human provisions to perish, were wrong (Paley II.XI, 1819: i.74ff). From this Lockean starting point, however, Paley saw duties reflected in God's design to treat the earth and its products in ways that were conducive to human happiness. If, for example, a medicinal spring was discovered on a person's land, Paley would support compensation to the owner of the field and a profit to the discoverer of the spring, but he doubted if any human laws could justify the owner of the land in prohibiting the use of the water or selling it at so high a price as to constitute a prohibition. This principle was then extended, for example, to challenge attempts by one or two countries to exclude mankind from 'inexhaustible' fishing stocks (cod off Newfoundland and herring around Britain).

When he turned to consider property on its own, he continued in a vein that suggested that a severe critique of existing property was forthcoming:

Among men, you see ninety-and-nine toiling and scraping together a heap of superfluities for one (and this one too, oftentimes the feeblest and worst of the whole set, a child, a woman, a madman, or a fool;) getting nothing for themselves all the while, but a little of the coarsest of the provisions, which their own industry produces; looking quietly on, while they see the fruits of all their labour spent or spoiled; and if one of the number take or touch a particle of the hoard, the others joining against him, and hanging him for the theft.

(Paley III.I.I, 1819: i.80)

Like Hume, Paley granted that the institution of property was 'paradoxical and unnatural', but he nevertheless found much in it to recommend. It allowed

for an increase in the produce of the earth. It preserved this produce to maturity by preventing others from taking or spoiling it. It prevented war and waste where there was not enough for all. Finally, it improved the quality of life in society by encouraging the division of labour and numerous arts which depended on it and which distinguished 'civilized' from 'savage' life. Furthermore, although Paley accepted that inequality of property as it existed in Europe was an evil, it was an unavoidable one produced by the institution of property. If some great inequality was not linked to property, he considered in a somewhat vague manner that 'it ought to be corrected' (Paley III.II, 1819: i.83).

When Paley finally considered the basis of a right to property, he first rejected a number of the common foundations such as the right of the first occupier, the labour theory, for which he credited Locke, and provision by God for human needs. His only conclusion was that it was 'the law of the land', and such law was consistent with 'the will of God' (Paley III.IV, 1819: i.88–9). He granted that such a conclusion would give a person 'a right to keep and take every thing which the law will allow' and that such an arrangement 'in many cases will authorize the most flagitious chicanery' (Paley III.IV, 1819: i.90). The only exception was the measure of flexibility within the law which allowed for equity and natural justice, but on the whole he favoured a rigorous enforcement of the law, even where penalties were severe (see Schofield 1987: 4–22; Crimmins 1987: 23–34).

Paley's treatment of property reflected Barker's judgement of him as a codifier of thought. Nearly every argument concerning property was entertained and most were accommodated in one form or another with only a few of them rejected. In the end one finds the principle of utility, but not on its own. The law of the land may be justified by its utility, but ultimately its justification is in God's intention, design, and will. Furthermore, despite a consideration of opposing doctrines, which theoretically might undermine 'the law of the land', Paley usually concluded with a justification of existing institutions and practices. In this sense Paley was closer to Blackstone than to Bentham, particularly when one recalls Bentham's epithet: 'every-thing-is-as-it-should be' Blackstone (see Schofield 1996: 101).

Liberty

What remains puzzling is why Paley was a follower of Hume. Bentham partly grasped the answer when he pointed out that Hume accounted for what is, while he (Bentham) for what ought to be (Bentham 2000: 149). But Bentham was mistaken in thinking that Paley followed him in using utility to account for what ought to be, when, in fact, he seemed to follow Hume in using it to account for the status quo.

The only work of Hume's to which Paley directly referred in the *Principles* was the second *Enquiry*. Paley also quoted Hume's remark that the *Enquiry* was 'incomparably the best he ever wrote' (Paley II.IV, 1819: i.49). He cited a section

which might be said to embody most strongly the doctrine of classical utilitarianism (Hume 1998: 9.14–25; Paley II.IV, 1819: i.49). A passage from this section concerning virtue will show Hume's position:

The dismal dress falls off, with which many divines, and some philosophers, have covered her [virtue]; and nothing appears but gentleness, humanity, beneficence, affability; nay, even at proper intervals, play, frolic, and gaiety. She talks not of useless austerities and rigours, suffering and self-denial. She declares, that her sole purpose is, to make her votaries and all mankind, during every instant of their existence, if possible, cheerful and happy; nor does she ever willingly part with any pleasure but in hopes of ample compensation in some other period of their lives. The sole trouble, which she demands, is that of just calculation, and a steady preference of the greater happiness.

(Hume 1998: 9.15)

Paley referred to this section as a whole as part of a challenge and part of a criticism. The criticism was that Hume believed that he could separate ethics from Christian theology, as in the above passage concerning virtue. The challenge was to read the section of the *Enquiry*:

When they have read it over, let them consider, whether any motives there proposed are likely to be found sufficient to withhold men from the gratification of lust, revenge, envy, ambition, avarice; or to prevent the existence of these passions. Unless they rise up from this celebrated essay, with stronger impressions upon their minds than it ever left on mine, they will acknowledge the necessity of additional sanctions.

(Paley II.IV, 1819: i.49)

Paley thus believed that however attractive or even true Hume's account of virtue might be (and he did not wholly commit himself on this topic), it was incomplete. The 'additional sanctions', he thought, were well established and mentioned in scripture. There were future rewards and punishments after death, and it was no accident that Paley chose to criticize Hume in his chapter entitled 'The Will of God' (see Paley II.IV, 1819: i.48). As far as Paley was concerned, the will of God in this respect was manifest both in the Bible and in what he called 'the light of nature'. We could come to understand the will of God by enquiring if a given action possessed a 'tendency ... to promote or diminish the general happiness', as God wished the happiness of his creatures, and actions which promoted happiness were agreeable to God (Paley II.IV, 1819: i.50).

The differences between Hume and Paley cannot be accounted for by ascribing to them differing estimations of the human condition. Paley did not take a darker view of mankind and for this reason insisted on the need for future rewards and punishments to keep human beings on the path of virtue. God,

Hume, and Paley seem to have agreed in wanting to advance human happiness. Where Hume and Paley differed was that, for Hume, the pursuit of virtue was self-regulating with the punishment of vice with regard to serious misdemeanours in life left to justice. This self-regulation was important and it is not entirely clear that Paley excluded it in his account of virtue and the obligation to follow it. After all, the individual's estimation of future rewards and punishments is something each person estimates for him- or herself and might be regarded as simply one further ingredient in the elements of human happiness which would leave the individual to embrace virtue: pleasure in this world and more pleasure in the next. Nevertheless, Hume differed from Paley in several important respects. Besides finding little empirical evidence for 'the light of nature', he believed that the passions themselves could deliver virtue. The passions and self-interest provided sufficient conditions to recommend virtue in so far as it 'is attended with more peace of mind than vice, and meets with a more favourable reception from the world' (Hume 2000: 11.20). Paley, however, questioned whether Hume's account could deal with 'lust, revenge, envy, ambition, avarice; or to prevent the existence of these passions' (Paley II.IV, 1819: i.49), and obviously thought that future punishments were needed to do so. But Hume would regard preventing the existence of passions, and particularly sexual passion and the social passions which fuelled revenge, envy, ambition, and avarice to be a hopeless task, and he was well aware of how the passions themselves could create virtue and hence happiness. In an economic system envy and ambition might not prove to be vices, and revenge might prove to be the passion at the foundation of a system of justice. Lust, as Paley called it, might give pleasure and satisfaction as well as form the basis of many social institutions, such as the family. The fact that Paley even wrote of preventing passions might place him among Hume's 'austere pretenders', 'enemies to joy and pleasure' who were either rejected as 'hypocrites and deceivers' or allowed in the train of virtue, ranked 'among the least favoured of her votaries' (Hume 1998: 9.15). Like many of Hume's critics, Paley seemed uneasy with the lack of effort required by Hume's account of virtue (see Rivers 2000: 308).

In suggesting that the key difference between Hume (and Smith, Helvétius, Bentham, and Mill) on the one hand and Paley on the other rested with their respective attitudes towards the passions, one is stating only part of the story. The reason these other writers were more accepting of the passions was that their theories were underpinned by a conception of individual liberty. Despite his acceptance of the principle of utility, the starting point for Paley was the will of God, and the will of God revealed the dictates of utility. Individuals were enjoined by duty and obligation to conform to the common interest in which the happiness of the community and that of the individuals comprising it were to be found.

Paley did not reject the various notions of liberty prevalent in eighteenth-century moral and political philosophy. He recognized the existence of 'natural

liberty' ('to do what we will') and 'civil liberty', which he saw as liberty created by restraints on others, and wrote:

it is possible that the liberty of the individual may be augmented by the very laws which restrain it; because he may gain more from the limitation of other men's freedom than he suffers by diminution of his own ... civil liberty is the safe exclusive, unmolested enjoyment of a cultivated enclosure.

(Paley VI.V, 1819: i.392)

Like Bentham, Paley even linked the idea of security to civil liberty, as when he noted:

There is another idea of civil liberty ... This idea places liberty in security; making it to consist not merely in an actual exemption from the constraint of useless and noxious laws and acts of dominion, but in being free from the *danger* of having such hereafter imposed or exercised.

(Paley VI.V, 1819: i.395)

For Paley, civil liberty plus security amounted almost to what Bentham called security of expectation (the expectation of liberty under law in the future) and to a conception of political liberty (freedom from the imposition of tyrannical government). In his discussion of government itself, he embraced the separation of powers and especially the separation of legislative and judicial power. He regarded this aspect of the separation of powers as 'the first maxim of a free state' and already well established in Britain (Paley VI.VIII, 1819: i.443–4; see Vile 1998: 116–17).

Paley also embraced religious liberty and presented a strong case for religious toleration, particularly of Dissenters and Roman Catholics. He defined religious liberty analogously to civil liberty as 'not an immunity from restraint, but the being restrained by no law, but what in a greater degree conduces to the public welfare' (Paley VI.X, 1819: ii.45). In other words, religion was to be within the law, and freedom of religion was to be protected by law and even enhanced by considerations of public welfare. He made a strong case for the toleration of Roman Catholics:

If popery, for instance, and protestantism were permitted to dwell quietly together, ... [the Roman Catholics] would become more enlightened and informed; they would little by little incorporate into their creed many of the tenets of protestantism, as well as imbibe a portion of its spirit and moderation.

(Paley VI.X, 1819: ii.53)

Not only would toleration lead to moderation and civil peace, but it would also be conducive to the pursuit of truth in religion. But the theme of liberty was of no less importance. 'The confining of the subject to the religion of the state', he wrote, 'is a needless violation of natural liberty' (Paley VI.X, 1819: ii.53).

It should be clear that Paley recognized the importance of liberty in numerous contexts, including, in addition, resistance to government, the abolition of slavery, and reform of the usury laws (Paley VI.III, 1819: i.375–6; III.II.III, 1819: i.172–5; III.IX, 1819: i.116–26). Nevertheless, no modern commentator, so far as I know, has praised Paley for his devotion to liberty or enlisted him in a pantheon of great liberal thinkers. Barker thinks his general idea of liberty 'somewhat limited' (Barker 1948: 242), and Le Mahieu calls attention to the 'conservative thrust' of his thought in showing 'how existing institutions and practices already suited the basic injunctions of morals and politics' (Le Mahieu 1976: 116). Barker seems to think that Paley concentrated mainly on civil liberty and a 'private liberty, liberty for a man to manage his own life so far as may be consistent with the general happiness of the community' (Barker 1948: 242). But Barker is only partly correct in so far as Paley's idea of liberty seems to be deficient precisely in this private sphere where a person might conceivably be allowed to manage his or her own affairs. Consider, for example, the case of suicide, a self-regarding act an individual might freely choose when faced with a life of much greater pain than pleasure. Paley clearly denied that such a liberty existed (see Paley IV.III, 1819: i.284–92). In part, he did not seem to recognize a sphere of self-regarding action which concerned no one but oneself, and in part he believed in 'duties' to oneself which were derivable from the will of God. Suicide was treated as a clear violation of such a duty, as to conform to the will of God meant to live (including to suffer and endure suffering) until one's natural term of life was completed. In addition, no matter how useless one might feel in this life, there would remain considerations of rewards and punishments in a future life and the possibility of meliorating future prospects while still alive.

This account of suicide does not do justice to Paley's numerous arguments. But suicide, for Paley, was hardly self-regarding in its effects on families and communities, and he could not accept a concept of self-regarding actions which included it. But he was also aware of no express prohibition of suicide (and hence no clear statement of the will of God in the Bible), and he had to construct his argument from the Bible with care and sensitivity.

In the realm of self-regarding actions, including those between consenting adults, Paley thus recognized no obvious sphere of liberty. He placed his emphasis on duties and noted at one point that 'every duty is a duty towards God, since it is his will which makes it a duty' (Paley VI, 1819: i.293). Even though duties towards God should not conflict with utility and should advance human happiness, the focal point was taken away from the individual's direct experience of pleasure and pain. Paley also rejected the doctrine of a moral sense, which gave to the individual a kind of moral instinct on which moral

judgements might be based independently of any other authority (Paley I.V, 1819: i.14). He questioned whether or not such sentiments were universal, and whether or not the propensity to imitation, commonly found in children, was particularly moral. Even if there were innate moral sentiments (which he denied) they still had to be applied to circumstances. Truth telling and promise keeping, important general moral maxims, had occasionally to be denied when applied in practice. What is important here is not only Paley's rejection of the doctrine of moral sense in favour of the principle of utility, but also his rejection of any largely empirical doctrine which might be used to determine the ingredients of happiness. If the moral sense was supposed to be a manifestation of the will of God, he believed that his own approach, using utility and happiness, was a clearer and surer path. But his own path via the will of God limited the input from those whose happiness was at stake. Who determined if fornication brought less pleasure and happiness than the cultivation of a cucumber? Paley did not leave the choice of pleasures (the main ingredient in happiness by Paley's own admission) to the estimation of ordinary people. This choice was the essence of human liberty in the modern utilitarian tradition. It underpinned a number of elements in utilitarianism from the concept of an interest to the idea that happiness in general could not be distinct from the happiness of particular individuals in society. While Paley believed that his aim was human happiness and that this was best determined through duties discernible through the will of God, the consequence of his 'surer road' to happiness was a general disinclination to trust humanity on its own to choose the right pleasures, and to appreciate the way ordinary passions could support the public good when channeled through justice and liberty.

Conclusion

One might wonder why Paley turned to utility, based on pleasure and pain, as the foundation of morals and politics. He seemed unaware or untroubled by the association of the doctrine with scepticism, agnosticism, and atheism. One of his severest critics, Thomas Gisborne, unequivocally rejected the idea that utility could somehow be linked to the will of God:

I apprehend, however, that the principle of general expediency is not supported by any proof which will stand the test of close examination; that it is liable, in the hands of man, to such misapplication and perversion, that its general reception would apparently be most unfavourable to human happiness; that it is totally incompatible with the precepts of Scripture; and that it never could be designed, nor can possibly be adopted, for the regulation of human conduct.

(Gisborne 1798: 24)

Not only could the utility principle, in Gisborne's eyes, be used to justify the punishment of the innocent, but it might also be used to embrace an idolatrous religion or to start a war (Gisborne 1798: 187–8, 338–9). Although one might have expected such remarks to be hurled against Hume or Bentham by theologians, it seems odd to read such an attack on Paley who left no doubt that without the will of God, the principle of utility was ineffectual and human happiness generally could never be realized.

Paley seemed indifferent to such criticisms and confident of the synthesis he had achieved. He wanted to state the principles of moral and political philosophy in terms any student of the time might understand. As Barker has suggested, he sought to achieve in this field what Blackstone achieved for the common law, and within its own compass, he succeeded. According to one commentator:

natural theology was the spiritual core of the British Enlightenment. In its methodology and assumptions, it was completely compatible with the 'new science', providing eager scientists with a convincing metaphysical justification for their research.

(Le Mahieu 1976: 31)

The principle of utility might also be considered as standing at the heart of the British Enlightenment, put there initially by Hume who had taken it from the earlier modern Epicurean tradition. Paley made a bold step in joining two apparent opposites in so modern a theology. He could see that the calculation of rewards and punishments to be realized after death could not only influence calculations of pleasure and pain in this life but also work hand in hand with secular utilitarian arguments. He eschewed a theology which denied the importance of human happiness. In style there is also a thoroughly modern side to his writing. His quotations from scripture are few and are seldom used to settle disputes or to end arguments. Footnotes are few in number and seldom elaborate. He consciously avoided the writings of Grotius and Pufendorf as being of 'too forensic a cast, too much mixed up with civil law and with the jurisprudence of Germany' (Paley Preface, 1819: i.lvii), and seems to have found a lighter hand in Hume and other earlier British writers such as Locke. He attempted to be empirical in his emphasis on relating the will of God to existing laws, practices, and circumstances, and cautious in his conclusions. It is no wonder that his *Principles of Moral and Political Philosophy* endured for so long as a major text in this field.

LIBERTY, UTILITY, AND THE REFORM OF THE CRIMINAL LAW

The object of this chapter is first to chart the development of philosophical thought about crime and punishment in the latter half of the eighteenth century with special emphasis on the writings of Montesquieu, Beccaria, and Bentham. It will be shown that the common thread running through this material is the application of a doctrine of civil and political liberty to an important aspect of state power, intertwined with an equal emphasis on the foundational role of utility. A second object is to relate the philosophical arguments of these influential thinkers to more practical discussions, mainly in Great Britain, regarding the abolition of the death penalty and the use of alternative forms of punishment such as transportation and imprisonment. Contrary to the views of some social historians, it is argued that intellectual debate was not simply between ‘reformers’ and ‘conservatives’ but proceeded in a more complex manner on philosophical and ideological levels and towards different objects.

Liberty and the criminal law

Montesquieu was the first major writer to place the reform of the criminal law on the agenda of the Enlightenment.¹ As early as 1721 in his first book, *Persian Letters* (*Lettres persanes* – see especially number 80, and also numbers 76 and 102, Montesquieu 1973: 158–9, 152–4, 187–9), but mainly in books VI and XII of the *Spirit of the Laws* (*De l'esprit des lois*), he contended that severe punishments did not necessarily deter crime (Montesquieu 1989: 72–95, 187–212). Following his typology of constitutions he argued that mild punishments were appropriate to moderate governments and severe ones only to despotisms (Montesquieu VI.9, 11–13, 1989: 82–3, 84–8). In moderate governments the wise legislator attempted to prevent crime by the adjustment and use of customs and traditions. Where penalties were needed, they could be mild with the use, for example, of fines, which could also be made proportionate to fortunes (Montesquieu VI.18, 1989: 93). Torture had no place in moderate governments, and he even hesitated to recommend the practice as being suitable for despotisms (Montesquieu VI.17, 1989: 92–3).

The theme of a proportion between crimes and punishments was invoked by Montesquieu on several occasions in book VI. 'It is essential for penalties to be harmonious among themselves', he wrote, 'because it is essential that the greater crime be avoided rather than the lesser one' (Montesquieu VI.16, 1989: 91). To punish robbery and murder with the same penalty would not encourage the robber to avoid committing murder. Montesquieu praised the use of transportation in England for robbers (though not for murderers), as a way of distinguishing between crimes. But he did not explain in book VI how punishments could be 'harmonious among themselves', beyond several examples and anecdotes where the lesser penalty was or was not provided as an encouragement to the reduction of crime. However, he returned to the theme of proportion in book XII where he approached this problem from the perspective of individual liberty.

Montesquieu's celebrated discussion of constitutional liberty is usually presented in terms of the doctrine of the separation of powers in book XI, but little attention has been devoted to what he called political liberty in its relation to the citizen, discussed more fully in book XII.² He defined political liberty as:

that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen.

(Montesquieu XI.6, 1989: 157)

Constitutional liberty was obviously connected to political liberty in that the separation of powers would prevent the abuse of power by government and encourage government under law. These in turn would enhance the security of the individual citizen. But Montesquieu also distinguished between constitutional and political liberty, as he thought that it was possible to have one without the other. The citizen could enjoy freedom in the sense that life and property were in fact secure in a constitution where no separation of powers existed (Montesquieu XII.1, 1989: 187). But the two were closely related, and the *de facto* security enjoyed by a citizen in an unfree state, depending mainly on customs, manners, and some purely civil laws regarding the individual and his or her property, would not be sufficient to sustain freedom. Montesquieu then looked, in addition, to the criminal law to establish that political liberty which complemented the separation of powers.

When Montesquieu defined liberty as security, he gave his definition an individual orientation in saying that liberty 'consists in security or in one's opinion of one's security' (Montesquieu XII.1; see XII.2, 1989: 187, 188). Security, for Montesquieu, was established by governments only with reference to the individual citizen. The importance of this perspective as well as the definition of liberty as individual security will be seen in his discussion of penalties and use of proportion in book XII, which clearly differed in scope

and application from the earlier discussion in book VI. Montesquieu began his analysis with the following declaration:

It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness ends; the penalty does not ensue from the legislator's capriciousness but from the nature of the thing, and man does not do violence to man.

(Montesquieu XII.4, 1989: 189)

Montesquieu was not initially concerned here (as he was in book VI) with how penalties harmonized with different offences (e.g. murder and robbery), but with the different sorts of offences to which punishment should be attached. He began by distinguishing four sorts of crimes: (a) against religion; (b) against mores; (c) against tranquillity; and (d) against the security of citizens. In crimes against religion, such as sacrilege, witchcraft, etc., Montesquieu knew that traditional penalties in many societies, and especially in France, were horrendous. He simply rejected most of these so-called offences in so far as they did not violate individual liberty. As crimes, they had the lowest and not the highest priority. The same argument was applied to the second category of crimes against public mores. In this category he tended to include mainly sexual offences. He distinguished between sexual crimes, such as rape or kidnapping, which threatened individual security and those which were more simply based on the pursuit of pleasure. For the latter, he suggested a number of mild penalties and argued that such offences were based less on wickedness than on 'forgetting or despising oneself' (Montesquieu XII.4, 1989: 191). In the third category were crimes against tranquillity by which he meant public order offences which did not threaten the security of other individuals. Here again, no great penalties were proposed. These were reserved for the final category of crimes against security, where the idea of proportion entered at still another level. For these offences punishment was needed and Montesquieu conceived of it as 'a kind of retaliation'. The punishment 'is derived from the nature of the thing and is drawn from reason and from the sources of good and evil' (Montesquieu XII.4, 1989: 191).

Despite these vague phrases Montesquieu clearly sought to proportion punishment to the severity of the offence (in terms of the violation of individual security) with death envisaged as the appropriate punishment for murder, and lesser penalties for lesser crimes. He believed that offences against property should not be punished as severely as offences against persons, and while he could conceive of some capital offences involving the theft of property, he thought that loss of goods for those who had them and corporal punishment for those who did not, were preferable (Montesquieu XII.4, 1989: 191). What was significant in Montesquieu's analysis was the way in which the idea of liberty as security formed the basis of his examination of proportion in the relationship between crimes and punishments. Proportion was no longer a formal idea suggested in the traditional phrase depicting justice as 'to each his due'. The

basis of 'his due' was to be calculated in terms of individual security with those acts which posed the greatest threat to security to receive the greatest punishment. Montesquieu developed his idea in skillful assaults on existing offences such as magic, heresy, and homosexuality ('the crimes against nature') (Montesquieu XII.5–6, 1989: 192–4). From his point of view these often capital offences were virtually dismissed as not being crimes at all.

He criticized at length the crime of high treason for its vagueness and for the tendency to include within the offence a variety of actions including forgery and counterfeiting (Montesquieu XII.7–8, 1989: 194). Even worse was the extension of the offence of high treason to thought, speech, and writing, which he rejected as not being crimes except when part of the preparation of an actual criminal act (Montesquieu XII.9–13, 16, 1989: 196–200, 201). 'How, then, can one make speech a crime of high treason? Wherever this law is established, not only is there no longer liberty, there is not even its shadow' (Montesquieu XII.12, 1989: 198).

In suggesting that Montesquieu set the agenda for the reform of the criminal law during the Enlightenment, it should now be clear that he went further than an opposition to severe penalties and to punishment based more on religious enthusiasm than on actual injuries to individuals. He called for a careful definition of offences based on the idea of individual liberty as security; he attempted to link punishment to the nature of the crime itself (as a kind of 'retaliation'); and he called attention to the link between customs, mores, and forms of government on the one hand and crime and punishment on the other to encourage a more varied approach to criminality which placed considerable emphasis on prevention rather than strictly on punishment.

Crime and punishment in Beccaria

The importance of Montesquieu was readily recognized in discussions of criminal law throughout the latter half of the eighteenth century, and no less so than by one of his most important disciples, Cesare Beccaria, whose celebrated *On Crimes and Punishments* (*Dei delitti e delle pene*) was published in 1764, sixteen years after the *Spirit of the Laws*. Although Beccaria freely acknowledged his great debt to Montesquieu (Beccaria ch. 1, 1958: i.46; 1963: 9), he developed a more consistent critical argument, the method of which was taken perhaps more from Helvétius than from Montesquieu, and which was clearly utilitarian. The object of legislation should be '*la massima felicità divisa nel maggior numero*' (in the English translation of 1767: 'the greatest happiness of the greatest number' (Beccaria 1767: 2; see Shackleton 1972; Venturi 1971: 102). His prescriptions were universally applicable, and he introduced into his arguments for the first time, as Bentham later noted, 'the precision and clearness and incontestableness of mathematical calculations' (Bentham 1838–43: iii.286–7; see Hart 1982: 40). This 'mathematical' approach was combined with a passionate attack, particularly in the chapters on torture and the death penalty (chs. 12 and 16: 1958:

i.66–72, 79–87; 1963: 30–6, 45–52), on the cruelty and folly of the criminal law and its enforcement in eighteenth-century Europe. Both the passion and the calculation of Beccaria's treatise differed from the 'satirical, witty, urbane, irreverent' approach of Montesquieu (Cranston 1986: 9), so characteristic of the Enlightenment itself, but Beccaria's work became widely read, translated and admired throughout Europe.³

Like Montesquieu, Beccaria took the theme of individual liberty as the basis of his treatise, though he followed Rousseau in employing the doctrine of the social contract. To escape from a state of war, where liberty had ceased to have value, free and equal individuals sacrificed part of their liberty to establish peace and security (Beccaria ch. 2, 1958: i.47–9; 1963: 10–13). The portion of liberty which was given up was used by the sovereign to defend the liberty of members and the bond of society itself, and punishment played a key role in this defence. Punishments were then seen as providing motives for individuals to prevent their acting so as to cause anarchy and chaos.

Beccaria agreed with Montesquieu that every punishment which was not based on the absolute necessity to defend the security of members of society was tyrannical, and this limited power of punishment was the sole, legitimate use of that liberty which was given up by individuals to the sovereign. 'No man ever freely sacrificed a portion of his personal liberty', he wrote, 'in behalf of the common good' (Beccaria ch. 2, 1958: i.48; 1963: 11). By justice he meant simply the maintenance of the bond on which society was based. 'Punishments that exceed what is necessary for protection of the deposit of public security are by their very nature unjust' (Beccaria ch. 2, 1958: i.49; 1963: 13). The 'justice of God', he noted, was a very different idea concerned only with rewards and punishments in the next world (1958: i.49n; 1963: 13n).

On a number of themes Beccaria restated Montesquieu's position and then built on it. For example, he favoured mild rather than severe punishments and used several arguments already developed by Montesquieu such as the importance of encouraging criminals to choose the lesser crime and the diminishing value of severe penalties, such as the wheel, which, when generally accepted, no longer deterred. But Beccaria stressed, in addition, the importance of the certainty of punishment as opposed to its severity. To the argument that the prospect of severe punishment deterred crime, he replied (in the English version of 1767) that 'crimes are more effectually prevented by the *certainty*, than the *severity* of punishment'. 'The certainty of a small punishment', he continued, 'will make a stronger impression, than the fear of one more severe, if attended with the hopes of escaping' (Beccaria 1767: 98; see ch. 20, 1958: i.92–4; 1963: 58–9). Beccaria applied a utilitarian calculation which led him to conclude that the expectation of pain to follow the crime from immediate apprehension, trial, and punishment would be sufficient to prevent crime and would enable the legislator to avoid the use of severe punishments. He was anxious to see crime and punishment closely associated (as closely as cause and effect), with the punishment inflicted as soon as possible after the crime was committed. This emphasis on the

certainly of punishment led him, like Rousseau and Kant (though for different reasons) to criticize the use of pardons in the enforcement of the criminal law (Beccaria ch. 20, 1958: i.93; 1963: 58–9; Rousseau II.5, 1968: 79–80; Kant 1970: 160). The code itself should display clemency through the employment of mild punishments, and clemency by judges or sovereigns would not be necessary. To encourage the hope of a pardon would be to encourage the avoidance of punishment.

Like Montesquieu, he believed that ‘there must, therefore, be a proper proportion between crimes and punishments’ (Beccaria ch. 23, 1958: i.97; 1963: 62), but he also did not work out such a proportion with any precision. He conceived of a scale of crimes with those that threatened the bond of society itself at the top and the smallest injustice to the individual at the bottom. Punishments would then be ranked to match the crimes. Such a scale, once established with scientific precision, could even be used to provide a ‘common measure’ to assess the degrees of liberty and slavery, and humanity and cruelty in various nations (Beccaria 1958: i.97; 1963: 63). The stage of civilization achieved by various states could be assessed by the various punishments they employed.

Beccaria provided few clues as to how any precise relationship between crimes and punishments might be established. The object of having mild punishments, applied with certainty, based on a clearly defined code, and serving to prevent crime would go part of the way towards establishing the guiding principles of such a scale. At one point he called for punishments to be as analogous as possible to particular crimes (Beccaria ch. 19, 1958: i.91; 1963: 57). In explanation, he saw the punishment as leading the criminal to see the particular crime in a different and less advantageous light than seen at the time the criminal act was committed. He thought that ‘public punishment’, particularly of small crimes, would serve to prevent larger crimes, and for this reason he opposed forms of imprisonment or transportation for those crimes which removed the criminal from immediate public gaze (Beccaria ch. 19, 1958: i.92; 1963: 57). Yet, the ‘public’ character of such punishments was never explored. He clearly intended to employ calculations of pleasure and pain as ways of measuring punishments and adjusting them to the scale of crimes, though he did not develop this calculus to any extent (see Beccaria ch. 23, 1958: i.97; 1963: 63).

Both Beccaria and Montesquieu, as we have seen, did little to develop such ideas as proportional and analogous punishments or even the idea of using mild punishments to prevent crime. What was perhaps more important was their use of these concepts to *exclude* other and more traditional means of approaching crime and punishment. They strongly opposed the intermingling of the ideas of crime and sin, and reserved for the former a narrow definition and a minimal range of punishments. As for the latter, sinful acts were not necessarily considered crimes at all (see Beccaria ch. 24, 1958: i.98–100; 1963: 64–6).

In the brief chapters of his treatise Beccaria covered a wide range of topics. He was eloquent in rejecting the cruelties of excessive punishments currently

employed and particularly common punishments for suicide, sodomy, infanticide, bankruptcy, so-called crimes against religion such as heresy, sorcery, and witchcraft, and crimes against property. He was also eloquent in his opposition to the death penalty (see Beccaria ch. 16, 1958: i.79–87; 1963: 45–52) for which he could find virtually no justification except for extreme necessity where a powerful figure in the state not only threatened it with destruction but his very existence would certainly succeed in doing so. Such times of threatened anarchy would, however, be rare.

Beccaria presented two sorts of arguments to support his position: the first was based on his conception of the social contract, and the second was founded on utilitarian considerations. As for the social contract he asked whether or not any person had ever given up to the sovereign the right of taking one's life. He had in fact prepared to answer this question negatively in his earlier account of the terms of the contract. If each person joined with every other only to protect themselves from the invasion of their lives and property, it did not necessarily follow that the sovereign could take life to provide that protection. Indeed, if the contract was for the protection of life and property, there was nothing that one might do to have this protection withdrawn.

Beccaria clearly differed from Rousseau on the connection between sovereignty and the death penalty. Although in a practical sense Rousseau believed that the death penalty should not be used if the criminal was no danger to society, he held in principle that under the social contract 'it is in order to avoid becoming the victim of a murderer that one consents to die if one becomes a murderer oneself' (Rousseau II.5, 1968: 79). Furthermore, in breaking the law, the wrongdoer ceased to be a member of society and could be considered as having made war against it. Beccaria denied that the sovereign possessed the authority to punish with death, and, turning Rousseau's formulation around, he asserted that the offender remained a citizen against whom the whole nation had wrongly declared war (Beccaria ch. 16, 1958: i.80; 1963: 45).

Nevertheless, Beccaria did not rely wholly on arguments connected with his account of the social contract. He followed this analysis with a series of arguments to show that other forms of punishment made the death penalty unnecessary as a deterrent to others. His first general argument was that the intensity of pain felt when a criminal was executed had a less powerful effect on the mind of the observer than the repeated feeling of lesser pains following the observation of the criminal suffering imprisonment at hard labour. To the spectator, then, the continued spectacle of a prisoner deprived of liberty and condemned to hard labour perhaps for the rest of his life was, according to Beccaria, a more powerful deterrent to crime than the brief experience of intense pain in watching an execution (Beccaria ch. 16, 1958: i.81; 1963: 46–7).

In this somewhat artificial argument Beccaria went to the heart of the debate over the death penalty in attempting to counter the widespread belief that it was the only certain deterrent of crime, and especially of violent crime such as murder. That Beccaria adopted a utilitarian form of argument perhaps corre-

sponded to the fact that the problem itself, the degree of deterrence of certain punishments, was one that was posed in terms of the calculation of consequences, that is to say, the consequences of certain forms of punishment in deterring crime. As we shall see, Bentham rejected the argument concerning the relationship between the intensity and duration of pain and conceded that the death penalty did in fact have one advantage over other forms of punishment in being widely perceived as the most effective deterrent. In this sense he regarded it as a 'popular' punishment. Furthermore, Beccaria failed to deal with an obvious problem in recommending hard labour as an alternative punishment, in that the condition of most free labour at the time did not differ much from penal servitude. On its own for most of the population of most countries hard labour was not a punishment at all (see Venturi 1971: 106).

Second, Beccaria argued that an execution aroused both compassion and indignation in the spectator, and not simply the terror of possibly suffering a similar fate. In the suffering of penal servitude only terror would be aroused and hence this latter punishment would prove more effective. To the objection that perpetual slavery and hard labour were as cruel a penalty as death, Beccaria replied that while it might appear to be the case to the spectator, it would be the same for the person sentenced to this loss of liberty, because the pains of the prisoner were not collected to one point, but were scattered throughout his life. In addition, Beccaria argued that the death penalty was a barbarous punishment and one that encouraged the taking of life. In this respect it was an imperfect deterrent and even an incitement to murder.

Beccaria's treatise 'made the idea of reform popular, palatable, respectable, almost fashionable' (Gay 1973: ii.446). But it was criticized and not just by those who preferred a penal system based on vengeance and the widespread use of the death penalty. His arguments against the death penalty were not generally accepted; even Voltaire did not wholly support its clear abolition. In the two codes influenced by Beccaria, which did abolish the death penalty, those of Leopold, Grand Duke of Tuscany, and Joseph II of Austria, this was done not because it was believed that the state had no right to punish with death, but because capital punishment had failed to deter crime. In some respects what replaced capital punishment was even more severe and brutal. Flogging, branding, and very long periods of imprisonment under atrocious conditions meant that the savagery against which Beccaria had protested most strongly remained in spite of the abolition of capital punishment (see Radzinowicz 1948-86: i.297-8).

Another sort of criticism was developed by Kant who dismissed Beccaria's account of the right of punishment as 'pure sophistry' (Kant 1970: 158). Kant sought to establish a strict relationship between crime and punishment, so that the punishment for murder would be death. Without this sort of retribution there could not be justice in the state. For Beccaria to argue that the pact of society precluded the use of the death penalty on the grounds that a man could not have consented to give to others what was not in his power to do by right

himself was, for Kant, to confuse the right of punishment with extraneous considerations. According to Kant, the right to punish, including the death penalty for murder, was established when the individual as co-legislator authorized the penal law. As a subject, he agreed to live within the framework of the law, and as a criminal, accepted punishment according to it. In comparison with Beccaria, the criminal, as an individual, had less control over his destiny and had to submit to the legislator's justice. Although Kant's theory was retributive, it was not based on vengeance; he referred to the *jus talionis* in terms of sin, but he did not confuse crime and sin (Williams 1983: 97–109; Fleischacker 1988: 436, 442). Beccaria and Kant had developed two thoroughly modern, though incompatible, theories of punishment. But if Kant rejected Beccaria's argument regarding the death penalty, he did not forgo entirely the use of utilitarian arguments in his discussion of punishment (Williams 1983: 106; see Hare 1993: 1–20).

Bentham's theory of proportion

Jeremy Bentham was influenced by both Montesquieu and Beccaria but especially by Beccaria. Beccaria had made the first attempt to apply the principle of utility to the reform of the criminal law, and Bentham, having already been attracted to such an approach from his reading of Helvétius, found in Beccaria important ideas to develop (Bentham 1968: 99). These ideas consisted of more than an early statement of the greatest happiness principle. Both Bentham and Beccaria believed that punishment was a subject that could be analysed critically, and not left to prejudice, and the justification of existing practices (Hart 1982: 42–4). They believed that a system of punishments could be devised which would reduce existing crime and prevent numerous offences. At the minimum, such a system could contribute to human happiness in reducing the terrible suffering and brutality of existing punishments which had also apparently failed to reduce the great suffering caused by crime.

Despite Beccaria's acknowledged influence on Bentham and Bentham's apparent adoption of Beccaria's ideas regarding certainty of punishment, and the use of proportion and analogy in devising a scale of punishments, Beccaria, like Montesquieu, had done no more than set an agenda. With regard to the much discussed proportion between crimes and punishments, Bentham noted:

Establish a proportion between crimes and punishments, has been said by Montesquieu, Beccaria and many others. The maxim is, without doubt, a good one; but whilst it is thus confined to general terms, it must be confessed it is more oracular than instructive.

(Bentham 1838–43: i.399)

Bentham's discussions of proportion, though written in the 1770s, were substantially more advanced than anything attempted at that time, and arguably might be seen as putting this key topic in the theory of punishment on a different

level (see Draper 1997: 218–60). He did so by working up a number of rules to govern the relationship between crimes and punishments which were based on assumptions or arguments he had already worked out. The first rule was that ‘the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence’ (Bentham 1996: 166). The rule assumed several key aspects of Bentham’s penology. The first idea was that of an economic model that allowed him to write of the ‘value’ of the punishment and the ‘profit’ of the offence (see Hart 1982: 46). Bentham was well aware that the language of political economy had not yet been applied to punishment, and he saw in this language the possibility of the greater use of reason and calculation. Besides very crude and largely intuitive notions such as that a thief should not receive the same punishment as a murderer, no one had devised a way to relate punishments to crimes, or, for that matter, crimes to crimes and punishments to other punishments. Bentham believed that his economic model would enable him to do so. The pain of punishment was regarded as capital which was invested with the expectation of profit. The profit was the prevention of crime in the future; loss, the continuation or increase in crime. The idea of an economic punishment was one that produced its desired effect with the least possible cost of suffering.

The profit of the offence would have to be weighed against the profit of the punishment with the latter profit having to be greater than the former. There were several interests at stake. The first was that of the offender who profited from the offence. The second was that of the person or persons who suffered from the offence and who had an interest in the punishment. The third was that of the public at large whose interest in the prevention of crime gave it an interest in the punishment. The economic model depended on the calculation of these interests which might be physical, financial, or psychological but were expressible in terms of pleasure and pain. Indeed, the economic model was a model about pleasures and pains and only indirectly about profit and loss in any financial sense. The question then arises: does the model make the scale of punishment any more accessible than before? To answer this question it is necessary to see how Bentham used it in his rules to measure what ought to be the proportion between crimes and punishments.

As for the two terms in the first rule – the profit of the offence and the value of the punishment – Bentham meant by the former the force which urged the person to commit the offence, i.e. what one got from doing so, and by the latter, the force employed to prevent the crime. Even where the offence was easily quantifiable, Bentham was aware that the calculation was not a simple one. If an offender stole a pound, the first rule would indicate that he should at least be forced to repay the pound plus the costs of obtaining it from him. But such a simple equation of crime and punishment might not be adequate. If the offender had little reason to believe that he would be caught, he might be willing to steal again. A low detection rate might allow him to steal several pounds before having to repay only one. Furthermore, the offender might have stolen a

pound but so alarmed others by the audacity of his theft that he forced them to purchase expensive locks. This expense, plus the psychological pain suffered by the increased expectation of theft, might make the repayment of only one pound too slight a punishment for the offence committed. On the other hand, the person who stole the pound might be very poor and at the point of starvation. The money might be needed to feed his family, and the punishment to repay the one pound might be not only far beyond his grasp but also no deterrent, because he was impelled to steal more by the pain of hunger and extreme suffering than by the fear of punishment.

How is one to decide when the 'value of punishment' exceeds the 'profit from an offence'? Some assistance comes from other rules which Bentham devised. The second was that 'the greater the mischief of the offence, the greater is the expence, which it may be worth while to be at, in the way of punishment' (Bentham 1996: 168). Bentham believed that this rule needed little argument in its support, though he admitted that so-called crimes against religion, such as sacrilege, witchcraft, and sorcery, were often severely punished though they caused little mischief. His rule would oppose that trend, but it did not in itself reveal how mischief was to be understood.

For Bentham, mischief was constituted by acts which produced pain or diminished pleasure. He considered mischief a highly complex idea even within the framework of a system of offences. He first distinguished between primary and secondary mischief. Primary mischief (divided into original and derivative mischief) consisted of mischief sustained by assignable individuals. Secondary mischief (divided into 'alarm' and 'danger') consisted of mischief suffered by unassignable individuals as a result of the primary mischievous act (Bentham 1996: 143–4). For example, the person who suffered loss in a robbery was in receipt of primary mischief. As a consequence of being robbed, other assignable individuals might suffer, e.g. a person to whom he was about to pay some money when it was taken from him. This is some of the derivative mischief arising from the initial robbery, though not part of the robbery itself. Secondary mischief was also of two kinds: the first (called 'alarm') was the pain of apprehension, which spread throughout the community, that life and possessions were increasingly under threat. The amount of pain suffered by people in general upon learning about the robbery would depend on the circumstances of the robbery itself. If it were particularly cruel and brutal, a greater alarm would be felt. The second part of the secondary mischief (called danger) consisted of the apprehension in the whole society of the chance that one might suffer at the hands of the same robbers or similar ones as a result of the robbery that had been committed.

The third rule was that 'when two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less' (Bentham 1996: 168). This rule was first devised (by Montesquieu (VI.16, 1989: 91–2), but Bentham criticized Montesquieu for his praise of England, where the possibility of transportation contributed to the effect sought by the rule. For Bentham, the English practice depended on an arbitrary act by the sovereign

rather than on a rule embodied in a scale of punishments. He clearly favoured a scale of crimes and punishments where the effect would operate more definitely and surely (Bentham 1838–43: i.400n–1n). The fourth rule was that ‘the punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it’ (Bentham 1996: 168). This rule, which, Bentham believed had been violated ‘in almost every page of every body of laws I have ever seen’ (Bentham 1996: 168n), would give offenders every incentive to limit or reduce the magnitude of the offence. If a person was given the same punishment for stealing ten shillings as for stealing five, he argued, the second group of five shillings was taken without the offender receiving any punishment. Thus punishments would have to be carefully graduated so that increases in the mischief of the offence could receive a corresponding punishment.

If the first four rules were designed to prevent punishments from being too small, rules five and six were intended to prevent them from being too great (see Bentham 1996: 169). Bentham believed that punishments which were too small were fairly obvious as they would fail to deter crime. But there was a strong tendency to punish with undue severity, because it was not easy to make the correct estimation of what punishments would in fact succeed in preventing crimes. If rule five aimed at curbing severe punishments by requiring punishments to fall within the rules requiring inexpensive punishments for offences, rule six introduced a whole range of factors to be considered in doing so. Bentham knew that certain punishments, while severe to some, were not so to others. A fine which was nothing to a rich man would ruin a poor man. ‘The same imprisonment that would be ruin to a man of business, death to an old man, and destruction of reputation to a woman’, he wrote, ‘would be nothing, or next to nothing, to persons placed in other circumstances’ (Bentham 1838–43: i.401). Bentham’s approach required that various factors influencing sensibility (such as age, sex, rank, wealth, etc.) should be taken into account in the actual imposition of punishments so that some were not too severe and others too mild. This calculation could not, however, be embodied in the code itself and would require considerable latitude in the imposition of punishments (within the maximum and minimum frame established for each offence) to be placed in the hands of judges.

After completing the first six rules, Bentham added three additional ones to fill out and elaborate the first rule which was that the value of a punishment must not be less than the profit from an offence (Bentham 1996: 170). If there was less of a certainty of punishment for any given offence, the punishment must be increased in proportion to the uncertainty. Similarly, if the punishment were remote in time from the offence, it would have a diminished deterrent effect and hence would have to be increased in proportion. Finally, if a number of offences had been committed by the same offender (e.g. fraud in weights and measures) it was necessary that the punishment should reflect all of the instances of the offence so that the punishment was greater than the profit from the offence.

Otherwise, an offender would find it profitable to pay a small penalty and continue committing the offence.

Bentham's economic model tended to assume that the relationships between crimes and punishments could be established and adjusted largely in quantitative terms, especially in the adjustment of the amount of punishment to the profit of the offence. But Bentham also realized that given a variety of forms of punishment, there was no exact way to quantify their deterrent capacity and that where certain punishments seemed most appropriate to particular crimes, they might not necessarily be the cheapest to prevent the crime. Like both Montesquieu and Beccaria, Bentham was interested in the idea of linking punishment to a crime in a way that would dramatically reduce the motivation to commit the crime. For example, he favoured castration as opposed to the death penalty as a punishment for rape. Not only would it be the less drastic punishment but it might also 'produce a strong impression on the mind at the moment of temptation' (Bentham 1838-43: i.418; see Williams 1983: 106). He rejected the idea of punishment based strictly on retaliation due to both its tendency towards severity and its highly limited applicability. To find a punishment that exactly mirrored a crime would be difficult and the only merit that Bentham could see in the idea was its simplicity and the popularity of the idea of punishing murder with death (Bentham 1838-43: i.409-11). Analogous punishments were another matter, especially where their use seemed to reduce the quantity of punishment traditionally employed (Bentham 1838-43: i.407-9). But in establishing a proportion between crimes and punishments, he admitted that these qualitatively different punishments would be difficult to relate quantitatively to each other (see Bentham 1996: 171).

When Bentham felt that he had set forth the basic groundwork for his theory of punishment, he then proceeded to establish various 'properties' of punishment to be used by the legislator to establish a system within the rules of proportion (Bentham 1996: 175ff). The 'properties' of punishment were necessary to make the system work. Among the eleven 'properties' listed and discussed were variability, equability, and commensurability. Bentham emphasized the quantitative aspect of punishments in holding that for every variation in the severity of an offence (see rules one and four), there should be different degrees of punishment. Otherwise, there would be needless or inefficacious punishment. The second property, equability, was related to the first. Although a punishment might allow for variability, it might not be adjustable to fit a variety of circumstances so that for one person it would fall heavily and be severe, while for another it might be overly mild. The forfeiture of property was an example used by Bentham, where, despite the possibility of variability in the parcels to be forfeited, the severity of punishment would depend on whether or not the prisoner possessed that kind of property and to what extent. Bentham noted that under English law certain offences required the forfeiture of moveable property (money, goods, etc.) but not immoveable property (land, buildings, etc.). If a person's fortune was in moveable property, all would be lost; if in immoveable,

no loss would be suffered. A third ‘property’ of punishment was called commensurability. This was necessary to implement the third rule of proportion which would lead the offender always to choose the lesser of two related offences. For two punishments to be commensurable, all persons in various circumstances should be willing to choose the lesser offence over the greater. This ‘property’ differed from equability, in so far as it was mainly concerned with relating punishments to each other while equability is a matter of relating punishments to individual crimes.

As Bentham spun his web of offences and punishments into ever more complex patterns, he was well aware that he was risking making it unworkable (see Bentham 1996: 171). At the same time the rules of proportion and the various ‘properties’ of punishment seem fairly remote from an actual scale of crimes and punishments as envisaged by Montesquieu and Beccaria. Etienne Dumont, his Genevan editor (see Blamires 1990), used an unfortunate metaphor in referring to this material as the ‘logical apparatus’: ‘the scaffold which ought to be taken down when the building is erected’. Once the penal code was constructed, however, the rules of proportion would no longer have any direct utility in relating punishments to crimes, except, as Dumont put it in a better metaphor, as ‘a machine for thought – *organum cogitativum*’ (Bentham 1838–43: i.407n).

The debate over the death penalty

Due to their philosophical character Bentham’s writings on punishment stood apart from the numerous discussions of various aspects of crime and punishment which continued into the early decades of the nineteenth century. In the debate over the death penalty in Great Britain (see Gatrell 1994), there was a general acceptance by all of the main parties of ‘rational principles’ regarding punishment. These were for the most part utilitarian in being concerned with preventing and deterring crime and not with the guilt or sinfulness of the criminal. Even so extreme a writer as Michael Madan, who favoured a rigid executive justice, whereby all who were convicted of capital offences would suffer the death penalty, declared that the end of punishment was the prevention of crime and that (like Montesquieu and Beccaria) certainty of punishment was more important than severity, and argued from a general concern with the consequences of existing and proposed policies (Madan 1785: 11, 62n–3n, 131–2ff). Madan believed that the death penalty alone provided the only satisfactory deterrent to crime, although at one point he thought that transportation might work were this punishment strictly enforced (Madan 1785: 76). Given the importance of self-preservation, he argued that criminals would do and suffer virtually anything rather than die (see Madan 1785: 108ff). He regarded the current situation in England as wholly unsatisfactory, with numerous capital offences, but juries unwilling to convict and judges all too willing to exercise mercy.

If Madan believed that the way to prevent crime was to enforce the law with

certainty so that the criminal would know what to expect, William Paley took a different view. Like Madan, he believed that the end of human punishment was not the 'satisfaction of justice' but 'the prevention of crimes' (Paley VI.ix, 1819: ii.1), and that the death penalty was the only available punishment with sufficient terror to deter crime. If a crime was difficult to prevent, it should be more severely punished and for this reason he could justify making theft from a shop a capital offence (Paley VI.ix, 1819: ii.2). Similarly, Paley justified the English practice of making sheep-stealing, horse-stealing, stealing cloth, etc. capital offences by arguing that these crimes were more difficult to prevent than others and required the 'terror of capital punishment' to protect the public (Paley VI.ix, 1819: ii.2). The death penalty for non-violent crimes such as forgery and perjury was justified in terms of the consequences of these offences in threatening commerce and civilization itself (Paley VI.ix, 1819: 13ff). Unlike Madan, however, Paley supported current English practice which assigned capital punishment to numerous offences, but inflicted it only on a few (Paley VI.ix, 1819: ii.6ff). He opposed torture and was opposed to spectacles of human agony which tended to harden and deprave. Yet he wanted the horror of the death penalty fully felt by the populace in order to deter crime and suggested at one point that murderers should be cast into a den of wild beasts, but that such an execution should be concealed from the public so as not to deprave them. Such a suggestion was based on Paley's calculation of the consequences of the punishment for the prevention of crime (Paley VI.ix, 1819: ii.21–3). In the same vein he opposed transportation on the grounds that it did not contain sufficient terror, especially for those without property, friends, and other ties to the community (Paley VI.ix, 1819: ii.18).

These utilitarian arguments for the retention of the death penalty by Madan and Paley were opposed by other arguments of a similar form but towards differing ends in two pamphlets by Samuel Romilly (1786; 1810).⁴ Unlike Beccaria, whom he generally admired, Romilly was not wholly opposed to the death penalty, but he did oppose it for offences against property (Romilly 1786: 24–5). He set forth a series of arguments in criticism of Madan's contention that the death penalty was the only effective deterrent for theft. He pointed to other countries where milder punishments deterred crime, and argued that the spectacle of frequent executions eventually ceased to deter people from crime, as they grew hardened and corrupted by it (Romilly 1786: 30). He cited Blackstone's argument that to deter crime by any means was not justifiable (Romilly 1786: 32–3). He rejected the view, adopted by Madan, that the sacrifice of one guilty person to preserve thousands was justifiable on the grounds that it assumed that the death penalty was a valid means of deterrence. Madan's position, he argued, would also justify the sacrifice of an innocent person.

At the heart of Romilly's critique of Paley were two doctrines. The first was based on Paley's belief in Beccaria's maxim that certainty of punishment was of more consequence than severity. Romilly used this against Paley to argue that Paley's faith in the discretionary power of magistrates to impose the death

penalty or to grant pardons and his belief in the death penalty for theft, in fact, led to uncertainty of punishment (Romilly 1810: 33–5). The second doctrine, also originating in Montesquieu and Beccaria, was that there should be a proportion between crimes and punishments with the most severe punishments reserved for the worst crimes (Romilly 1810: 21, 49–50). Both Madan and Paley rejected this doctrine as it would lead to a major reduction in the use of the death penalty.

The idea of a proportion between crimes and punishments or a scale of punishments was based on the doctrine of liberty adopted by Montesquieu, Beccaria, and Bentham. For these writers, liberty meant individual security, and the proportion between crimes and punishments would work towards a condition in society where arbitrary and unnecessary punishments would be abolished. Neither Madan nor Paley was enthusiastic about liberty. Madan thought that justice and liberty were in conflict, that the security of the public was more important than the security of the individual (Madan 1785: 12, 15–16). Paley rejected Montesquieu's idea of liberty as the security of the individual (see Rosen 1992: 32–4), and believed that too much liberty in Britain was in fact the cause of crime and a reason why the death penalty was needed. Paley seemed to argue that in despotic societies there was less crime, because legal rights protecting the individual were not observed and punishments were both severe and certain (Paley VI.ix, 1819: ii.16ff). He rejected the maxim that it was better for ten guilty persons to escape than one innocent man should suffer (Paley VI.ix, 1819: ii.26–7). He also took the view that one might regard the sacrifice of an innocent man in terms of a person giving his life for his country.

As we have seen, Bentham adopted Montesquieu's idea of liberty and embedded it in his own theory of punishment. He became a firm opponent of the death penalty (see Jackson 1991), though at first he accepted its use for the crime of murder. He also recognized some positive features about the death penalty: it prevented the offender from doing further injury; it was analogous to the offence of murder and could be seen as the appropriate penalty; it was popular with the public in general; and, contrary to the view of Beccaria who argued that the prospect of life imprisonment was more painful than the prospect of death, Bentham believed that the death penalty made a deep and lasting impression, and served as an example to deter others (Bentham 1838–43: i.444–5). Yet, there were also numerous disadvantages: it could not be 'convertible to profit' in the sense that compensation might be obtained from the labour of the criminal; it represented a loss of 'frugality' because society was deprived of the labour and strength of the person executed; it did not affect different people in the same way, as some feared death and others did not, or at least not to the same degree; it was not remissable and hence the innocent might be killed; and it paradoxically produced a tendency in juries not to convict and in judges to show mercy, hence producing arbitrary punishment and even contempt for the law (Bentham 1838–43: i.445–50).

Bentham at first agreed with Beccaria that the death penalty might be justi-

fied where rebellion threatened society and by destroying the leader one could destroy the rebellion (Bentham 1838–43: i.449–50). When he returned to the theme of the death penalty at the end of 1830, he was even more strongly opposed to it, and could see no place for its continuation (Bentham 1838–43: i.525–32). He then felt that imprisonment was a fully viable and superior alternative to capital punishment. He had also become more radical in his political opinions and could readily sympathize with the view that the law ‘grinds’ the poor, because it is made and enforced by the rich. The example of milder punishments in the United States, especially for minor crimes such as theft, provided further evidence that the use of the death penalty for stealing sheep or theft from a private house would only cease when radical political reform took place in England (Bentham 1838–43: i.532). Bentham looked forward to a fully representative democracy which would provide the engine for reform, including the reform of the criminal law (see Rosen 1983).

Transportation and imprisonment

The attack on severe punishments and the widespread use of the death penalty led to a search for alternatives to such cruelty and inhumanity and to the development of secondary punishments (Beattie 1986: 450–1). Transportation, which had ceased abruptly with the American War of Independence but had begun again in 1787 with the first voyage to Botany Bay, was favoured by some. Montesquieu had viewed it favourably as an alternative to the death penalty. The libertarian William Godwin, opposed to all forms of punishment, found it least objectionable when not combined with a regime of slavery (Godwin 1976: 679). Nevertheless, most writers were suspicious of transportation. Eden tended to oppose it as a loss of manpower to the country (Eden 1771: 28). Romilly thought transportation a severe punishment, but that it seemed mild when compared to the death penalty (Romilly 1810: 63). Bentham’s critique of transportation was perhaps more thorough but not less critical (Bentham 1838–43: i.490–7).

The only serious alternative to transportation was imprisonment, which, of course, existed throughout the period in question. But few who had read John Howard’s *The State of the Prisons in England and Wales* doubted that there was an urgent need for considerable reform. Howard was not initially concerned with prison as an alternative to the death penalty or to transportation. As High Sheriff of Bedfordshire he had responsibility for the county gaol. He became interested in the people who languished in prison awaiting trial and found that even if they were acquitted or if the prosecution did not proceed with its case, they were often unable to leave prison, as they were liable to exorbitant gaoler’s fees. He was also deeply distressed by the widespread disease and general squalor in prisons (Howard 1777: 1–3). Howard influenced the passage of the Gaols Act of 1774 and his own proposals for an ideal prison were ‘in many ways the forerunner of [Bentham’s] panopticon’ (Semple 1993: 72). Bentham thought highly

of Howard's work and at one point planned to dedicate his book on the theory of punishment to him (if he managed to complete it) (Semple 1993: 74). In later editions of his treatise Howard acknowledged the influence of writers such as Beccaria and Eden (Howard 1792: 9n, 14n, 15, 19, 42n, 43n, 118n).

Together with Blackstone, Howard assisted a small group of reformers, including Eden, Charles Banbury, and Gilbert Elliot, to draft and see through parliament the Penitentiary Act of 1779. When the bill was about to be published Bentham was prompted to write his *View of the Hard Labour Bill* which started him on the road to the panopticon prison (Semple 1993: 42–61; Bentham 1838–43: iv.3–35). Bentham apparently favoured a more lenient regime than that proposed in the bill. Nevertheless, he accepted initially one aspect of contemporary penology which was hardly lenient in its effects on the prisoner. The use of solitude (or solitary confinement) was not necessarily part of the reforms inspired by the Enlightenment, but became associated with both imprisonment and the reform of prisoners. Partly inspired by the desire to keep prisoners apart to prevent prisons becoming seminaries for thieves or other criminals, partly by a desire to save Christian souls, and partly to protect prisoners from intimidation by other prisoners, the emphasis on solitary confinement became commonplace in eighteenth-century writings on penology (Semple 1993: 78ff). Among influential writers in favour of solitary imprisonment were Samuel Denne (1771), John Jebb (1786), and Jonas Hanway (1775; 1776; 1781).

Although Howard initially favoured solitary confinement, he soon changed his mind (Semple 1993: 89). In his *An Account of the Principal Lazarettos in Europe* (1789: 169n, 192n), he recognized the dangers of the use of solitary confinement for more than two or three days. Nevertheless, Howard's name became associated with this regime, and a writer such as Godwin could call attention to 'the well intended, but misguided, philanthropy of Mr. Howard' in creating prisons where 'the prisoners ... spend a large proportion of their time shut up in silent and dreary cells, like so many madmen' (Godwin 1976: 679n).

Bentham accepted solitary confinement in the original panopticon *Letters*. By 1790 he began to have doubts, and these doubts were fully expressed in the *Postscripts* (Bentham 1838–43: iv.47, 59, 71–6; Semple 1993: 130). He cited Howard's new position and referred to solitary confinement as enabling one 'to screw up the punishment to a degree of barbarous perfection never yet given to it in any English prison, and scarcely to be given to it by any other means' (Bentham 1838–43: iv.71). He favoured two, three, or possibly four prisoners placed together in double or larger cells. The change of view, though 'not a trifling one', revealed the extent to which he was not overly concerned with the cure of souls through solitude and contemplation in any religious sense. His concern was more simply to prevent the commission of crime when the prisoner was released from prison and to develop the productive use of labour. He argued that the productivity of labour was actually enhanced with more than one person working in a cell, and he believed that the panopticon prison scheme

could lead to the prevention of crime by means other than by solitary confinement.

Enlightenment and reform

The legacy of the Enlightenment to the reform of the criminal law was the insistence on humanity in the face of cruelty and on liberty in place of despotism. For the former, the life and writings of Voltaire provide an important example; his efforts in the Calas, Sirven, and La Barre cases testify to his humanitarianism (Gay 1959: 273–94). A comparison of his *Commentaire sur le livre des délits et des peines* (Voltaire 1766) with the text of Beccaria's treatise on which it comments reveals in Voltaire's work less of a theory and more of a sense of outrage at the unjust, inhumane, and pernicious character of the legal systems of most European states, and particularly France.

The concern with liberty was more complex and clearly began with the writings of Montesquieu and Beccaria upholding the liberty of the individual citizen by seeing that liberty closely connected to the reform of the criminal law. But it was difficult to see how liberty entered into any theory of punishment except in the sense that members of society were protected from various crimes, and the system of criminal procedure prevented arbitrary accusations, trials, and punishments. The theory of liberty not only encouraged these important aspects of the criminal law, but it also penetrated into the very idea of punishment itself, which might otherwise be defined in broad terms as being concerned with the deprivation of liberty.

The idea of a scale of punishments was one major attempt to bring liberty to bear on this aspect of state power. The scale of punishments, in the language of liberty, meant that each person had a right to security from interference by others, but that if this right was violated, punishment would be limited to the prevention of profit from the offence and would aim to deter others from committing a similar offence. Any greater amount of punishment beyond these two objects would be a deprivation of liberty. In the hands of Beccaria and particularly Bentham the doctrine was clearly utilitarian, but both placed the idea of liberty at the heart of their utilitarianism. Liberty rested on the calculation of the consequences of the minimum exercise of state power, and hence pain, necessary to deter certain actions which were deemed criminal by their effects on individual security and could be prevented by no other means than by punishment.

During the eighteenth century there was no understanding of or even a consensus of opinion about what kinds and amounts of punishment would deter criminal action. But there were numerous writers willing to express an opinion, and some of these opinions were based on utilitarian calculations. Paley's argument is a good example, and the deep differences between Paley and Bentham arose not from their commitment to utilitarianism as an ethical theory but to Bentham's incorporation of the idea of liberty into that theory.

But can the panopticon prison system be regarded as the product of an Enlightenment theory of liberty applied to punishment? Recent social history and Marxist theory would tend to answer this question negatively and see in the

panopticon prison the failure of the Enlightenment to do little more than replace one system of terror with another (see Foucault 1975; 1977; Ignatieff 1978; 1983; Hay 1977; cf. Semple 1992; Langbein 1983). Such views have tended to interpret the movement towards imprisonment and hard labour less in terms of an advancement of liberty and more as the development of systems of discipline and control within capitalist society. But, for Bentham, widespread inspection, especially from the central core of the prison, was designed to prevent abuses of power by prison officers and other prisoners and to enhance the security of the prisoner. His inspection principle would remove the prison from seclusion and open it to 'the great *open committee* of the tribunal of the world' (Bentham 1838–43: iv.46). Inspection would enable a considerable leniency to be introduced into prison life. He believed that the inmates would approve of the regime, as, for example, irons and chains, widely used in most prisons, would not be employed (Bentham 1838–43: iv.47; cf. Ignatieff 1978: 34–5). The use of contract management and life insurance based on average mortality rates was intended to provide the governor with every incentive to keep prisoners alive, well, and actively engaged in productive labour (see Halévy 1952: 85). It is important to distinguish Bentham's panopticon scheme from the practices employed in many prisons in the nineteenth century. When Sir John Bowring, Bentham's friend and literary executor, examined prison labour in 1865, he could praise Bentham as 'the most profound and philanthropic writer on Prison Discipline' and at the same time condemn common Victorian practices as 'the crank, the treadmill, water lifting, stone breaking, oakum picking, absolute isolation – unremunerative, hopeless, heartless toil' (Bowring 1865: 1–2).

Some recent historians have also dismissed the tendency to emphasize the so-called movements to reform the criminal law in the eighteenth century as a 'Whig interpretation' of this period in that it assesses the eighteenth century in terms of progress made towards the humanitarian ideas of a later period (Emsley 1987: 200–1; see Innes and Styles 1986; Philips 1983). Nevertheless, this criticism tends to assume that a debate between 'reformers' and 'conservatives' took place at this time (Hay 1977: 56 and n). Such a view underestimates the complexity of varying initiatives to reform the criminal law in the eighteenth century.

A major objective of movements for reform in many countries, including England, was the abolition of severe penalties for so-called religious offences. In England this issue united Paley as well as Romilly, and Blackstone as well as Bentham. Blackstone could confidently declare (citing Beccaria) that 'all crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society' (Blackstone 1765–9: iv.41). By the time he wrote these words criminal offences against God and religion were in decline and would

cease to be a major issue, at least in England, by the end of the eighteenth century. But the movement to assess the seriousness of offences ‘according to the mischiefs they produce in civil society’, and hence separate crime from sin, represented a major development in legal theory.

Only Bentham made any major advance on the ideas of Montesquieu and Beccaria on a philosophical level. His analysis was highly complex, even technical, largely because it was a more complex issue than Montesquieu and Beccaria could appreciate when they called for punishments in proportion to crimes. Although the theory was developed in the latter chapters of *IPML* (originally drafted as an introduction to a penal code), published in 1789 but with limited circulation, the full statement of his ideas on penal law only appeared in French in 1802 and 1811, and not in English until 1830 and in the posthumously published edition of his works, edited by Bowring between 1838 and 1843 (see Bentham 1802; 1811; 1830; 1838–43). This important development of the ideas of Montesquieu and Beccaria was part of Bentham’s legacy to the nineteenth century.

It is difficult to discover any sort of public ‘debate’ between ‘reformers’ (such as Eden, Bentham, Romilly) and ‘conservatives’ (e.g. Madan and Paley) beyond Romilly’s critique of both Madan and Paley on the death penalty. Beccaria’s influence, for example, seemed everywhere (Draper 2000: 177–99). Of equal importance perhaps was the fact that writing was developing on different levels and towards different objects. Both Eden and Bentham might be regarded as major reformers of the criminal law in England (Holdsworth 1903–72: xii: 364–5; Draper 2001: 106–30), but the differences between them are striking. Bentham stated some of these in a candid note in his manuscripts:

I write from system: and it is the fashion to hate systems. I labour to learn and to instruct: he writes secure of pleasing. He swims with the current: my struggle is to turn it He is one of the ornaments of a court. I have long sequestered myself from the face of men, in the fond hope that I might one day do them service.

(Bentham *UC*: xxvii.107, quoted by Semple 1993: 59)

Bentham was well aware of the need for allies in the uphill struggle to reform the criminal law, but Eden, though a reformer and despite Bentham’s approaches, would not become one (see Bentham 1968: 90–3). Eden’s achievement was more like Blackstone’s, to show how far the criminal law had already progressed since an earlier and less civilized period, and to suggest areas where further reform was necessary (see Lieberman 1989). Bentham’s philosophical approach looked first towards a system that might resolve the numerous difficulties and puzzles so easily passed over by Eden. His work was closer, perhaps, to that of Paley, who also devised a system and used it to consider the criminal law. Both Paley and Bentham were engaged in the philosophical construction of systems and in both cases with the idea of utility at their foundations. To see

them simply as a 'conservative' and a 'reformer' respectively falsifies the historical experience of the eighteenth century and seriously underestimates the role of philosophical thought in this period (see Hay 1977: 56–63).

J.S. MILL'S HEDONISM

Few aspects of John Stuart Mill's thought have generated as much controversy as the discussion of pleasure and pain in *Utilitarianism*. My own contribution is not intended to add to this controversy, but to suggest that several contentious issues are not necessarily contentious and have been inflated artificially by not attending to biographical, historical, and textual considerations, as well as to philosophical argument. Two related issues deserve brief consideration at the outset. The first is concerned with whether or not Mill rejected Bentham's hedonism, particularly that set forth in the first chapters of *IPML* (see Bentham 1996: 11–73). Wendy Donner has recently expressed a view, common among Mill scholars and among philosophers generally, that in *Utilitarianism* 'Mill rejected much of Bentham's thought and radically reinterpreted utilitarianism, expanding and enriching the conception of good at its core' (Donner 1991: 8).¹ In 1968, Maurice Mandelbaum made a similar point as follows:

Nonetheless, as every reader of *Utilitarianism* knows, the differences between Mill's position and Bentham's are striking. One may in fact view each of the chapters of that work, except the first, as being, in part, an attempt to correct what Mill took to be either errors or lacunae in the position of Bentham. For example, the emphasis in Chapter II is placed on rebutting what Mill took to be the most serious charge against Benthamism: its failure to acknowledge distinctions in value among various types of pleasurable experiences.

(Mandelbaum 1999: 418–19; see also Mandelbaum 1968: 221ff; Quinton 1973: 38, 42)

To justify this sweeping characterization of *Utilitarianism*, Mandelbaum turns to the earlier essays Mill wrote on Bentham ('Remarks on Bentham's Philosophy' (1833) and 'Bentham' (1838), Mill 1969: 3–18, 75–115) and notes that Mill 'rightly saw Bentham as a person who lacked imagination and did not learn from others, and whose own range of experience was exceedingly narrow' (Mandelbaum 1999: 419n). Crucial to Mandelbaum's approach are two assumptions that appear as commonplaces in much of the philosophical literature on

Mill: (a) that Mill's rejection of Bentham's utilitarianism was bound up with his estimation of deficiencies in Bentham's life and thought; and (b) that this view of Bentham persisted without modification from the 1830s to *Utilitarianism* and took the form, for example, of the well-known discussion by Mill of 'higher pleasures'.

Other scholars have taken a different view of Mill's relationship to Bentham on this topic. Geoffrey Scarre has observed:

'Utilitarianism' ... is a highly puzzling work. Many of its ideas and arguments could have flowed from the pen of Bentham himself ... These formulations resemble closely the summaries of Bentham's position in the essays of the 1830s; the difference is that Mill now appears to accept them!

(Scarre 1996: 91)

Other writers have noted that Mill seemed to have returned to his roots in Benthamite utilitarianism by the time he wrote *Utilitarianism* (see, for example, Hollander 1985: ii.602–3, 605; Schwartz 1972: 58; Robson 1968: 35) or have asserted that Mill wrote the essay 'to defend his father and Bentham from the attacks made upon them' (Plamenatz 1958: 134). As opposed to Robson, however, Hollander (1985: ii.657) emphasizes the 'discernible break' in Mill's position with regard to Bentham and subsequent 'discernible return to the fold'. Even Mandelbaum admits that Mill defended Bentham's utilitarianism in the essay, 'Whewell on Moral Philosophy' (1852), though he fails to see that Mill might also have returned to the Benthamite camp in *Utilitarianism* itself (Mandelbaum 1999: 419n; Mill 1969: 165–201). As for explanations as to how Mill was able to do this, Scarre seems most insightful when he states that Mill was drawing on a larger Epicurean tradition for his account of utilitarianism (Scarre: 1996: 93; 1994: 219–31). Where Scarre and I disagree is that he omits to consider the distinction between higher and lower pleasures in Bentham's utilitarianism and the different ways Bentham himself drew on the Epicurean tradition he inherited from Hume, Helvétius, and others. Furthermore, my own contribution begins with the belief that however critical of Bentham Mill might have been in 1833 and 1838, he had clearly returned to Bentham's theory by 1861. Among his objects, however, was not only a defence of Bentham but also an attack on the views of Thomas Carlyle whom he believed was influential in attempting to establish a new Puritanism in Britain. My starting point in this chapter will thus be the relationship between Mill and Carlyle.

The second issue is concerned with whether or not Mill rejected hedonism as the basis of happiness, and adopted what might be called an Aristotelian view which saw pleasure as only one ingredient in happiness. We shall not be concerned with many aspects of this issue, which would take us into such themes as whether or not Mill's *On Liberty* is compatible with *Utilitarianism*. But the widely accepted version, most recently advanced by Fred Berger, touches directly on the

theme of Mill's hedonism to be considered here (see Berger 1984: 30–51). Berger is willing to accept all of the standard criticisms of Mill's hedonism: that (a) the distinction between higher and lower pleasures presupposed that things other than pleasure had value; that (b) Mill admitted that people desired such things as power, money, and virtue as parts of happiness and thus could not desire happiness for itself; and that (c) in his defence of freedom Mill had to use non-utilitarian arguments, as he could not argue that maximizing freedom always led to maximizing pleasure (Berger 1984: 30–1). Berger's approach is simply to accept these criticisms (which are in fact the same as those which show Mill as a critic of Bentham) and to reconstruct Mill's argument so that the criticisms are no longer valid. He first draws a clear distinction between pleasure and happiness and asserts that 'human happiness is not an open concept in the sense that it consists of pleasures completely unspecified' (Berger 1984: 39). He then portrays happiness as a *telos* consisting of various elements which are requisite to happiness and among which are a sense of independence and self-determination, sense of power, freedom, excitement, whatever is necessary to maintain human dignity, and security (Berger: 1984: 39ff; see also Hoag 1999: 189ff, 200ff; 1992: 247–78).

Although Berger's account appears to solve problems raised by commentators on Mill's thought, it assumes a value-pluralist account of happiness which Mill never advocated (see Riley 1993: 293n; Long 1992: 281–4). Furthermore, the account is contradicted by Mill's clear statement in *Utilitarianism* that 'by happiness is intended pleasure, and the absence of pain; by unhappiness, pain and the privation of pleasure' (Mill 1969: 210; 1998: 55).² This statement established a direct link between pleasure and happiness, and where he continued in the same paragraph to elaborate his position, he did not qualify it:

But these supplementary explanations do not affect the theory of life on which this theory of morality is grounded – namely, that pleasure, and freedom from pain, are the only things desirable as ends; and that all desirable things (which are as numerous in the utilitarian as in any other scheme) are desirable either for the pleasure inherent in themselves, or as means to the promotion of pleasure and the prevention of pain.

(Mill 1969: 210; 1998: 55)

One might be tempted merely to accept Berger's work as a revisionist text helping Mill to resolve difficulties in his thought which he had failed to do, and which have perplexed friends and critics ever since. To do so, however, would make understanding Mill an even more difficult task than it already is. It would obscure the Epicurean foundations of Mill's thought on which his utilitarianism is based, and which should provide a context for interpreting his thought and the tradition in which he worked. Berger's interpretation will also not encourage scholars to come to terms with the widespread failure to understand Bentham's hedonism and its place in the Epicurean tradition. One main object in this

chapter is to begin to remedy this failure.

Mill and Carlyle

In his biography of Mill, Michael St. John Packe records the following incident concerning Mill's attendance at Carlyle's lectures on Heroes and Hero Worship in May 1840:

Mill himself was absent. He and Harriet Taylor had attended the earlier performances, but at the second, the 'Hero as Prophet', he had disgraced himself. For when the orator launched into his favourite denunciation of 'Benthamee Utility, virtue by Profit and Loss', and had reached the rhetorical passage 'if you ask me which gives, Mahomet or they, the beggarlier and the falser view of Man and his Destinies', Mill had risen to his feet, pale but unable to contain himself, and called out a decided 'No!' After which Harriet Taylor seems to have given away their tickets.

(Packe 1954: 264–5; see Carlyle 1993: 65)

The apparent departure of Mill and Harriet Taylor from the audience led Carlyle to offer an apology (though a highly qualified one) in the fifth lecture on 'The Hero as Man of Letters' (see Carlyle 1993: 148–9). But even here, he remained a severe critic of Bentham's utilitarianism. Much of the criticism referred to political economy (calculation, profit and loss), an emphasis on mechanics, logic, steam power, machines, determinism, a Godless doctrine, and wherever he added James or J.S. Mill to Benthamite utilitarianism, he employed the pun of a mill grinding out pleasure and morality. It is probably no accident that Charles Dickens's *Hard Times* (1854), dedicated to Carlyle, contained the prominent character of Gradgrind, linked to utilitarianism (see Dickens 1988: 43; see also Winch 2000: 243–66).

Carlyle was consistent in his opposition to Bentham's utilitarianism. As early as 1830, for example, he wrote in his journal:

What is Jeremy Bentham's significance? Altogether intellectual, logical. I name him as the representative of a class, important only for their numbers; intrinsically wearisome, almost pitiable and pitiful. Logic is their sole foundation, no other even recognized as possible: Wherefore their system is a *Machine*, and can not *grow* or endure; but after thrashing for a little ... must thrash itself to pieces, and be made fuel. – Alas poor England, stupid, purblind, pudding-eating England! Bentham with his *Mills* grinding thee out Morality.

(Carlyle 2000: 293)

At the same time Carlyle maintained a strong attack on the utilitarian focus

on pleasure and happiness, and on what he took to be the brutish over the angelic (see Carlyle 2000: 325). In *Sartor Resartus* he referred dismissively to grinding out virtue 'from the husks of Pleasure' (Carlyle 2000: 121–2, 349). 'If what thou namest Happiness be our true aim', he added, 'then are we all astray' (Carlyle 2000: 122). He mentioned 'a dead Iron-Balance for weighing Pains and Pleasures on' as reflecting both the utilitarian emphasis on mechanism and on pleasure and pain (Carlyle 2000: 163). His object was to look beyond pleasure, love, and happiness to blessedness and God. 'Love not Pleasure', he proclaimed, 'love God' (Carlyle 2000: 143). The path to God, he insisted, was not through the calculation of pleasures, but through renunciation. 'It is only with Renunciation (*Entsagen*) that Life, properly speaking, can be said to begin':

What Act of Legislature was there that *thou* shouldst be Happy? A little while ago thou hadst no right to *be* at all. What if thou wert born and predestined not to be Happy, but to be Unhappy!

(Carlyle 2000: 142–3)

As one reads these words and considers Carlyle's attack on utilitarianism and even on happiness, one wonders what attracted Mill to him in the first place (see Mill 1963: i.85). In 1869, looking back on their relationship Mill wrote that 'it is only at a particular stage in one's mental development that one benefits much by him (to me he was of great use at that stage) but one continues to read his best things with little if any diminution of pleasure after one has ceased to learn anything from him'.³ In his *Autobiography* Mill defined their relationship in terms of 'one of the channels through which I received the influences which enlarged my early narrow creed', but he said that he was never converted to any particular doctrine espoused by Carlyle (Mill 1981: 181). He already had received whatever truths these doctrines contained from elsewhere, and, in any case:

They seemed a haze of poetry and German metaphysics, in which almost the only clear thing was a strong animosity to most of the opinions which were the basis of my mode of thought; religious scepticism, utilitarianism, the doctrine of circumstances, and the attaching of any importance to democracy, logic, or political economy.

(Mill 1981: 181)

What Carlyle did for Mill was to bring to life truths that Mill already knew, so that he wrote of Carlyle's influence ('and I was during a long period one of his most fervent admirers') not in terms of 'philosophy to instruct but as poetry to animate' (Mill 1981: 183). In a fragment related to the *Autobiography* he also referred to his use of the ideas of Carlyle (together with 'the Coleridgians' and 'German thinkers') in terms of exhibiting a 'willingness and an ability to learn from everybody' (Mill 1981: 253). In this sense he seemed to have identified with

Socrates, and sought to examine all sides of questions even where the positions under investigation were considered false and opposed to his own.

Mill's *Autobiography* contains much reflection on relationships like his friendship with Carlyle. It is highly suggestive in depicting how he could have admired and supported Carlyle over a fairly long period of time (they met in 1831), when he was strongly opposed to numerous sentiments expressed by him. Carlyle seems to have animated Mill, both positively and negatively, to extend and develop his own ideas, and arguably among those ideas was his own account of the principle of utility.

In an early letter to Carlyle, written in 1834, Mill referred to his own mental state when he became acquainted with him as an 'intermediate' state: 'a state of *reaction* from logical-utilitarian narrowness of the very narrowest kind, out of which after much unhappiness and inward struggling I had emerged, and had taken temporary refuge in its extreme opposite' (Mill 1963: i.204). This 'intermediate state' was exhibited in the essays entitled 'The Spirit of the Age', published in the *Examiner* in 1831, which were the occasion of Carlyle and Mill becoming personally acquainted and which led Carlyle to proclaim on reading them: 'here is a new Mystic' (see Mill 1981: 181). At this time Mill depicted himself as:

a school-boy fresh from the logic-school, had never conversed with reality; never seen one; knew not what manner of thing it was; had only spun, first other people's & then my own deductions from assumed premises.

(Mill 1963: i.205)

He pointed out that at this time he was highly tolerant and catholic in his examination of all topics and seldom took issue with anyone (including Carlyle). But in this letter he decided to state the main differences between them. The first was his scepticism about the existence of God, and the second that 'I am still, & am likely to remain, a utilitarian', though he immediately added: 'though not one of "the people called utilitarians"; indeed, having scarcely one of my secondary principles in common with them; nor a utilitarian at all, unless in quite another sense from perhaps any one except myself understands by the word' (Mill 1963: i.207). One might see in this affirmation of Mill's continued adherence to utilitarianism enough contrary sentiment to tempt one to consider it a rejection of the doctrine of his father and Bentham. Mill made clear that he wanted to take on board a strong conception of duty. He also rejected the view that acts should be approved in so far as they contributed to the greatest happiness – what he called 'the benevolent, soup-kitchen school'. He agreed with Carlyle (he hoped) that each person should take as his 'exclusive aim the development of what is best in *himself*' but then developed this idea to include his working for all mankind (Mill 1963: i.207–8). Mill also noted that his reverence for Christ, deepened perhaps from his recent reading of the New Testament, still amounted only to reverence.

Mill's account of utilitarianism in this letter is remarkable for what it says and what it omits. It is a re-affirmation of the doctrine at a time (1834) when he might have wholly rejected it. It is also remarkable for its omission of any reference to pleasure and pain in his account of utilitarianism, especially as *Sartor Resartus* was being published at this time in *Fraser's Magazine* (the same journal in which *Utilitarianism* subsequently appeared), and Carlyle's ideas concerning happiness and renunciation may well have already been familiar to Mill. Two decades later, at the time he was beginning to write *Utilitarianism*, and when Mill was writing about Carlyle's views on hero worship in a diary he briefly kept, he wrote the following (for 8 April 1854):

Moral regenerators in this age mostly aim at setting up a new form either of Stoicism or of Puritanism – persuading men to sink altogether earthly happiness as a pursuit ... What is now wanted is the creed of Epicurus warmed by the additional element of an enthusiastic love of the general good.

The reason Mill gave for the contemporary relevance of a version of Epicureanism was that 'an earthly life both pleasant and innocent can be had by many and might by all' (Mill 1988: ii.666). It should have been clear to Mill that whatever doctrine Carlyle espoused, it would have excluded Epicureanism, for no Epicurean would have questioned a person's aspiration to happiness.

The Epicurean tradition

The link between utilitarianism and Epicureanism was strong in Hume, Smith, Helvétius, Paley, and Bentham, and it was arguably even stronger in Mill. For at least one contemporary critic of Mill's *Utilitarianism* the connection was particularly clear: 'The utilitarians may say what they please, but the truth remains the same, and they are only repeating the doctrine of the ancient Epicureans, a doctrine which never made much progress even among Pagans.' To this he added: 'Mr. John Stuart Mill ... may be regarded as the living chief of the small sect of modern Epicureans' (Anon 1864: 2).

In contrast with Bentham who tended to avoid the largely pejorative term, 'Epicurean', Mill seemed to use it with relish (see Bentham 1996: 19). At the beginning of chapter II of *Utilitarianism*, he wrote of 'every writer, from Epicurus to Bentham, who maintained the theory of utility, meant by it, not something to be contradistinguished from pleasure, but pleasure itself, together with exemption from pain' (Mill 1969: 209; 1998: 54). He invoked Epicurus, Epicureans, and Epicurean life six times in the opening paragraphs of this chapter (see Mill 1969: 209–12; 1998: 54–7). The points he made were not particularly novel or contentious. He referred, as just noted, to the link between utility and pleasure and pain. He defended Epicureans against the criticism that they held human nature in a degrading light and insisted that the Epicurean's life was not like that

of a beast. 'But there is no known Epicurean theory of life', he added, 'which does not assign to the pleasures of the intellect, of the feelings and imagination, and of the moral sentiments, a much higher value as pleasures than to those of mere sensation' (Mill 1969: 211; 1998: 56). There is no reason to believe that Mill was not including Bentham among the Epicurean writers who placed a higher value on the pleasures of the intellect, feelings, imagination, and moral sentiments. But Mill then changed tack somewhat in the following passage:

It must be admitted, however, that utilitarian writers in general have placed the superiority of mental over bodily pleasures chiefly in the greater permanency, safety, uncostliness, &c. of the former – that is, in their circumstantial advantages rather than in their intrinsic nature. And on all these points utilitarians have fully proved their case; but they might have taken the other, and, as it may be called, higher ground, with entire consistency. It is quite compatible with the principle of utility to recognize the fact, that some *kinds* of pleasure are more desirable and more valuable than others. It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone.

(Mill 1969: 211; 1998: 56)

Mill did not state who was included in the phrase, 'utilitarian writers', though most commentators have assumed that he was referring to Bentham and to the chapter on the measurement of pleasures and pains in *IPML* (Bentham 1996: 38–41). If so, why did he use the plural and refer to 'utilitarian writers'? Perhaps he simply meant utilitarian writers since Bentham and clearly under Bentham's influence. We shall consider Bentham's hedonism and particularly the issue of quality and quantity shortly, but first let us consider other aspects of the Epicurean account of mental pleasures.

The emphasis on mental pleasures is supported by the Epicurean doctrine that no foolish person could be happy and no wise person could fail to be happy (Cicero I.xviii.61, 1999: 65). That the wise person was always happy was supported by a number of considerations. The wise kept desires within bounds so that numerous pains could be avoided. Death was disregarded, and the wise did not hesitate to die nor did they fear God or death. Memories of the past were recalled with gratitude, the pleasantness of the present was enjoyed, and the future was not depended on as a source of pleasure, even though the expectation of future pleasure might be such a source. The wise person also obtained pleasure from the comparison of the quality of life between the wise and the foolish. Finally, the Epicureans believed that fortune did not affect the wise, as a life guided by reason and wisdom afforded protection against the obstacles fortune placed in one's path.

Mill's interest in Epicurean thought has tended to be ignored by modern commentators (see, for example, Irwin 1998: 423–63). However, students of Epicureanism have long emphasized the connection between ancient Epicureanism and modern utilitarianism (see Scarre 1994: 219ff; Cicero 1999: xxii; Mitsis 1988: 103–4). But Mill (perhaps following his friend George Grote) tended to ascribe the source of modern utilitarianism to Socrates in Plato's *Protagoras* rather than more directly to Epicurus. In the very first paragraph of *Utilitarianism* he suggested that utilitarianism was as old as Plato's *Protagoras* with Socrates, the utilitarian, opposing 'the popular morality of the so-called sophist' (Mill 1969: 205; 1998: 49). But in his review essay, 'Grote's Plato' (1860), he depicted the argument in the *Protagoras* in a manner to which no Epicurean could possibly object:

According to the Sokrates of the *Protagoras*, there is nothing good as an end except pleasure and the absence of pain; all other good things are but means to these. Virtue is an affair of calculation, and the sole elements of the calculation are pains and pleasures.

(Mill 1978: 418)

Grote himself wrote two brief essays on 'Epikurus' and 'The Stoics' which were published posthumously and warmly recommended by Mill in another review (Grote 1872: 434–50; Mill 1978: 477). In the essay on Epicurus Grote acknowledged that Epicureanism had been a much maligned system of thought and depicted the doctrine as follows:

The standard of Virtue and Vice is referred by Epikurus to Pleasure and Pain. Pain is the only evil, Pleasure is the only good. Virtue is no end in itself, to be sought; vice is no end in itself, to be avoided. The motive for cultivating virtue and banishing vice arises from the consequences of each, as the means of multiplying pleasures and averting or lessening pains.

(Grote 1872: 434)

This doctrine was also linked to Socrates and, in particular, to the Socrates of Plato's *Protagoras*. In one respect, however, Mill sought to distinguish modern utilitarianism from its ancient version, and this was with respect to the self-regarding hedonism in ancient Epicureanism and Socrates (see Mill 1978: 418). Modern utilitarianism was oriented towards the greatest happiness of the greatest number and enjoined a full measure of altruism as well as egoism.

Quantity and quality

To see more clearly the significance of Mill's use of the Epicurean tradition in his attack on Carlyle and defence of utilitarian writers in that tradition, it is

necessary to return to what has been taken in the critical literature as the decisive rejection of Bentham, i.e. Mill's advocacy of the consideration of quality as well as quantity in the estimation of pleasures (see, for example, Darwell 1998: 120). The crucial passage in Mill, set forth in the context of his consideration of higher pleasures, is this: 'It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone' (Mill 1969: 211; 1998: 56). Mill reached this conclusion by arguing that writers in the Epicurean tradition (including, one should think, Bentham) had long recognized the higher pleasures connected with the intellect, feelings, imagination, and moral sentiments, but they tended to express themselves differently, upholding the doctrine, but using arguments concerned with the permanence, safety, and cost. While earlier utilitarians had established their position, they could have done so equally as well by taking 'the higher ground' with similar consistency (Mill 1969: 211; 1998: 56).

At this point commentators often invoke Mill's criticism of the phrase he supposedly found in Bentham regarding pushpin and poetry. It is as if a preference for pushpin is the outcome of a quantitative approach to life's pleasures and pains, while a qualitative approach leads to poetry (see, for example, Feldman 1997: 108). Let us begin by noting that Mill's criticism did not appear in *Utilitarianism* at all, but in the much earlier 'Bentham', published in 1838, at the time when he was still under the influence of Carlyle (Mill 1969: 113). The context of Mill's remark concerned Bentham's failure to take into account judgements concerning taste in addition to those concerning morality. Mill noted that Bentham disliked references to good and bad taste, regarding them 'as an insolent piece of dogmatism in one person to praise or condemn another in a matter of taste' (Mill 1969: 113). At this time Mill did not seem to be aware of the link in Bentham between individual liberty and the forbearance to make judgements on the basis of taste. Mill proclaimed:

as if men's likings and dislikings, on things in themselves indifferent, were not full of the most important inferences as to every point of their character; as if a person's tastes did not show him to be wise or a fool, cultivated or ignorant, gentle or rough, sensitive or callous, generous or sordid, benevolent or selfish, conscientious or depraved.

(Mill 1969: 113)

Mill then turned to Bentham's views on poetry, which he distinguished from Bentham's acknowledged deep love of music. In pointing out Bentham's indifference to and even dislike of poetry (due to its rhetoric and indifference to 'precise logical truth'), he wrote: 'He says, somewhere in his works, that, "quantity of pleasure being equal, push-pin is as good as poetry"' (Mill 1969: 113). Scholars have traced the passage to a work entitled *The Rationale of Reward*, first published in English in 1825 (shortly before the onset of Mill's mental crisis), but written in the 1770s and 1780s, and appearing first in French in Dumont's recension,

Theorie des Peines et des Recompenses (1811) (see Bentham 1811; 1825). There are two points worth noting about this passage in Bentham. First, the published versions (in French and English) do not refer to 'quantity of pleasure' (see Bentham 1825–6: ii.235; Bentham 1838–43: ii.253), and had Mill quoted the passage accurately, it might never have been noticed by later scholars as being of any relevance to the distinction between quality and quantity of pleasure as it appears in *Utilitarianism*. Mill himself did not draw attention to any connection, and one may doubt that he saw one. Second, the context of Bentham's comment concerning reward was whether or not the state should contribute funds to encourage the arts and sciences. Bentham appreciated the fact that even the arts and sciences which simply amused had utility in so far as they gave people pleasure, but he saw no way to estimate this utility from the point of view of reward. In this context he wrote:

Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnishes more pleasure, it is more valuable than either. Everybody can play at push-pin: poetry and music are relished only by a few.

(Bentham 1838–43: ii.253)

By 'prejudice apart' Bentham meant individual taste; he personally would have preferred music to push-pin. But from the point of view of society as a whole, the state should not support pleasures (through taxation), which could only be enjoyed by a few. When Mill wrote 'quantity of pleasure being equal', he was not misrepresenting Bentham, and was only calling attention to the fact that greater numbers of people enjoyed push-pin as opposed to poetry. Nevertheless, he unintentionally misled later scholars on the trail of the distinction between quantity and quality of pleasures and pains. Furthermore, there is a great difference between assessing public support for the arts (as nowadays when one argues for and against state subsidies for opera, poetry, and music which are enjoyed only by a few), and the issue in *Utilitarianism* in which Mill is emphasizing the importance of arguments regarding quality as well as quantity in the estimation of pleasure. As Ross Harrison has noted, 'if it pleases people as much, the state should be as concerned to promote pushpin as poetry, football as opera ... [it is] still a contentious matter; however it is nothing like as contentious as the suggestion that it is an appropriate system of personal values' (Harrison 1983: 5).

As for the meaning of 'quantity' and 'quality' as basic terms in philosophy and in common use, Bentham did not seem to deviate from accepted usage. According to the *Oxford English Dictionary* 'quality' refers to a particular nature, class, kind, or grade of any object, which distinguishes one thing from another. When 'quantity' is employed, it refers to size, amount, sum, and number and is concerned with questions such as: how great? and how much? When Bentham discussed quantity and quality, he seems to have accepted this common usage

and additionally emphasized the interaction or, as he put it at one point, 'a sort of reciprocal intercourse' between the two:

As a *quantity* has its qualities, for instance vastness, minuteness, etc., – so has a quality its quantities.

The *quantity of a quality* is termed a *degree*.

(Bentham 1997: 98)

At one point when he discussed pleasure and pain, he wrote:

Mr. Bentham deduces the quantity and quality of applications he proposes ... and while the graphic pencil is kept employed in the delineation of their respective qualities or forms, scales with weights and measures are at the same time kept employed in giving intimation of their respective quantities.

(Bentham 1983b: 295)

Although Bentham used his pencil to delineate and define qualities (in this case of pleasure and pain), he also employed his weights and measures to determine quantities. He felt that he was following in the footsteps of Francis Bacon, but noted that while Bacon emphasized experimentation in his studies of the physical world, Bentham placed his emphasis in the moral world on observation. The deductions mentioned above in the passage just quoted followed from and were based on observations regarding such topics as pain and pleasure.

In *IPML* (chapter 5), where Bentham listed fourteen kinds of pleasure and twelve kinds of pain, he was referring to different qualities of pleasure and pain, which he had delineated on the basis of careful observation and deduction (Bentham 1996: 42–50). Hence the pleasures of memory or expectation were different from the pleasures of skill and pleasures of power. For Bentham one could not say that the possession of various skills generated more or less pleasure than the possession of power, as they referred to different kinds of pleasure which were not commensurable, except possibly to the individual whose subjective assessment indicated a preference for one over the other. Such a preference might vary from moment to moment within the person expressing the preference.

In chapter 4 of *IPML* Bentham discussed how the value of pleasures and pains were to be measured and suggested that he was going to use a quantitative approach rather than a qualitative one (Bentham 1996: 38–41). But such a distinction would be misleading. When Bentham listed seven 'elements' or 'dimensions' of value (intensity, duration, certainty, propinquity, fecundity, purity, and extent), he might have been referring to quantitative assessment, but the seven elements or dimensions comprise different qualities of measurement concerning pleasure and pain. It would be difficult to weigh up the intensity and purity of a pleasure in one sum, though not impossible to suggest that one plea-

sure was more intense than another or purer in the sense of not being followed by pain.

What did Bentham mean, then, when he wrote regarding pleasures and pains:

Sum up all the values of all the *pleasures* on the one side, and those of all the *pains* on the other. The balance, if it be on the side of pleasure, will give the *good* tendency of the act as a whole, with respect to the interests of that *individual* person; if on the side of pain, the *bad* tendency of it upon the whole.

(Bentham 1996: 40)

When he stated that one should ‘sum up’ first pleasures and then pains, he did not provide any mathematical formula for doing so. It would seem impossible to add up all of the pleasures surrounding most actions into a single sum (see Robbins 1978: 179–81). What is more probable is that summing up takes place to a limited extent within the different qualities of quantity (i.e. intensity, duration, purity, etc.), although some further development is possible (see further Warke 2000: 176–203). At the end of the chapter on measurement Bentham claimed that his theory was not a novel one: ‘In all this there is nothing but what the practice of mankind, wheresoever they have a clear view of their own interest, is perfectly conformable to’ (Bentham 1996: 40). In other words wherever we can see our interest clearly we tend to sum up and weigh pleasures and pains. The example Bentham provided in one sense referred to common practice, but it also clearly demonstrated how limited the calculation of pain and pleasure actually was. He mentioned an estate in land whose possession allowed a person to produce much pleasurable sensation and avoid much pain (see Bentham 1996: 40–1). The value of the estate, however, was ‘universally understood’ to increase or decrease according to the length of the time it was possessed, the certainty of possession, and the nearness in time in which it would come into possession. These three factors are complex enough, but it should be possible to say that possessing the estate for ten years should provide more pleasure than possessing it for five years. But even this must be qualified. Bentham noted that the intensity, fecundity, or purity of pleasures one might derive from the estate could not be put into the equation, because these could only be ‘estimated’ after a person had the benefit of possessing the estate. So when we say that, all other conditions being equal, a lease of ten years on an estate is of greater value to us than one of five years, we are merely saying that only in this limited respect can we weigh up quantitatively pleasures and pains.

Why then did Bentham bother to emphasize the measurement of pleasure and pain when such measurements seem to us to be so limited? First, we have pointed out that Bentham was as concerned with quality as with quantity and the interaction between the two. It must be remembered that when he began writing *IPML*, there had been no attempt in the modern period, despite the

influence of Epicureanism, even to list pleasures and pains. For Helvétius, as we have seen, there were only two pleasures and pains – those derived from sensation and those derived from expectation. Bentham thought that he was taking a major step forward in the logical analysis of pleasure and pain and could never have conceived that he was being typecast as a villain in a story in which he was presenting a shallow quantitative approach rather than a qualitative one. Given his emphasis on reciprocity between quality and quantity, he would have found this a logical impossibility.

Second, the emphasis on quantity as well as quality was already present, albeit in an undeveloped form, in the Epicurean tradition. In the discussion of pain and pleasure in Cicero's *de Finibus*, Torquatus argued that Epicurus believed that the absence of pain constituted the greatest pleasure, and pleasure could not be increased in amount beyond this point. As one often felt pleasure apart from the absence of pain, it was explained as not an increase but a variation in the amount of pleasure already felt (*variari, non augeri*) (Cicero I.xi.38, II.iii.10, 1999: 43, 89). This distinction was important not only in relation to the Epicurean emphasis on reducing pain (and the conception of the good life without physical and especially psychological pain) but also as part of the view of life as living quietly in one's garden and not increasing without distinction the number of pleasures one enjoyed. Bentham's concerns were obviously different from those he would have found in *de Finibus*, but the idea of increasing the quantity of pleasure and the problems connected with such an increase would have been familiar to him. Third, the whole of the utilitarian project (and not simply that part concerned with welfare in society) depended on the development of as objective a theory of morals and politics as possible. In Bentham's day the value of an estate in land would most probably not have been calculated with any dispassionate objectivity but mainly left to ancestry, prescription, and the vagaries of the Court of Chancery. Although it is arguable that Bentham's own analysis would not have taken the assessment of the value of an estate much further, it is also arguable that his analysis contained useful hints concerning how to go about such an assessment. It is not without some reason that Bentham is regarded as the early pioneer of such widely accepted practices as cost–benefit analysis.

Unlike some of his more recent disciples, perhaps, Bentham was fully aware of the complexities of assessing and estimating pleasures. At the end of his discussion of the various kinds of pleasure and pain he provided a brief account of the pleasures of observing a country scene (Bentham 1996: 49n–50n). He first distinguished between pleasures of the senses and 'pleasures of the imagination produced by association'. As for the first category (the pleasures of the senses), he confined himself to four: the pleasures of sight, sound, smell, and an 'inward sensation'. These were in turn developed, e.g. the pleasures of sight to include 'agreeable colours and figures, green fields, waving foliage, glistening water, and the like' and the pleasures of the ear, those 'excited by the perceptions of the chirping of birds, the murmuring of waters, the rustling of the wind among the

trees'. As for the 'agreeable inward sensation', he mentioned among others that produced 'by a brisk circulation of the blood, and the ventilation of it in the lungs' by unpolluted air. Under the pleasures of the imagination Bentham listed a series of pleasurable ideas stimulated by the particular scene and enhanced by the pleasures of sympathy. For example, these included 'the idea of plenty, resulting from the possession of the objects that are in view, and of the happiness arising from it' or 'the idea of gratitude, excited by the contemplation of the all-powerful and beneficent Being, who is looked up to as the author of these blessings'. Even this brief selection from what Bentham readily admitted was only 'a short specimen' of the pleasures stimulated by a country scene, should be sufficient to show that his account of pleasure and pain was not quantitative or reductionist, nor did it fail to appreciate higher pleasures.

Let us return to the passage in Mill which first led us to a consideration of quantity and quality of pleasure. The important point to appreciate is that there is no evidence that the object of Mill's criticism was Bentham, but a good deal for assuming that he was addressing Carlyle. In other words Carlyle's constant criticism of 'Benthamee utility' with its quantitative calculations of profit and loss are wholly mistaken not only with regard to Bentham (as we have seen) but also with regard to the whole Epicurean tradition. Although the youthful Mill rejected 'logical-utilitarian narrowness of the very narrowest kind', he never rejected utilitarianism as a whole, and in later life mounted a strong counter-attack against its detractors. When Mill wrote in *Utilitarianism* that 'it is quite compatible with the principle of utility to recognize the fact, that some *kinds* of pleasure are more desirable than others', he would not have found Bentham in disagreement. Nor would he have found any disagreement with his view that the preference for the more valuable pleasure must depend on those who have experienced both.

Socrates dissatisfied

In the Epicurean tradition (which includes both Bentham and Mill) it was generally believed that happiness favoured the wise over the foolish. The wise person could not be unhappy and the pleasures of the fool would be few (largely confined to the pleasures of the senses) and inconstant (see Cicero I.xviii-xix.61-3, 1999: 65-6). Mill, however, appeared to depart from this tradition when he claimed that it was better to be Socrates dissatisfied than a fool satisfied. Bentham could easily accept that a person might sacrifice pleasure for the sake of greater pleasure in the future. Any modern economy depended on people saving and investing (and hence denying themselves immediate satisfaction) in order to purchase a house, educate their children, plan for the future, etc. Bentham found no difficulty with this doctrine, and it clearly played an important role in his own system, and especially in the way he believed happiness was generated. But he would never say that it was better to be Socrates dissatisfied *per se*, and for Mill to do so marked a departure from Bentham's theory.

The starting point for Mill was Bentham's attack on asceticism in chapter 2 of *IPML*, where Bentham distinguished between two kinds of ascetics who justified the rejection of pleasure and the pursuit of pain which Bentham took to constitute a 'misapplication' of the principle of utility (Bentham 1996: 17–21). He called the first group of ascetics the 'philosophical party' and the second, the 'religious party'. The former, most probably the Stoics or those modern thinkers influenced by Stoicism, were not nearly as committed to asceticism as were those animated by religious considerations. They were animated more by the hope of honour and reputation and a philosophical pride, and in this sense included present and future pleasure in their concerns. According to Bentham, they made pain 'a matter of indifference', but not an evil. They rejected only gross, physical pleasures and not only enhanced refined ones but also magnified their importance. Nevertheless, they did so only by not using the term 'pleasure': 'to cleanse itself from the sordes of its impure original, it was necessary it should change its name: the honourable, the glorious, the reputable, the becoming, the *honestum*, the *decorum*, it was to be called: in short, any thing but pleasure' (Bentham 1996: 18–19).

The religious party was based on fear, especially fear of the prospect of pain, 'at the hands of a splenetic and revengeful Deity'. If the philosophical party seldom went beyond criticizing pleasure, the religious party, stronger among the vulgar and superstitious, approved the active pursuit of pain and celebrated its infliction on itself and on others. Although the motivation of the two parties differed, the principle of asceticism which they embraced was the same, and their ideas often intermingled, especially when in alliance against the 'common enemy': 'the partisan of the principle of utility, whom they joined in branding with the odious name of Epicurean' (Bentham 1996: 19). Despite the irony, particularly with regard to the Stoics, Bentham was under no illusion regarding the power of asceticism in society: 'Let but one tenth part of the inhabitants of this earth pursue it consistently, and in a day's time they will have turned it into a hell' (Bentham 1996: 21).

When Mill wrote that it was better to be Socrates dissatisfied than a pig satisfied, he was departing somewhat from Bentham's position, in accommodating aspects of Stoicism within his own Epicureanism. In 'Whewell on Moral Philosophy' he had written:

The Stoics did not go so far as the ascetics; they stopped half-way. They did not say that pain is a good, and pleasure an evil. But they said, and boasted of saying, that pain is no evil, and pleasure no good: and this is all, and more than all, that Bentham imputes to them, as may be seen by anyone who reads that chapter of his book. This, however, was enough to place them, equally with the ascetics, in direct opposition to Bentham, since they denied his supreme end to be an end at all. And

hence he classed them and the ascetics together, as professing the direct negation of the utilitarian standard.

(Mill 1969: 176)

In this analysis Mill was not straying too far from Bentham's position. But throughout his writings, Mill tended to treat the Stoics more sympathetically than those he often referred to as 'Puritans' or 'ascetics'. In *On Liberty* he could refer in passing to 'the fanatical moral intolerance of the Puritans', and their 'success' in putting down public and private amusements: 'especially music, dancing, public games, or other assemblies for purposes of diversion and the theatre' (Mill 1977: i.283, 286). Later in the 'Inaugural Address Delivered to the University of St. Andrews' (1867) he mentioned 'Puritanism, which looking upon every feeling of human nature, except fear and reverence for God, as a snare, if not as partaking of sin, looked coldly, if not disapprovingly, on the cultivation of the sentiments' (Mill 1984: 253). At the same time he could point out in 'Nature' how Stoics and Epicureans agreed in holding that their respective systems were regarded as dictates of nature (Mill 1969: 376) or write sympathetically in *The Subjection of Women* about the Stoic teaching concerning moral obligations to slaves (Mill 1984: 266).

In this move to relate Stoicism to Epicureanism, Mill was invoking a long literary and philosophical tradition. Both the ancient Stoics and Epicureans regarded themselves as direct descendants from Socrates whom they treated as a 'wise man' and approved his ascetic way of life (though in different ways) (see Cicero 1991: 8). On a different subject George Grote could observe:

It is remarkable that Stoics and Epikureans, in spite of their marked opposition in dogma or theory, agreed so far in practical results, that both declared these two modes of uneasiness (fear of the gods and fear of death) to be the great torments of human existence, and both strove to remove or counterbalance them.

(Grote 1872: 437)

In modern thought from the seventeenth century onwards, there was a cultural obsession with Stoics and Epicureans, with Epicureanism growing in importance and significance, though often submerged beneath a more visible Stoicism (see Barbour 1998: 2–3). Not only could aspects of Epicureanism become reconciled with Stoicism but also with Christianity. The emphasis on the pursuit of pleasure, consisting of a simple diet and a life of austerity lived in tranquillity, were aspects of Epicureanism which resonated with similar themes in some forms of Christianity in which was added the prospect of even greater happiness after death (see Barbour 1998: 50–2).

Mill's agenda in this part of *Utilitarianism* was to prise elements of Stoicism away from Puritanism and link them to the Epicurean tradition. Here he was able to argue in a straight-forward manner regarding the enjoyment felt by intel-

ligent human beings as opposed to fools. Even though happiness, derived from the higher pleasures, might leave the individual subject to acute suffering, and the intelligent person might need more to make him- or herself happy, he invoked Stoic themes, such as a love of liberty, independence, and a sense of dignity, to give greater force to his view that it was better to be Socrates dissatisfied than a fool satisfied. At this point he did not stray far from Epicureanism, but he was now prepared for the main object of his criticism, Carlyle's belief that men lived and could live well without happiness. Here was a new form of Puritanism, one combined with German thought, which was mingling well with various homegrown versions, and against which Mill was mounting a serious attack. By taking elements of Stoic thought into his approach (and in this respect slightly modifying Bentham but not the larger Epicurean tradition), Mill could juxtapose a new kind of utilitarian hero who embraced sacrifice but, unlike Carlyle, did not renounce happiness. The utilitarian hero (or martyr) could sacrifice his or her own happiness to serve the happiness of others, and Mill considered such a sacrifice to constitute the highest virtue. In a paradoxical fashion, he continued: 'I will add, that in this condition of the world, paradoxical as the assertion may be, the conscious ability to do without happiness gives the best prospect for realizing such happiness as is attainable' (Mill 1969: 217; 1998: 63). In the previous paragraph Mill wrote concerning this sacrifice:

I ask, would the sacrifice be made if the hero or martyr did not believe that it would earn for others immunity from similar sacrifices? Would it be made, if he thought that his renunciation of happiness for himself would produce no fruit for any of his fellow creatures, but to make their lot like his, and place them also in the condition of persons who have renounced happiness? All honour to those who can abnegate for themselves the personal enjoyment of life, when by such renunciation they contribute worthily to increase the amount of happiness in the world; but he who does it, or professes to do it, for any other purpose, is no more deserving of admiration than the ascetic mounted on his pillar.

(Mill 1969: 217; 1998: 63)

Compare this passage with the following in Carlyle's *Sartor Resartus*:

there is in man a HIGHER than Love of Happiness: he can do without Happiness, and instead thereof find Blessedness! Was it not to preach for this same HIGHER that sages and martyrs, the Poet and the Priest, in all times, have spoken and suffered; bearing testimony, through life and through death, of the Godlike that is in Man, and how in the Godlike only has he Strength and Freedom?

(Carlyle 2000: 143)

Mill thus takes Kantian duty for utilitarian morality, and even Jesus of

Nazareth in whose golden rule 'we read the complete spirit of the ethics of utility' (Mill 1969: 218; 1998: 64). If Bentham had thought that Jesus, unlike Paul, never saw harm in anything which gave pleasure (Bentham 1823: 394), Mill took the sacrifice of Jesus for the happiness of mankind to represent the highest statement of utilitarian virtue.

Mill's concern here, however, was not only with the development of an ethics of sacrifice within utilitarianism but also with the political question of whether or not humanity could become happy and in what that happiness consisted. There would be, additionally, no point in establishing the institutions and laws and pursuing the path of reform (and even sacrifice) unless that happiness was attainable. Mill did not deny that most people lived in a state of unhappiness due to numerous factors such as poor laws, corrupt government, poverty, disease, selfishness, ignorance, and the absence of liberty, but he thought that the main elements of a happy life could be realized. Each satisfied life required moments of tranquillity intermingled with moments of excitement. It required the opportunity to care for others and for mental cultivation, not in order for everyone to become philosophers, but to develop interests in the world around them. In the exercise of one's faculties, one finds 'sources of inexhaustible interest': 'in the objects of nature, the achievements of art, the imaginations of poetry, the incidents of history, the ways of mankind past and present, and their prospects in the future' (Mill 1969: 216; 1998: 61). Mill was convinced that poverty could be overcome by society, and that science, together with good habits of physical and moral education, could enable mankind to tackle much debilitating disease. Mill was not setting forth utopia as being within the immediate grasp of mankind. On the one hand he believed that 'all the grand sources ... of human suffering are in a great degree, many of them almost entirely, conquerable by human care and effort'. But on the other hand he recognized that the removal of these sources of suffering would be 'grievously slow' and 'a long succession of generations will perish in the breach before the conquest is completed' (Mill 1969: 217; 1998: 62). He could appreciate that vast numbers of people were living without happiness and that in so-called civilized societies only a small percentage lived happily (Mill 1969: 217; 1998: 62–3). This recognition of widespread unhappiness did not lead him to abandon utilitarianism nor to restrict happiness to the life of the Epicurean sage, but to see the importance of sacrifice and duty in order to achieve happiness for everyone. In this respect he could argue that no other morality contained a greater degree of nobility and exaltation of the spirit than utilitarianism.

J.S. MILL ON JUSTICE AND LIBERTY

For approximately 300 years a number of philosophers have set forth what seemed to be a counter-intuitive thesis, that justice ought to depend on utility. It was counter-intuitive in the sense that it seemed odd that something so apparently definite, absolute, and morally demanding as justice should be based on what many thought was a shifting foundation of expediency. As we have noted, Hume and Bentham saw their own doctrines of utility reflected in the line from Horace to the effect that utility was the mother of justice and equity. The influence of this doctrine in numerous fields from moral philosophy to economics and politics has been enormous, but at the same time it has never been wholly convincing. That J.S. Mill would feel it necessary to state (and restate) arguments for the dependence of justice on utility reflects not only the enduring character of classical utilitarianism but also lingering doubts concerning one of its major principles.

In recent decades a further dimension to the problem of the connection between justice and utility has emerged. Scholars have reacted against a widely-held but simplistic view of utilitarianism, which seems to ascribe to the individual the moral obligation to act always to increase the happiness of members of society (and often of all sentient creatures in the world). This approach appears to require extreme benevolence and much self-sacrifice. In order to counter this view of utilitarianism, David Lyons, for example, has distinguished between Mill's theory of value on the one hand and his theory of obligation on the other. The former is concerned with pleasure, pain, and happiness, while the latter, with duties and rights (Lyons 1994: 112ff). To understand Mill's account of obligation, it is first necessary to turn to the arguments concerning justice which appear mainly in the final chapter of *Utilitarianism*. As Lyons writes:

If Mill were an act-utilitarian, his explicit, deliberate discussion of morality, in chapter V [on justice], would be, not just pointless, but positively misleading and inconsistent with that position. Mill's talk of rights

and obligations would be empty; some ascriptions of them would have little or no significance for practice.

(Lyons 1994: 75)

If we are obliged morally always to try to act to increase the amount of happiness in the world, Mill's attempt to define and limit our moral duties under the heading of justice would indeed have been pointless, because no such definition and limitation would be necessary, and our duties would be clear. But Mill's chapter on justice was not an appendix written to fill out his act-utilitarian theory. A number of commentators have found this material on justice not only indispensable for understanding Mill's utilitarianism but also highly relevant to his account of liberty in *On Liberty* (see, for example, Berger 1984; 1997: 45–65; Gray 1996; Brown 1999: 3–28). In addition, as we shall see, many of the ideas developed here were not unfamiliar in the classical utilitarian tradition discussed in this book. This suggests that the ascription of a simple act-utilitarianism to classical utilitarianism as a whole (i.e. from Hume to Mill) is seriously misleading.

In this chapter many of the themes in classical utilitarianism, particularly those concerned with utility, justice, and liberty, will be re-examined through a study of Mill's *Utilitarianism* and *On Liberty*. This analysis of Mill's theory will show not only how well he had absorbed the Epicurean and utilitarian traditions he inherited, but also how he deepened and enriched them with some new arguments and perspectives. In the course of this analysis the views of a number of his most prominent recent interpreters will be challenged, in so far as they have failed to capture the relationship between justice and liberty in his thought. They have failed to see clearly the connection between the account of rights and the liberty principle on the one hand and to appreciate the importance of freedom of thought and discussion in this context on the other.

Justice and utility

Mill's first object in the chapter on justice in *Utilitarianism* was to challenge the widespread belief that justice had a fixed and determinate meaning by asserting a number of common opinions connected with it, and suggesting that while justice was not regarded as an ambiguous idea (see Mill 1998: 139n), 'it is a matter of some difficulty to seize the mental link which holds them together, and on which the moral sentiment adhering to the term essentially depends' (Mill 1969: 244; 1998: 91). Berger (1984: 127) has suggested that the 'mental link' is the idea of punishment, but, surely, while punishment enabled the distinction between justice and ordinary expediency to be made, it did not capture a common theme in the different opinions concerning justice. It is important to emphasize that Mill did not find these common attributes 'ambiguous', as if a clearer conception of justice than the ones embodied in the attributes might replace them. As we shall see, the answer to the problem was not one of a less ambiguous intuition regarding justice, but one of a different foundation. In other

words, nothing linked the various opinions regarding justice, but, nevertheless, the idea of utility (and subordinate concepts) would enable Mill to present a coherent account of justice, which included these various conceptions.

The first notion of justice was that it was unjust to deprive anyone of personal liberty, property, etc., that is to say, it was just to secure their legal rights (Mill 1969: 241–2; 1998: 88–9). The second common attribute considered the problem of unjust laws. Hence it was commonly believed that justice extended to securing moral rights, and that it was unjust to deprive a person of that to which he or she had a moral right (Mill 1969: 242; 1998: 89). The third common attribute concerned desert and the belief that each person should receive that which he or she deserved (whether good or evil). Mill noted that it was ‘perhaps the clearest and most emphatic form in which the idea of injustice is conceived by the general mind’ (Mill 1969: 242; 1998: 89–90). We feel unfairness directly and often with powerful mental and physical effects on us. The sense of justice, which evokes fairness (in returning good for good and evil for evil), might be embodied in something so basic as talionic punishments. Nevertheless, as Mill also pointed out, while desert was clear and determinate, it was seldom regarded as absolute. We do not always regard it as right when we employ desert as the basis of justice and can often waive the claims of justice as desert (as Jesus or Socrates did in returning good for evil) in favour of other considerations.

The fourth common attribute was concerned with keeping and breaking faith, or, in Bentham’s terms, which Mill employed, with securing or disappointing expectations. Like other ‘obligations of justice’, these could be overruled at times by other considerations which would absolve one of the obligations (Mill 1969: 242–3; 1998: 90). The final common attribute was connected with impartiality: ‘it is by universal admission inconsistent with justice to be *partial*; to show favour or preference to one person over another, in matters to which favour and preference do not properly apply’ (Mill 1969: 243; 1998: 90). Impartiality should not be regarded as a duty to be observed at all times, because at times favour or preference was relevant to decisions. But under other circumstances it was obligatory, e.g. where rights were concerned, where impartiality meant being influenced by desert, and where the object was to advance the public interest. Impartiality was also connected with equality, though some would argue that equality constituted the essence of justice (Mill 1969: 243–4; 1998: 91). But equality varied a good deal in its application, and Mill noted that great inequalities were often accepted even by those who adopted equality as a principle of justice. Mill then turned to the etymology of justice, again to show that there was no obvious meaning for the term. If the etymology led anywhere, it was to the ideas of law and legal constraint. And with these ideas came those of duty and sanctions for non-performance (Mill 1969: 244–5; 1998: 91–2).

The account of justice which earlier writers in the utilitarian tradition attacked was one surrounded by great cruelty. Mill’s nineteenth-century opponents might have been more civilized, but, nonetheless, Carlyle and Puritanism seemed to have one feature in common with earlier targets of utilitarianism, the

renunciation of happiness. Nevertheless, Mill's discussion of the common attributes of justice apart from utility did not mention its emphasis on pain and its potential cruelty. What utility brought to justice in this part of *Utilitarianism* was mainly intellectual coherence, but in fairness to Mill, the idea of justice serving human happiness, as opposed to being an end in itself, was not neglected in the overall account of utility.

Mill developed the idea of justice by drawing on the Grotian distinction between perfect and imperfect obligations, and both kinds of obligations (which comprise justice and morality) were distinguished from general worthiness. He had already distinguished between morality and worthiness by attaching duty and obligation to the former but not to the latter. But the distinction between perfect and imperfect obligations allowed him to distinguish between justice and the rest of morality:

In the more precise language of philosophic jurists, duties of perfect obligation are those duties in virtue of which, a correlative *right* resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right.

(Mill 1969: 247; 1998: 94)

The fulfilment of imperfect obligations, as in instances of charity and beneficence (which we are morally bound to practise), were open to choice. My obligation to be charitable did not confer any right to charity upon a specific person, and I could choose the objects of my beneficence. With perfect obligations, however, such rights existed or ought to have existed. Thus, justice required a response to claims that one had a legal or moral right.

We have already seen in the earlier discussions of justice in the Epicurean tradition how the distinction between perfect and imperfect obligations was used to clarify ambiguities in the older Aristotelian distinction between corrective and distributive justice. Justice was linked more definitely to the realm of perfect rights and obligations, and Mill's employment of the distinction in *Utilitarianism* was designed to limit the range of moral behaviour covered by justice. If all duties were absorbed into justice, society would become highly regulated and deeply unpleasant, with punishment deemed appropriate for every moral lapse.

Let us consider briefly the connection between the survey of different ideas of justice and the distinction between perfect and imperfect obligations. On the face of it, the distinction between perfect and imperfect obligations would not be relevant to many of the common ideas of justice, and in particular to issues of desert, impartiality, and equality (see Lyons 1994: 143). The distinction seems mainly useful for clarification where moral and legal rights are involved. In his use of the distinction, as we have noted, Mill was attempting to draw a line as to where moral obligations which might be regarded as obligations of justice should be located without drawing all moral obligations into the realm of justice. Under the distinction, issues of desert or equality might or might not become issues of

justice with respect to rights, though they might remain as issues of justice in an ideal sense. For example, we might conclude that the possession of equal amounts of property is required by justice as an ultimate goal without ascribing any rights to individuals. This conclusion would not involve the use of the distinction between perfect and imperfect obligations. In addition to these difficulties in reconciling the different conceptions of justice with the distinctions between perfect and imperfect obligations, Berger has noted that Mill did not often use the distinction, and there are a number of discussions of duties and rights in Mill where no allusion is made to it (Berger 1984: 214ff). The distinction does not appear in *On Liberty*, for example, even though it might have been useful to clarify the meaning of the references to rights and punishment in the opening paragraphs of chapter IV (Mill 1977: i.276), concerned with the relationship between the individual and society, and to establish a clear link with the argument of *Utilitarianism*. We shall return in the next section to the problem of the relationship between the main arguments of *On Liberty* and their connection with those in *Utilitarianism*.

Having used the distinction between perfect and imperfect obligations to identify that part of morality and worthy deeds that might be ascribed to justice, Mill then turned to the sentiments and feelings related to it. Like the distinction between perfect and imperfect obligations, these sentiments are familiar elements in the utilitarian tradition. One might pause to enquire why Mill wished to consider such feelings and sentiments here. He recognized both the strength of feelings regarding justice and injustice and the way such feelings tended to legitimate a more encompassing idea of justice that was thought by some to be incompatible with the idea of utility. Deep feelings of revenge where one was harmed, and sympathy where others close to us were harmed, inclined one to insist on justice being enforced in 'the whole detail of private life' (Mill 1969: 245; 1998: 92). But if our feelings regarding justice can form the main obstacle to a utilitarian account of justice, at the same time the problematic character of these feelings can generate the need for utilitarian considerations. We obtain great pleasure from the 'feelings of fitness' aroused when we see injustice punished, and additional pleasure from acts of punishment that repress injustice (Mill 1969: 245; 1998: 93). Any account of justice and utility that failed to address these feelings would not be very persuasive.

Mill relied explicitly on Alexander Bain's discussions of the importance of the sanctions of punishment to that part of morality linked to justice, and to the connection between utility and sentiment in the composition of moral rules (see Bain 1859: 286–7, 307–8). Bain, in turn, drew on the Scottish tradition in moral philosophy and Bentham's account of utility. According to Bain (1859: 308), moral rules were partly based on utility and partly on sentiment and tradition ('the continuing influence of some former Utility or Sentiment'). Those based on utility and linked to justice were depicted as follows:

all those that protect the persons, property, good name, etc., of the members of each society from violation; that enforce justice and the fulfillment of bargains and engagements; that uphold veracity and integrity; that maintain obedience to constituted authority; that extend protection to the helpless, and so forth.

(Bain 1859: 308)

When Mill turned to the feelings and sentiments concerned with justice, he set forth the thesis that the sentiment of justice did not arise from utility, but though ‘the sentiment does not, whatever is moral in it, does’ (Mill 1969: 248; 1998: 95). He meant by the ‘sentiment’ of justice (a) the desire to punish someone who had harmed another; and (b) the belief that there was a definite person who had been harmed (reflecting presumably the idea of specific people with rights having been harmed). He then distinguished two further sentiments that generated the first, i.e. the desire to punish someone who had harmed another. He referred to these in terms of natural instincts: (a) the impulse of self-defence; and (b) the feeling of sympathy (Mill 1969: 248; 1998: 95). Humans resembled other animals in seeking to injure those who had injured them, but they differed with respect to a wider range of sympathy, which they were capable of extending to all sentient beings. Humans also had a superior intelligence which enabled them to grasp ‘a community of interest’ between themselves and human society:

The same superiority of intelligence, joined to the power of sympathizing with human beings generally, enables him to attach himself to the collective idea of his tribe, his country, or mankind, in such a manner that any act harmful to them rouses his instinct of sympathy, and urges him to resistance.

(Mill 1969: 248; 1998: 96)

Mill then asserted that the sentiment of justice, including this desire to punish based on a ‘natural feeling of retaliation or vengeance’ extended, through intelligence and sympathy, to society as a whole, ‘has nothing moral in it; what is moral is, the exclusive subordination of it to the social sympathies’ (Mill 1969: 249; 1998: 96).

For Mill, therefore, feelings of vengeance and retaliation for injuries committed on others and us were not the basis of justice or part of its moral character, though he would concede that from such feelings justice might acquire ‘its peculiar impressiveness, and energy of self-assertion’ (Mill 1969: 250; 1998: 97). He did not concede that these sentiments might form the basis of a rejection of utility as the foundation of justice. For justice to be a moral virtue, it must be composed of more than feelings of vengeance. These other elements, as we have seen, consisted of rules of conduct and equally strong feelings that those who broke the rules and infringed upon rights should be punished. The conception of

moral rules Mill sought to embrace was not different from Kant's principle, but he connected it directly to the principle of utility (see Mill 1969: 249; 1998: 97). Revenge alone was not sufficient for justice. The context of justice was provided by the other elements discussed above, and particularly by the idea of possessing a right which society ought to defend.

At this point Mill brought together his account of the sentiment of justice with the earlier account of perfect obligations and moral and legal rights. At stake in the connection with utility was what Mill referred to as 'the extraordinarily important and impressive kind of utility' which was so important and so impressive that he claimed that feelings of vengeance and retaliation, thought by many to be the essence of justice, were considered to be derived from this special kind of utility. He depicted this utility as follows:

The interest involved is that of security, to every one's feelings the most vital of all interests. Nearly all other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment; since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves.

(Mill 1969: 250–1; 1998: 98)

The emphasis on security followed directly from the idea of perfect obligations. For Lyons, this emphasis seems to suggest 'a *negative* utilitarian conception of justice, the obligations of which are seen as prohibiting various forms of conduct that harm other persons' (Lyons 1994: 117). Mill obviously lent support to this view in referring to 'the moral rules which forbid mankind to hurt one another' (Mill 1969: 255; 1998: 103). It is worth noting here (though it will be developed in the next section) that Mill took this emphasis from a familiar distinction Bentham often made between liberty on the one hand and security on the other. If liberty meant acting as one wished without restraint, security meant being restrained from acting to harm others and hence being secure from harm because of this restraint enforced on everyone. Donner is correct in seeing that the distinction employed by Mill is not one that is commonly made (following Berlin) between negative and positive liberty (see Donner 1991: 162; chapter 15 in this book). But she seems wrong in suggesting that the idea of security can be understood in terms of a distinction between negative and positive rights. For Bentham (and also for Mill) security was not purely negative and could not be conceived simply in terms of the absence of interference. That was liberty. Security required positive restraint and the institutions and practices to develop and enforce that restraint. It required the criminal law, the police, courts,

and other agencies to prevent people from harming others. It required the civil law and numerous civil agencies to ensure that contracts, for example, were fairly made and enforced, and that rules concerning the sale or inheritance of property were fair and fairly enforced. It required people to feel secure regarding not only the present but also the future so that they could enjoy certain settled expectations, e.g. that the enjoyment of their property would not be suddenly brought to an end without compensation by a highway built through it, or that an agreed rate of interest for a loan of money was not arbitrarily repudiated. Mill was aware of the positive side to security and justice when he gave examples of rights. ‘Thus, a person is said to have a right’, he wrote ‘to what he can earn in fair professional competition; because society ought not to allow any person to hinder him from endeavouring to earn in that manner as much as he can’ (Mill 1969: 250; 1998: 98). The positive dimension to the security established by the right referred to the complex institutional development necessary to ensure ‘fair professional compensation’. The negative side – non-interference in earning as much as one can – diminishes in significance next to the positive side of living in a society that secures the complex restraint necessary to achieve ‘fair professional competition’. Nevertheless, the positive side of security did not extend for Mill to the right to earn a given sum of money, even though that sum might enable one to develop oneself as an individual (Mill 1969: 250; 1998: 98). Hence, there would not be, for Mill, a positive moral right to individual development in this sense. However, included within security might be positive as well as negative objects. Bentham, for example, included subsistence and abundance (as future subsistence) as part of security, and if, in Mill’s terminology, security established moral rights, these rights might well go beyond non-interference to a perfect right to subsistence. This would appear to be a positive as opposed to a negative right, but this distinction only makes much sense if security was meant to be *either* negative *or* positive, when it was both. Security in relation to subsistence protects one against the deprivation of nourishment, which endangers life and health, as well as affording access to food where it is available and where one is in danger of starvation.

Besides the use of the idea of moral rights, which Bentham generally opposed (see chapter 13 in this book), Mill also differed from Bentham (and from jurists such as Grotius) in seeing security as an idea based on feelings as intense and absolute as those usually associated with justice and not necessarily associated with utility. Mill’s position is easily grasped in the following passage:

Our notion ... gathers feelings round it so much more intense than those concerned in any of the more common cases of utility, that the difference in degree (as is often the case in psychology) becomes a real difference in kind. The claim assumes that character of absoluteness, that apparent infinity, and incommensurability with all other considerations, which constitute the distinction between the feeling of right and wrong and that of ordinary expediency and in expediency. The feelings

concerned are so powerful, and we count so positively on finding a responsive feeling in others ... that *ought* and *should* grow into *must*, and recognised indispensability becomes a moral necessity, analogous to physical, and often not inferior to it in binding force.

(Mill 1969: 251; 1998: 98)

Mill's moral imperative regarding justice was elevated into a principle with a force analogous to a physical law. It acquired this force via the feelings he believed were associated with security, and which gave that portion of utility this additional absoluteness and compelling force.

Mill used these assertions to criticize those who held that justice was a standard that one's mind could intuit ('can recognize by simple introspection of itself') apart from utility. He called such a standard 'ambiguous' and asked 'why so many things appear either just or unjust, according to the light in which they are regarded?' (Mill 1969: 251; 1998: 99). As we have seen, while the common attributes of justice were not necessarily ambiguous, any attempt to grasp an idea of justice that embraced these different attributes, apart from utility, was bound to fail. Furthermore, he had dealt with the problem of defining a branch of morality which included justice and had the force of an absolute principle.

But Mill was not content to leave utility, that is to say, that part of utility concerned with security, as an absolute principle, as this would deprive it of its other attributes which made it attractive to earlier writers, especially in the eighteenth century. He returned to the controversies surrounding justice and argued against those who saw justice as an absolute and self-evident principle, that:

Not only have different nations and individuals different notions of justice, but, in the mind of one and the same individual, justice is not some one rule, principle, or maxim, but many, which do not always coincide in their dictates, and in choosing between which, he is guided either by some extraneous standard, or by his own personal predilections.

(Mill 1969: 251–2; 1998: 99)

Mill had thus used the principle of utility to show both the absoluteness of justice and its flexibility in encompassing numerous and complex moral ideas.

Justice and liberty

Let us now turn to the difficult question of the connection between justice and liberty in Mill's thought. An influential version of this connection is that Mill's conception of liberty can be studied best 'as a branch of his theory of justice' (Berger 1984: 227; see also 229). This follows from a preoccupation among recent commentators with the doctrine of rights in *Utilitarianism* (connected to the distinction between perfect and imperfect duties) and Mill's reference to the

‘wrongful interference with each other’s freedom’ as falling within the scope of justice (Berger 1984: 231; Mill 1969: 255; 1998: 103). In support of this approach, Berger, for example, also refers to Mill’s *Autobiography*, where the phrase ‘the rights of individuality’ appears, thus emphasizing the way the account of justice in *Utilitarianism* provides both a framework of security for non-interference in *On Liberty* and a support for the cultivation of individuality (Berger 1984: 229; Mill 1981: 260).

Before exploring Mill’s text in greater detail it will be appropriate to review the different ideas he inherited from the utilitarian tradition. Four important strands appear in Bentham’s writings, which Mill clearly adopted. The first, as we have seen, was Bentham’s emphasis on security and particularly security of expectation as the basis of civil liberty (see Rosen 1987a: 121–38; Kelly 1990: 137–67). What was surprising about Mill was not that he adopted the idea, but that he followed Hume in linking security to justice rather than to liberty. Mill might have discussed security in *On Liberty* as that form of liberty that embraced issues traditionally associated with justice, but to do so successfully, he might have felt it necessary to provide a full account of justice and its connection with utility. He remedied his omission in *Utilitarianism*, but to do so he had to connect security with justice. Nevertheless, his conception of justice clearly reflected the liberty principle at one level where Mill referred to a framework of interests and rights, which formed limits to the free exercise of individuality but within which individual freedom could be paramount. Such a framework (in Bentham conceived as civil liberty) might explain why Mill referred in *On Liberty* to ‘the nature and limits of the power which can be legitimately exercised by society over the individual’ as ‘Civil, or Social Liberty’ (Mill 1977: i.217). It might also explain how Mill could easily move from a discussion of rights within this framework to duties and responsibilities as a result of receiving its benefits. The utilitarian idea of security, though referring to liberty under law, was not, as we have seen, a theory of pure liberty (doing as one pleased), and hence could require various curtailments of liberty in this sense for the sake of security or civil liberty. Civil liberty could then be conceived in terms of duties (involving restraint on liberty) not to harm others.

The second idea that Mill inherited from Bentham was that of a sphere of private ethics, which existed apart from legislation. Bentham distinguished between these two spheres as follows:

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 of 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 the most conducive to the happiness of

the whole community, by means of motives to be applied by the legislator.

(Bentham 1996: 293)

The problem with maintaining the distinction was that the legislator had tended in most countries to interfere too much in this private sphere:

The great difficulty here is, to persuade them to confine themselves within bounds. A thousand little passions and prejudices have led them to narrow the liberty of the subject in this line.

(Bentham 1996: 291)

Bentham mentioned, in particular, aspects of religion, situations where the individual had harmed himself or herself, and where beneficence came into play. His comments on religion were somewhat sarcastic, particularly in his portrayal of the legislator unable to control his benevolence in correcting errors of belief, which usually resulted in great misery inflicted on his subjects. He referred specifically to Louis XIV's revocation of the Edict of Nantes in 1685: 'The ground-work, pure sympathy and loving kindness: the superstructure, all the miseries which the most determined malevolence could have devised' (Bentham 1996: 291). Bentham's position was fairly clear: matters of religious belief belonged properly to the realm of private ethics rather than to legislation.

Although Bentham recognized that legislation played a key role in preventing the commission of harmful acts against others, he nonetheless believed that acts of self-harm fell mainly in the category of private ethics. He also believed that rules of beneficence should be left largely to the free choice of the agent. In this sphere, however, he believed that there were a few cases where the law might enforce beneficence to good effect. He posed the following question:

In particular, in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?

(Bentham 1996: 293)

Bentham presented three brief examples where legislation might enforce duties of beneficence with appropriate sanctions. In the first a woman's hat caught fire, and although there was water nearby to put it out, a man looked on and laughed. The second concerned a drunken man who fell into a puddle face down and was in danger of suffocation. Although he might be saved by his head being lifted and turned to one side, a person let him lie there and die. Finally, a man was allowed to enter a room filled with gunpowder with a lighted candle without any warning. In these examples Bentham believed that there were clear duties of beneficence and the failure to perform them should be subject to

punishment (Bentham 1996: 293n). In addition, Bentham also distinguished generally within the sphere of private ethics between duties to oneself and duties to others (Bentham 1996: 284). Mill clearly had absorbed this material in both *Utilitarianism* and *On Liberty*. Bain also did so when he wrote:

Now the happiness of each individual consists of two parts – the one depending upon himself, and the other depending upon his fellows. But whatever portion depends upon the individual's own self, is of course not affected by the conduct of others; still less are any persons responsible for it. The free action of individuals for themselves, and the happiness or misery resulting therefrom, is each person's own affair, and no other person can interfere to increase the sum of the one or diminish the sum of the other. Hence the region of human happiness resulting from individual action alone, perhaps the largest portion, ought not to be included in the happiness to be brought about by the actions of others.

(Bain 1852: 89–90)

Bain seemed very close to Mill's position, particularly where he concluded: 'what good I can most certainly do for my fellows, is to contribute to the *safety* of their condition, leaving them to work out their own happiness as they best can, and not troubling myself with the enormous problem of the maximum of human enjoyment' (Bain 1852: 90).

A third strand, which Mill adopted, concerned paternalism. In chapter 7 we have seen how critics of Bentham believed not only that usury laws were a useful economic principle limiting the costs of borrowing money but also that they had a more important value as part of a deeply paternal approach to the economy and constitution itself in protecting the weak and vulnerable against exploitation and the destruction of fortunes, families, institutions, and values. Bentham's intervention constituted much more than a correction of Smith's doctrine of free trade, and claimed new ground for liberty against paternalism.

A fourth strand, which was strong in both Bentham and James Mill and adopted by John Stuart Mill in his earliest writings, concerned those aspects of freedom of expression such as freedom of the press, restrictions on the use of libel law which had been used to silence the expression of religious and political opinions, and access to information so that corruption and oppression by ruling elites might be opposed (see O'Rourke 2001: 9–22; Rosen 1983: 19–40, 111–29; Bentham 1821a; 1983a: 86–7, 427; 1821b; Mill 1992: 95–135). Although most of Bentham's and the elder Mill's concerns were political, and they sought to restrict government interference with individual liberty, there were important implications for other aspects of individual development. These included the spheres of education and religion, each of which had an important bearing on the cultivation of individuality.

Given Mill's account of justice in *Utilitarianism* and the intellectual inheritance within the utilitarian tradition on which he could draw, there were numerous links between this theory of justice and liberty, which he might have explored. One can even claim that once Mill made the distinction between perfect and imperfect obligations and thus restricted justice and punishment to some moral acts but not others, the theory of justice became a theory of liberty, allowing the definition of spheres of moral life which should be protected by law and opinion, and the definition of other spheres which should be free.

There is thus a good deal of merit in approaching *On Liberty* from the account of justice in *Utilitarianism*, though there are also dangers in attempting to see all of Mill's views on liberty as, in Berger's terms, 'an application of his theory of justice'. At the level of biography O'Rourke has pointed out that there is little evidence for the widely accepted view that the two works were composed simultaneously and were intended to complement each other (O'Rourke 2001: 112–13; cf. Crisp 1997: 173–5). *Utilitarianism* was begun in 1859, a full year after *On Liberty* was offered for publication, and during the period of its composition, despite a correspondence with Alexander Bain concerning *On Liberty*, no reference was made in that correspondence or elsewhere to any connection between the two works. In addition, had *Utilitarianism* been written at the same time as *On Liberty*, O'Rourke suggests that there would have been some reference in *Utilitarianism* (as appeared in *On Liberty*) to Mill's indebtedness to Harriet Taylor.

Furthermore, and more importantly, O'Rourke challenges the account of a simple link between interests, rights, and hence justice on the one hand and the liberty principle on the other. He does so largely because such an account ignores the connections between chapter II of *On Liberty* ('Of the Liberty of Thought and Discussion'), concerned with truth and its apprehension, and the material in the rest of the text devoted to individual development apart from cases where liberty might be curtailed due to harm to the rights and interests of others (O'Rourke 2001: 111–12). In addition, the distinction between perfect and imperfect duties, which was crucial for the definition of justice in *Utilitarianism*, has no explicit role in *On Liberty* (see Lyons 1994: 137). Berger has noted that only in *Utilitarianism* did Mill suggest that one can act wrongly without acting unjustly (Berger 1984: 219), though there are numerous examples elsewhere in his work where beneficence does seem to give rise to rights in others (and hence claims for justice), such as in the right to subsistence where one is starving (Berger 1984: 222). Mill was also well aware that numerous institutions in modern society curtailed liberty either directly or indirectly through taxation and other means, and, like Bentham, he could appreciate that while curtailing liberty in one sense, these institutions provided greater security against harm and hence liberty in another sense. His account of liberty was not intended to prevent the existence of such necessary institutions.

These arguments about justice and liberty do not indicate whether or not Mill would support a socialist, welfare, or highly limited and libertarian state (and hence favour or oppose liberty at that level), though commentators have tended

to interpret Mill's conceptions of justice and liberty in this ideological fashion. For example, Donner's distinction between negative and positive rights, though not without merit, is used mainly to attack a politically libertarian position she ascribes to Gray (see Donner 1991: 162ff; Gray 1996). Her acceptance of Berger's account of the relationship between justice and liberty supports her critique of D.G. Brown's libertarianism (see Donner 1991: 190ff; Brown 1999). The attempt to embed Mill's thought into some version of liberalism or 'liberal theory' is also misleading, because the philosophical analysis of justice and liberty leads to no specific political orientation, and one can find conservative, liberal, and radical elements in numerous aspects of his discussion of these topics (see Ten 1980: 1; Gray 1996: 130–58). Indeed, some attempts to accommodate Mill's theory in one or other political doctrine have given rise to even more absurd theories concerning Mill's opposition to liberty and liberalism (see Cowling 1990; Himmelfarb 1974; Hamburger 1999).

The distinction between perfect and imperfect duties, which was originally intended to replace the Aristotelian categories of corrective and distributive justice, opened up the realm of distributive justice to liberty. In place of legal or even constitutional rules of distribution there can be free markets of various kinds where the rules governing markets are designed, on pain of punishment, to prevent people from harming each other. *On Liberty* might be regarded as proposing a free market in ideas and actions where, so long as the rules are kept (regarding physical injury, libel, censorship, etc.), the market will deliver enormous benefits to members of society.

In *On Liberty* Mill drew an analogy between the doctrine of free trade and the principle of liberty. In the past, he noted, it was considered important to fix prices and regulate the way goods were made. Under the principle of free trade:

it is now recognized, though not till after a long struggle, that both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free, under the sole check of equal freedom to the buyers for supplying themselves elsewhere. This is the so-called doctrine of Free Trade, which rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this Essay.

(Mill 1977: i.293)

Mill recognized, of course, that some public restrictions on markets were essential to prevent harm, and he noted two examples where this was the case. The first concerned the prevention of fraud by the adulteration of various products and the second, sanitary and safety precautions to prevent injury to people at work. For Mill:

Such questions involve considerations of liberty, only in so far as leaving people to themselves is always better, *caeteris paribus*, than controlling

them: but that they may be legitimately controlled for these ends, is in principle undeniable.

(Mill 1977: i.293)

Free trade could thus be limited or even curtailed to prevent harm. Mill then said that in matters of trade there were also issues that arose from the liberty principle as opposed to the principle of free trade. The three examples Mill employed were concerned with public restrictions on access to alcoholic drinks, opium, and poisons, and Mill distinguished these examples from those he used in free trade, as being concerned with infringements of liberty of the buyer rather than the producer or seller. Mill would not deny that the nature and extent of restrictions on producers and sellers would have a profound impact on the freedom of the buyer to purchase various products. He might well have accepted that if considered in the latter perspective the restrictions might be seen as restrictions on the liberty principle and hence the two principles could be regarded as being intertwined.

Mill's discussion of the distinction between free trade and the liberty principle, however, confirms his position that the liberty principle was not intended to cover all aspects of liberty. His chosen perspective was that of the individual, his or her security and development, as consumers of ideas and performers of actions based on those ideas. At the heart of the liberty principle was a freedom of access to those ideas and participation in a social system that kept the ideas alive and vibrant. One might even say that liberty of thought and expression was the lifeblood of the liberty principle.

In making this claim it is important to see how strongly Mill rejected paternalism here, and how important and radical such a rejection was. The attempt to interpret the liberty principle from the perspective of justice would not adequately capture the centrality of liberty of thought and expression to Mill's position. Riley, for example, labels the case of freedom of expression as an 'extraordinary' case rather than the archetypal or paradigm case of liberty, because freedom of expression can be seen as a strongly other-regarding sphere, though one that does not require control and regulation (Riley 1998: 120). But what placed freedom of expression at the heart of Mill's defence of liberty was its unambiguous rejection of paternalism, in insisting that the mature individual in a developed society must have free access to the information and knowledge necessary for individuals to determine the truth about issues concerning themselves and others. As a proponent of the interpretation adopted here, O'Rourke claims that 'this reading regards the principle of liberty as primarily anti-paternalist in focus, rather than regarding anti-paternalism as an implication or by-product of that principle' (O'Rourke 2001: 121). In making this claim he distinguishes it from the positions of Gray (1996) and Skorupski (1989) in holding that his aim 'is to demonstrate that anti-paternalism is not an *implication* but the *essence* of the principle of liberty' (O'Rourke 2001: 201n).

Liberty and the fragility of truth

Mill's argument concerning liberty of thought and expression not only embraced anti-paternalism but was based on a unique account of truth which was carefully linked with the liberty principle. This account of truth did not refer to individual self-understanding alone but was particularly other-regarding:

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.

(Mill 1977: i.229)

Mill was interested in the lack of concern with truth in the commonplace way most human beings, even those who were willing to entertain dissenting opinions, formed their views and enforced them on others. Most people, he noted, were diffident about their own opinions and were happy to accept those held by 'the world', or that part of the world with which they came into contact. Few were troubled by the fact that this acquiescence in the views of others led to a kind of relativism, as opinions differed in various parts of the world – 'the same causes ... make him a Churchman in London ... [and] a Buddhist or a Confucian in Pekin' – or in different ages (Mill 1977: i.230). The legal or popular enforcement of these opinions involved an assumption of infallibility, and it is worth noting that such an assumption went hand in hand with what might be called an indifference to truth. The deaths of Socrates and Jesus were terrible events on which we look back with horror. But Mill believed that those who had carried out these crimes were not evil people but were 'men who possessed in a full ... measure, the religious, moral, and patriotic feelings of their time and people: the very kind of men who, in all times, our own included, have every chance of passing through life blameless and respected' (Mill 1977: i.236). What was missing with these 'ordinary' people was a serious concern for the truth, which initially involved a recognition that they might not know the truth and hence could not act with any infallible certainty. According to Mill, for people to act on the basis of their opinions with a regard to truth, they should accept, as a condition of doing so, a complete liberty of challenging their opinions (see Mill 1977: i.231ff). This condition should apply whether or not the received opinions were false or true. If they were false, then freedom of expression would enable people to have access to the truth. If they were true, Mill believed that freedom of expression would enable the truths to be living truths and not dead dogmas. Received truths were regarded by Mill as particularly dangerous. They lulled the mind into a passive acceptance and almost a vacancy of understanding where

the truth was forgotten and never reconsidered. In some cases, he argued, accepted doctrines remained ‘outside the mind, incrusting and petrifying it against all other influences addressed to the higher parts of our nature’ (Mill 1977: i.248). However true these accepted doctrines might be, they became at best truths passively held and at worst truths which became half-truths, because other considerations were ignored.

Mill’s approach to truth was a crucial part of his doctrine of freedom of expression. His great admiration of Socrates was as much due to Socrates’s insistence on the search for truth as part of wisdom and justice as to whatever truths Socrates uncovered in his searches (even the main one, that he knew nothing). At one level Mill seemed to find truth difficult to discover and nearly as difficult to retain, and his understanding of Socrates was related to these difficulties. Bentham, for example, was highly critical of Socrates:

While Xenophon was writing History, and Euclid teaching Geometry, Socrates and Plato were talking nonsense, on pretence of teaching morality and wisdom. This morality of theirs consisted in words. This wisdom of theirs, in so far as it had a meaning, consisted in denying the existence of matters made known to every body by experience, [and] in asserting the existence of a variety of matters the non-existence of which was made known to every body by experience. Exactly in proportion as they and their notions thus differed from the general mass of mankind, exactly in that same proportion were they below the level of it.
(Bentham 1983b: 135)

While Mill, like Bentham, was an empiricist and believed that experience and observation played an important role in ethics and politics, he wanted to hold on to a Socratic notion of truth, which assumed a truth beyond truth, not a Platonic theory of forms, but a truth which made our ordinary truths living and vibrant. This assumption credited the negative dialectic of the Socratic dialogue, where no positive conclusion was reached, together with the formal Scholastic disputations of the middle ages with insisting on the value of hearing both sides of all arguments. Bentham believed that truth, so long as people were free to experience it for themselves, was easily obtained. Ordinary people knew their interests and needed no truth beyond truth, just as they did not naturally hold to a *summum bonum*. For Mill it was not enough to know the truth, but one needed a ‘clear apprehension’, ‘deep feeling’, and an avoidance of ‘exaggerated, distorted and disjointed’ elements common in popular opinion (Mill 1977: i.252).

Without necessarily ascribing to Mill a hostility to ordinary people and their opinions and a Coleridgean elitism, which draws one away from the key points of *On Liberty*, it is important to see clearly the contrast he was making between truth obtained through the negative Socratic dialectic and that obtained

through a wholly positive method (such as cramming). Mill was convinced of the importance of the former to society and civilization:

It is the fashion of the present time to disparage negative logic – that which points out the weaknesses in theory or errors in practice, without establishing positive truths. Such negative criticism would indeed be poor enough as an ultimate result; but as a means to attaining any positive knowledge or conviction worthy the name, it cannot be valued too highly; and until people are again systematically trained to it, there will be few great thinkers, and a low general average of intellect, in any but the mathematical and physical departments of speculation.

(Mill 1977: i.251–2)

To explain his position Mill referred, as an example, to the widespread belief in civilization that developed in the eighteenth century and the admiration ‘of the marvels of modern science, literature, and philosophy’ (Mill 1977: i.253). Against this position Rousseau’s ‘paradoxes’ exploded ‘like bombshells’ and forced those holding opinions in favour of civilization to take into account such ideas as the superiority of a simple life and ‘the enervating and demoralizing effect of the trammels and hypocrisies of artificial society’ (Mill 1977: i.253). Mill did not believe that Rousseau was closer to the truth than those writers who viewed civilization as an unmixed blessing. On the contrary, he believed that the latter were much closer to a defensible position, but Rousseau put into the minds of later thinkers ideas that they must reconsider and develop. Hence, even though the original admiration of civilization might have been largely true, only with the collision with other opinions (even though they might be false) would this view become closer to the truth. This approximation might be achieved by absorbing true elements from the largely false doctrine and forcing the elements of a one-sided, though largely true opinion, to recombine in a form which is closer to the truth.

One of the widely accepted views concerning modern civilization, which Mill mentioned in passing, was that which overrated the differences between ancients and moderns, which Rousseau had presumably challenged in his restatement of some themes from ancient writers in his various works. Unlike Bentham, Mill did not simply ridicule the thought of Socrates and Plato, and he chose in *On Liberty* to highlight the importance of the negative dialectic of Socrates to modern conceptions of liberty. We might say that he placed a social version of Socratic dialectic at the heart of the liberty principle. Furthermore, when Mill came to the account of individuality and action he also took an example from antiquity, but this time he chose the example of Pericles rather than Socrates. In a curious passage (which has not received much comment (see Riley 1996: 241–8; 1998: 82–3, 89–90)), Mill wrote:

‘Pagan self-assertion’ is one of the elements of human worth, as well as ‘Christian self-denial’. There is a Greek ideal of self-development, which the Platonic and Christian idea of self-government blends with, but does not supersede. It may be better to be a John Knox than an Alcibiades, but it is better to be a Pericles than either; nor would a Pericles, if we had one in these days, be without anything good which belonged to John Knox.

(Mill 1977: i.266)

The comparison (between Knox, Alcibiades, and Pericles) anticipated in form that between Socrates dissatisfied and a pig satisfied in *Utilitarianism*, though the content and context were different. The two phrases in inverted commas (‘Pagan self-assertion’ and ‘Christian self-denial’) were taken by Mill from an essay by John Sterling, a friend of both Mill and Carlyle, and the passage ran: ‘Christian self-denial and Pagan self-assertion had attained an equipoise, strengthening and elevating each other’ (Sterling 1848: i.190). Sterling favoured this mixture of Christianity and paganism, possibly to save and renew the Anglican church. It was thought that his interest in Carlyle was based on a hope that the Scottish Carlyle would become a new John Knox (Tuell 1941: 277).¹

The passage in Mill, quoted above, which used the allusion to Sterling, also referred to Knox, and was the culmination of Mill’s critique of Calvinism, which emphasized obedience and duty, and found in ‘self-will’ ‘the one great offence of man’ (Mill 1977: i.265). Whatever crushed ‘human faculties, capacities, and susceptibilities’ was of no concern to the Calvinist; what mattered was obedience and that one should surrender oneself to God’s will (Mill 1977: i.265). Mill stated that this view of life was held by many who were not explicitly Calvinist, and while perhaps not as ascetic as Puritanism, nonetheless it led to a ‘narrow theory of life’ and a ‘pinched and hidebound type of human character’ which was ‘cramped and dwarfed’ (Mill 1977: i.265). Sterling’s combination of Calvinism and a form of paganism might have been the recipe for a revived Christianity, and one Carlyle might have approved, but for Mill, individuality needed much more, if it was to defeat the self-denying form of Calvinism. He recognized that pagan Platonism and Christian ‘self-government’ were already intertwined, but individuality required that a different form of pagan self-assertion had to be advanced. While he was happy to favour Knox over the libertine Alcibiades, he stated boldly that it was better to be Pericles than Knox, and furthermore, if a Pericles existed at this point, no legacy at all from Knox would be necessary (Mill 1977: i.266).

For the contemporary Victorian reader of *On Liberty* the allusion to Pericles might have been puzzling and even shocking. Prior to Grote’s magisterial *History of Greece* there were few champions of ancient Athenian democracy, which, after all, condemned Socrates, who remained a major hero of the Victorian period and, additionally, was known as a critic of democracy (Demetriou 1999: 118ff, 125, 230–43). Most historians of Greece followed Plato, Aristotle, Xenophon,

Lysias, and Isocrates and favoured Sparta over Periclean Athens (Demetriou 1999: 119–23), as did philosophers such as Rousseau (see Rousseau 1986: 61, 78).

It is important to appreciate the significance of Grote's history of Greece for Mill's *On Liberty*. Grote referred to the emphasis Pericles placed on liberty of thought and action not only from legal restraints but also 'from practical intolerance between man and man, and tyranny of the majority over individual dissenters in taste and pursuit' (Grote 1907: vi.181). In a remarkable passage Grote elevated Periclean Athens above all modern states, including modern democracies, in the liberty it granted to individuals. For Grote, Pericles's funeral speech both encouraged a wide diversity of tastes and sentiments and reflected this encouragement within Athenian democracy. As Grote concluded:

To impose upon men such restraints either of law or of opinion as are requisite for the security and comfort of society, but to encourage rather than repress the free play of individual impulse subject to those limits – as an ideal, which if it was ever approached at Athens, has certainly never been attained, and has indeed comparatively been little studied or cared for, in any modern society.

(Grote 1907: vi.182)

Grote was well aware that his praise of Periclean Athens required him to provide an account of the life and death of Socrates that was compatible with it. Just as with Mill, Socrates was a philosophical hero for Grote, and both emphasized the significance for later thought of Socrates's negative method (see Demetriou 1999: 229ff). Grote had also corrected the general opinion of the Sophists as corrupt and subversive (see Grote 1907: viii.312–59), and he did not hesitate to link Socrates with the best elements (particularly those which encouraged liberty of thought and expression) of the Sophists (see Demetriou 1999: 231ff; 1996: 36–50). As for the Athenian condemnation of Socrates, Grote wrote:

In any other government of Greece, as well as in the Platonic Republic, Sokrates would have been quickly arrested in his career, even if not severely punished; in Athens, he was allowed to talk and teach publicly for twenty-five or thirty years, and then condemned when an old man. Of these two applications of the same mischievous principle, assuredly the latter is at once the more moderate and less noxious.

(Grote 1907: ix.87)

Mill accepted this new version of Greek history with enthusiasm (see Mill 1986: iii.867–75, 1084–8, iv.1121–8, 1128–34, 1157–64). He twice reprinted the passage on Pericles (Mill 1978: 319–20; 1986: iv.1129–31) that Grote had written (as well quoting at length from Pericles's funeral oration as it appeared in

Thucydides), and referred to the passage as a valuable contribution to a 'vital question of social morals' (Mill 1978: 319). Mill wrote:

In the greatest Greek commonwealth, as described by its most distinguished citizen [Pericles], the public interest was held of paramount obligation in all things which concerned it; but, with that part of the conduct of individuals which concerned only themselves, public opinion did not interfere: while in the ethical practice of the moderns, this is exactly reversed, and no one is required by opinion to pay any regard to the public, except by conducting his own private concerns in conformity to its expectations.

(Mill 1978: 319)

The account of Knox and Christianity would fit in well with Mill's depiction of the ethical position of the moderns. Vigorous self-assertion on the public stage was not encouraged. Not only was submission and obedience the norm in public life, but Mill also noted the tendency in modern societies for individuals to conform in private life to the expectations of society. By emphasizing the example of Periclean Athens, Mill was first pointing to the importance of a free and vigorous public sphere in which there was full debate of ethical and political issues. This public sphere then enabled the private sphere to be free as well, in so far as it was left to its own devices.

Mill was mainly concerned here with the public sphere of modern societies in which the tyranny of the majority in its 'collective mediocrity' had begun to assume power (Mill 1977: i.268ff). He found this majority, however powerful in limiting liberty, nonetheless passive and susceptible to being led by others. Mill particularly rejected Carlyle's idea of hero-worship, in which the 'strong man of genius' forcibly seized power and made the world 'do his bidding in spite of itself' (Mill 1977: i.269). Such a conception denied liberty in so far as opinions were forced on mankind, denying them the freedom to develop their own opinions. In addition, the 'strong man of genius' would undoubtedly be corrupted in the process. Mill sought instead a regime that embraced individual liberty and allowed and encouraged individuality to flourish, as did Periclean Athens with its acceptance of Socrates for seventy years. Mill wanted to oppose the 'tyranny of opinion' in his own society by the encouragement of eccentricity (Mill 1977: i.269). As he wrote:

Eccentricity has always abounded when and where strength of character has abounded; and the amount of eccentricity in a society has generally been proportional to the amount of genius, mental vigour, and moral courage which it contained. That so few now dare to be eccentric marks the chief danger of the time.

(Mill 1977: i.269)

The cultivation of individuality thus depended on individuals of strong character and genius daring to be eccentric, but to dare to be eccentric depended in turn on a public sphere which encouraged such eccentricity to develop. Without the Periclean perspective Mill believed that the cultivation of eccentricity would seriously diminish and, with it, the existence of liberty throughout society.

Mill's emphasis on eccentricity was not intended to be only self-regarding, that is to say, to allow individuals to be eccentric in private while they were obedient in public. In operating throughout society the tyranny of the majority potentially enslaved both the public and the private. The cultivation of individuality required the exercise and development of one's talents throughout society, and required people to take risks for the sake of their own happiness and that of society. In this respect it was strongly anti-paternalist. The key to the development of individuality was freedom of expression and a regard for the truth, which was also both social and anti-paternalist. In chapters II and III of *On Liberty* one thus sees the development of the liberty principle in the sense of it being anti-paternalist social liberty. In the remainder of *On Liberty* Mill adjusted the idea of social liberty to fit into the doctrine of civil liberty in defining the limits to self-expression and individual eccentricity in terms of harm to others and security based on rights. Rather than seeing liberty as an application of the theory of justice, as Berger argued, it might be better to see justice as setting the parameters of liberty, marking out its limits, while freedom of expression and individuality form its dynamic core.

In *On Liberty* Mill brought to the utilitarian tradition several ideas which were new or had been neglected, but which did not undermine in any serious respect the utilitarian doctrine he later set out in *Utilitarianism*. For this reason, perhaps, the later *Utilitarianism* did not refer back to *On Liberty* or contain reflections on this earlier work despite the overlapping themes. In a curious way, the argument in *On Liberty* might even be said to strengthen the Epicurean doctrine that one finds in *Utilitarianism*, with its strong emphasis on the pursuit of pleasure and the avoidance of pain. If *On Liberty* stressed the fragility of truth, the constant need to challenge existing and widely held truths so that they remained alive and vibrant, and the tendency in modern societies to ignore or repress the truth, Mill could turn to pleasure, pain, and happiness for the certainty humans craved, a certainty which would enable them to agree to allow the negative dialectic to flourish in their midst. Although some Platonists might regard this as a deal with the devil, Mill found no difficulty in reconciling hedonism with the pursuit of truth. There are a few additional themes which resonate in both essays. If Mill attacked Carlyle and Puritanism in *Utilitarianism*, he had already criticized Carlyle and Calvinism in *On Liberty*. If Socrates dissatisfied was superior to a satisfied pig in *Utilitarianism*, the Socratic negative dialectic had already been shown to be the key to liberty in the earlier essay. Mill had endeavoured in both works to attach the Epicurean tradition to Socrates, although the Epicurean garden was now clearly the whole of society.

Part II

PUNISHMENT OF THE INNOCENT

Many moral and political philosophers, including those sympathetic to utilitarianism, take the view that utilitarianism allows for and at times even requires the punishment of the innocent. Despite the widespread expression of this view, its meaning is not clear. One might trace at least three different strands of argument which are often conflated, if not confused. The first is concerned with punishment itself and sees the punishment of the innocent as part of the legacy of utilitarianism in a theory of deterrence. If crime can be deterred by punishing the innocent, such punishment is supposedly justified. The second strand is concerned with justice and the potential conflict between maximizing happiness on the one hand and its distribution according to some principle, such as desert, on the other. The idea of inflicting pain on an innocent person is introduced not as a component of a theory of punishment but as a possible means of maximizing happiness generally in society. The third strand holds that punishing the innocent or immorality generally is a potential feature of all teleological theories (including utilitarianism) in cases in which such actions would be conducive to the realization of the end. This strand of thought emphasizes the tendency for the end to justify whatever means are employed.

Of the three strands of thought my concern in this chapter will be with the first, in which punishing the innocent arises as a problem in the justification of punishment. The second strand will be considered in the next chapter. Ted Honderich has stated the problem with regard to punishment as follows:

if one maintains that punishment is justified by deterrence alone one seems committed to the immorality of punishing the innocent. It seems that one is committed to denying the rule that only the guilty may be punished. Surely, then, deterrence theory is unacceptable.

(Honderich 1969: 63)

Honderich is apparently concerned with the justification of punishment rather than with the general maximization of happiness. But compare Peter Vallentyne's recent remark that 'traditional act utilitarianism holds, for example, that it is morally obligatory to torture or kill an innocent person, when doing so

increases the happiness of others more than it decreases the happiness of the innocent person' (Vallentyne 1995: 207). Vallentyne's comment refers to an insensitivity to justice and desert he finds in traditional utilitarianism, with its emphasis on maximizing happiness, and belongs mainly to the second strand identified above.

Some authors have tended to combine the two strands. In defending a retributive theory of punishment, H.J. McCloskey writes:

Utilitarianism involves the conclusion that if it is useful to punish lunatics, mentally deranged people, innocent people framed as being guilty, etc., it is obligatory to do so ... In principle, the utilitarian is committed to saying that we should not ask 'Is punishment deserved?' The notion of desert does not arise for him. The only relevant issue is whether the punishment produces greater good.

(McCloskey 1965b: 255).

McCloskey's argument is confusing because it blurs the distinction between two problems and related arguments concerned with punishment on the one hand and maximizing happiness generally in society on the other. One of the problems with recent discussions of punishing the innocent in this wider context is precisely the attempt to use the categories and concepts of punishment (e.g. guilt, innocence, legal rules, etc.) to explore problems which have little to do with punishment. Classical utilitarianism, however, had different answers to the questions posed by punishment and by the distribution and maximization of happiness.

The argument here is largely historical. The issues raised by the possibility within utilitarianism of punishing the innocent cannot be considered fully without understanding how they have become *philosophical* issues, and, additionally, how they have become textbook commonplaces on which the rejection of utilitarianism has been based.¹ If one examines Bentham's writings on punishment and the discussions surrounding them, it soon becomes obvious that punishing the innocent was not originally conceived as a problem in his theory.² Punishment follows the breaking of legal rules, and hence, punishment implies guilt in this sense (cf. Quinton 1969: 55–64; Ten 1987: 14–17). Although Bentham devoted considerable attention to which acts ought to be offences, and of these which ought to be punished and how severely, that the innocent should be punished is never seriously considered. For punishing the innocent to become an important issue and, in addition, so important an issue that utilitarianism might be rejected as a serious philosophical theory, several new assumptions about punishment and utilitarianism have to be made. In contemporary discussions of punishment, they lie beneath the surface of familiar arguments concerning retribution, deterrence, and reform, and are largely unknown to those who use them. Once they are examined, however, it will be seen that they underpin a particular view of punishment, in which the theme of punishing the

innocent is an important ingredient. I have called this view the ‘post-utilitarian paradigm’ in order to emphasize that while it contains a number of assumptions about utilitarianism, these are nonetheless foreign to utilitarianism itself and have developed only with the rejection of utilitarianism as a philosophical theory in the late-nineteenth century. That we have continued to use and trade on this material, fairly uncritically, reflects a tendency in contemporary moral and political philosophy to neglect the history of its subject.³ In this chapter I shall be concerned with the history of the philosophical arguments which culminated in the post-utilitarian paradigm and the character of that paradigm.

But the argument here is not wholly historical. The post-utilitarian paradigm has been mistakenly attributed to utilitarianism by later writers on punishment. The mistake is to suppose that utilitarianism justifies punishment by deterrence alone, while deterrence in fact serves as one of several elements in the utilitarian theory of punishment. The mistake comes from ignoring the pleasure–pain dimension of traditional Benthamite utilitarianism and from thinking that utilitarianism begins with the general principle that utility (the maximization of happiness) is the sole criterion of right action, which is then applied to topics such as punishment in a ‘top-down’ fashion. In fact, classical Benthamite utilitarianism works in more of a ‘bottom-up’ fashion from secondary principles to the principle of utility.

The idealist background

If not the earliest statement connecting utilitarianism with punishing the innocent,⁴ one of the strongest may be found in F.H. Bradley’s *Ethical Studies*:

We need not ask how it is that, if 99 men are of the opinion that it is more convenient, for both the 99 and the 100th, or for the 100th without the 99, or the 99 without the 100th, that he, the 100th, should cease to exist – that *therefore* it is right for their opinion to be conveyed to him by the hanging of him, whatever may be his opinion on the subject. The discussion of this question we leave to utilitarian philosophers.

(Bradley 1952: 29)⁵

Bradley’s references to utilitarianism and punishment are not developed, and one finds no similar references in other leading Idealists, such as T.H. Green, Bernard Bosanquet, and J.M.E. MacTaggart, despite their giving some attention to the theme of punishment in their various writings (see Green 1967: 180–205; Bosanquet 1918: 181–212; 1965: 201–17; MacTaggart 1901: 129–50). That the idea of utilitarianism involving the punishment of the innocent was not developed did not follow from a lack of interest among the Idealists either in utilitarianism or in punishment. The critique of utilitarianism tended to concentrate on conceptions of the good and whether or not hedonism in the form of

Benthamite utilitarianism could provide an adequate basis for such a conception. The critique of utilitarianism was developed at this level and not at the level of punishment. Furthermore, when it came to punishment, the Idealists realized that the retributive theory which they espoused was an inadequate substitute for the utilitarian theory they sought to replace. Hence, at the level of punishment there was no direct assault on utilitarianism, but a kind of accommodation with it in order to fill out the retributive view and enable it to overcome its limitations.

A crucial aspect of the Idealist approach to punishment was the acceptance of the infliction of pain as right in itself. As MacTaggart (1901: 129) put it, 'we may define punishment as the infliction of pain on a person because he has done wrong'. Such an infliction of pain aims at no other good than 'that the criminal should repent of his crime and by so doing realize the moral character, which has been temporarily obscured by his wrong action, but which is, as Hegel asserts, really his truest and deepest nature' (MacTaggart 1901: 133). This view may appear to be reformatory, but MacTaggart insists that reformatory theory may not require punishment and the infliction of pain, while the retributive theory does. While retributive theory may recognize that the reform of the person punished is one consequence of punishment, it is not at the heart of the doctrine, which is the infliction of punishment on the guilty for its own sake, because to do so is just.

Most Idealist writers realized that retributive theory would not necessarily be widely accepted, as it was difficult to distinguish it from vengeance. Bosanquet, for example, starts his argument by setting forth the retributive view: 'Punishment is *prima facie* retrospective; it deals with the past' (Bosanquet 1918: 188). He is well aware of the objections to this approach in that it adds 'a new evil to an old one – pain to pain' (Bosanquet 1918: 189). Nevertheless, he is anxious to distinguish it from vengeance, or, as he puts it, 'an irrational vindictive impulse' (Bosanquet 1918: 192). The *lex talionis* embodied an important truth 'that wrong demands negation', and, according to Bosanquet, this view was becoming more obvious once the irrational elements of anger and revenge had been removed by the advance of civilization (Bosanquet 1918: 197–8). Green also distinguishes between retribution and vengeance on the grounds that unlike the desire for personal revenge retribution lacks this egoistic dimension, but rightly uses the language of indignation to demand retribution in punishment. But retribution means that 'the criminal should have his due, should be dealt with according to his deserts, should be punished justly' and hence contains an element derived from vengeance (Green 1967: 185). MacTaggart (1901: 130–1) notes that vindictive punishments (in which 'if a man has done wrong it is right and just that he should suffer for it, even if the pain does no good, either to himself or to others') have fallen out of favour except in theology with the idea of eternal punishments. As a result, there is less interest in backward-looking punishment and the question of desert 'really brings us back, if we press it far enough, to the old theory of vindictive punishment, which few of those who ask the question would be prepared to advocate'. 'On any other theory', he

continues, 'a man is to be punished, not to avenge the past evil, but to secure some future good' (MacTaggart 1901: 140). He eventually concludes that the retribution associated with Hegel has no place in state punishment, which should concentrate on deterrence and prevention (MacTaggart 1901: 144ff).

Besides the problem of distinguishing retribution from vengeance, the Idealists were aware of a second difficulty with retributive theory, that of translating moral guilt into a workable system of state punishment. As Rashdall put it in a critique of Bradley, 'the idea of expressing moral guilt in the terms of cat or birch-rod, gallows or pillory, hard labour or penal servitude, seems to be essentially and intrinsically unmeaning' (Rashdall 1924: i.289). But the problem was more serious than even this remark indicates. As Bosanquet admitted:

There *is* no estimate which can determine degrees of moral guilt in actual individual cases. Such a thing is wholly inconceivable. It would demand an insight into motive and temptation which it is impossible to possess for others, and all but impossible for oneself.

(Bosanquet 1918: 203)

For Bosanquet, despite his remarks in favour of retribution, all that the state can do is to distribute punishment on the grounds of deterrence and reform once it has established that the individual is responsible for the crime committed. It cannot establish moral guilt, or everyone will be punished as everyone has sinned (Bosanquet 1918: 203–4; see also MacTaggart 1901: 144–5; Green 1967: 192, 194–5).

We have devoted considerable attention to the Idealist approach to punishment to establish a few simple points. Although they repudiated utilitarian moral philosophy and favoured an emphasis on retribution in punishment, they by no means wholly rejected the utilitarian approach to punishment. Indeed, in the end they seemed to favour a system of state punishment which was remarkably similar to that of the earlier utilitarians.⁶

If the accommodation of utilitarian and retributive theories was the only achievement of the Idealists and their successors, there would be little need for this historical discussion of their ideas. For our purposes, however, of greater importance is their *creation* of the idea of deterrence as a justificatory theory of punishment out of traditional utilitarianism. When critical discussion of the Idealist theory of punishment takes place, the accommodation of utilitarianism is occasionally noted.⁷ It is clear, as we have seen, that the Idealists were forced to give retribution a carefully limited role in their theory. But the acceptance of even this limited place for retribution did not entail the rejection of the view that the infliction of pain is right in itself, a position which is wholly incompatible with classical utilitarianism. Benthamite utilitarianism holds that the pain of punishment should be outweighed eventually by pleasures associated, for example, with the reformation and rehabilitation of the criminal, the prevention of crime by others, the satisfaction of the community in apprehending a crim-

inal, and the adjustment of punishment to the severity of the crimes. The deterrence of future crime is one important objective in utilitarian punishment, but by no means the only one, and its importance is calculated by the amount of pleasure it can generate in the reduction of crime and also, as a consequence, a reduction in the need for punishment.

The Idealists ignored the connection between punishment and the pain–pleasure dimension of utilitarianism, and saw deterrence working closely with retribution as a forward–backward idea. Deterrence becomes curiously detached in their theory from human psychology and history. All that can anchor it is a limited version of retribution, that one can punish only someone who has in the past committed an offence. Deterrence then adjusts the punishment of past crimes so as to prevent further crime either by the offender or by others in the community. On its own, detached from retribution, the Idealists regarded deterrence as a barbarous theory. In order to deter crime, any invasion of traditional rights might be justified and hence the justification of the punishment of the innocent. Only retribution keeps deterrence linked to specific crimes committed in the past. Nevertheless, these claims for the deficiency of deterrence and the importance of retribution as the remedy are sustainable only if deterrence as a concept is clearly distinguished from utilitarianism and divorced from its roots in pain and pleasure. Hence, deterrence, in the form presented by the Idealists, is a peculiar offspring of retributive theory, designed to rescue retribution from punitive vengeance and to give it a central role in theories of punishment. The moral force of this development is in large part achieved by the proposition that deterrence allows for the punishment of the innocent and can be held in check only by a strong dose of retribution.

The post-utilitarian paradigm

What I have called the post-utilitarian paradigm for punishment is a way of looking at punishment which has dominated British philosophy from the publication of A.C. Ewing's *The Morality of Punishment* (Ewing 1929). The book was the most substantial philosophical study of punishment since Bentham's work more than 150 years earlier.⁸ Ewing drew considerably on writers in the Idealist tradition, on more recent 'intuitionist' philosophy, as well as on Bentham and utilitarianism. What makes his work so important for subsequent philosophy and has led me to see it as the basis of the paradigm are several key assumptions he incorporated into his work and the framework he established for later studies of punishment. These have led philosophers to discuss various 'theories', e.g. the retributive, deterrent, and reformative, each of which is inadequate on its own for the provision of a 'justification' for punishment, but a combination of them with possibly some additional ideas has been considered as providing the best justification. Hence, Honderich entitles the early chapters of his book, 'Retribution', 'Deterrence', and 'Reform' and later considers several 'Compromises' (Honderich 1969: 22–107, 148–89). He need not have taken

these categories directly from Ewing, as much debate during the last sixty years has taken place between those working within the same paradigm.⁹

Ewing's construction of the post-utilitarian paradigm was partly based on two important assumptions drawn largely from the Idealist tradition and more recent 'intuitionist' philosophy. These assumptions are not particularly concerned with punishment but with moral philosophy as a whole and reflect, as we have seen, the prevailing view in the Idealist tradition of rejecting hedonistic utilitarianism as a philosophy. Nevertheless, their impact on the theory of punishment that Ewing developed is crucial.

Two assumptions

The first assumption is 'that Utilitarianism, or the doctrine that pleasure is the only good, is false' (Ewing 1929: 5). Though stated explicitly, Ewing presents no argument to support his statement and would have felt no need to do so, as such an assumption, as we have noted, would have been accepted by most philosophers at the time, including some utilitarians. The significance of his assumption for the theory of punishment is also not difficult to discern, as it allows him to give prominence to retribution, 'which makes pain an end-in-itself' (Ewing 1929: 6), and ultimately to replace hedonistic utilitarianism with the theory of deterrence.

The second assumption is concerned with the nature of moral philosophy and is depicted by Ewing as follows:

The function of Ethics is, then, first to determine what is 'intrinsically good' or 'good in itself' (a knowledge which, as would usually be admitted by the supporters of the view, cannot be reached by strict logical proof but only with the help of something of the nature of what is commonly called 'intuition'), and afterwards to apply this knowledge to particular cases in the way just indicated. This is the view of 'Utilitarians' in the ordinary sense of the term, and of writers like Dr. Rashdall. It may be held equally by someone who regards pleasure as the only good and by someone who believes in a number of goods of quite different kinds, including but not confined to pleasure.

(Ewing 1929: 161)

This lengthy quotation is especially helpful in illustrating Ewing's belief that Ethics (and utilitarianism) works in a 'top-down' fashion. The first task is to determine what is good in itself and then apply it to particular cases. When he comes to utilitarianism, he assumes that the principle of utility determines the distribution of punishment. As the object of deterrence (into which the utilitarian theory has been transformed) is to prevent crimes in the future, in his view this version of utilitarianism may require the punishment of the innocent. Utilitarianism in this form does not possess a distributive principle except that

punishment should be inflicted so as to deter as much crime in the future as possible, and if that end can be achieved by punishing the innocent, the believer in the deterrent theory is bound to inflict punishment in this fashion.

Classical utilitarianism, however, might better be described as a ‘bottom-up’ theory, which employs a wide range of secondary principles, including principles of distribution, which are then justified on the grounds of their maximizing happiness. For example, Bentham adopted as a secondary principle the thesis, already developed first in a rudimentary fashion, as we have seen in chapter 9, by Montesquieu and Beccaria, that there should be a proportion between crimes and punishments (see Bentham 1996: lxiv–lxviii, 165–74). This thesis held that crimes should be punished in proportion to the harm done to the life and security of assignable individuals in society. Hence, instead of inflicting the most severe punishments for offences against religion or for homosexuality, the proportion would suggest that these so-called offences should receive little or no punishment so long as no direct harm (meaning mainly physical harm or the threat of physical harm) was caused. The use of the proportion could be justified by the principle of utility in the sense that pain was being minimized in the reduction of punishments to offences that actually caused or threatened to cause harm, and that pain was inflicted in proportion to the harm in this latter sense by insisting, for example, that a thief should not receive the same punishment as a murderer. Historically, the idea of a proportion between crimes and punishments developed independently of what we know as classical utilitarianism and, logically, it is doubtful that it could be ‘deduced’ from the utility principle itself. Yet, like other principles, it was justified in terms of the utility principle and became a secondary principle in the utilitarian system.

For classical utilitarianism, the secondary principles and not the principle of utility itself were to serve as tests of practice (see Mill 1969: 173). The idea of a proportion between crimes and punishments was to be used to judge practice, and by that judgement it would follow that the punishment of the innocent would generally be excluded. In other words, if there was no harm, there would not be a crime, and without a crime, punishment would be excluded.

From the two assumptions, however, Ewing then proceeds to develop conceptions of retribution and deterrence which form the core of his paradigm. These will be examined in the following two sub-sections.

Retribution

Ewing’s examination of retribution is as important as his critique of traditional utilitarianism, for retribution as the foundation of punishment must also be rejected, if the post-utilitarian paradigm is to be established. For Ewing, retribution as a principle of punishment is based on two ideas: first, punishment as an end-in-itself involves the guilty suffering pain; and second, suffering pain is based on desert and not on future advantages. The second idea depends on the first, for if punishment is not an end-in-itself, in Ewing’s view, one cannot say that it is

deserved. When he surveyed the Idealist tradition, in which retributive ideas were supposedly prominent, he noted with some dismay that many authors (he cited Bosanquet among others) justified punishment for its own sake by showing that it was likely to have good consequences (Ewing 1929: 13–14). ‘To justify punishment merely by reference to its future consequences’, he wrote, ‘seems *prima facie* at any rate, to take from the word “deserve” all its meaning’ (Ewing 1929: 15).

He found in Kant the strongest statement of the retributive view, where the *lex talionis* established both the degree and the kind of penalty (Ewing 1929: 15ff). For Ewing, however, the retributive view was opposed to intuitive understanding on several grounds, two of which had already been raised by the Idealists. First, he argued that if a criminal could be reformed and turned into a good citizen by a milder punishment, it would be wrong to impose a harsher punishment in cases in which that might be required by retribution. As he put it, ‘retributive justice may be a very good thing, but the saving of souls is a much better thing’ (Ewing 1929: 18). Second, he argued that it is virtually impossible to determine how to establish a proportion between the infliction of punishment and the degree of guilt in the criminal, as the latter requires an introspective knowledge of the criminal’s mind. Third, if the state ought to punish from retributive considerations, it ought to punish everyone, as everyone has sinned in one way or another. This view, he continued, undermined the criticism of traditional utilitarianism, as it suggested that no one was ‘innocent’, and hence it made no sense to say that the innocent should not be punished. Consequently, the retributive principle must be reduced to the maxim that one should punish only those who have committed an offence prohibited by law, leaving questions concerning what offences should be punished and with what degree of severity unresolvable by retributive considerations. Fourth, these problems with retribution lead to situations in which not all of the guilty are punished (only those who break the law and are caught), and many guilty persons go free. In addition, when a criminal is punished, the punishment often leads to the infliction of great suffering on relations and friends who may be entirely innocent of the offence. Hence, punishment of the guilty on retributive grounds can also involve the punishment of the innocent.

Ewing’s conclusion from this analysis is that ‘the retributive principle can never supply a legitimate reason for State action, since to apply it must frustrate its own ends’ (Ewing 1929: 43). Nevertheless, he does not dismiss retribution entirely as a justification for punishment, but merely shows that it cannot stand on its own. Its most valuable contribution to a larger theory is that it condemns the punishment of the innocent and provides a principle of desert which can be combined with other aspects of punishment. Even though his account of retribution might be regarded later as a ‘surrender’ (Mabbott 1969: 40), he has completed the transformation so that it becomes a valuable component of a larger theory.

Deterrence

As we have seen, deterrence as a major justification of punishment emerges from the shell of classical utilitarianism once the pleasure–pain dimension is set aside. It is conceived as a wholly forward-looking doctrine in which the individual is treated as a means and in this respect the punishment of the innocent may be justified, in order to prevent or deter crime in the future. In classical utilitarianism it is assumed (through the use of secondary principles and the pleasure–pain dimension) that a person would be punished only if a crime has been committed. In Ewing’s theory of deterrence punishment ‘does not imply that the man punished has done wrong, only that it is desired to prevent future wrong-doing’ (Ewing 1929: 55).

Ewing is clearly aware of the move he is making. In his view deterrence theory, like the theory of retribution, must not be able to stand on its own (as utilitarianism could), and as it allows for the punishment of the innocent, it needs retribution to remove this decisive failing. In the past retribution was criticized as being barbarous in inflicting excessive cruelty for no good end (supposedly to put justice into the soul). In the post-utilitarian paradigm deterrence theory is criticized for its barbarous treatment of the individual as a means while retribution provides the remedy. Ewing has enabled this shift to take place by conceiving deterrence theory apart from traditional utilitarianism.

The paradigm

What is significant about the post-utilitarian paradigm concerning punishment is not the extent to which subsequent writers on punishment cite and agree with Ewing’s arguments. Nor is his own theory, which places a considerable emphasis on reform as an object of punishment, of great interest to us here. What concerns us is the way writers after Ewing have accepted his approach to punishment and work within the boundaries set by his method.

Honderich’s work on punishment best illustrates the tendency to provide different answers to the key questions of punishment from those advanced by Ewing, but, nonetheless, to operate uncritically within the post-utilitarian paradigm. Punishment, for Honderich as for Ewing (though not for Bentham), raises mainly questions of ‘moral justification’ (Honderich 1969: 11). The three ‘theories of the justification of punishment’, i.e. retribution, deterrence, and moral regeneration, are considered untenable, and he denies that they can be easily reconciled by an argument which holds that the theories are in fact dealing with different questions (Honderich 1969: 12–14, 157–8). Nonetheless, as in Ewing, punishment can be justified by combining elements of the three theories (which on their own are rejected as ‘mistaken’) together with other ideas, such as equality, to produce an overall justification (Honderich 1969: 183–4, 189).

Honderich also uses the post-utilitarian paradigm to reject utilitarianism as a moral philosophy. At one point he writes:

The deterrence theory of punishment is a logical consequence of the morality of utilitarianism. In rejecting it we reject that morality as well, one which may be cursorily expressed as the principle that *an act is right or justified if it is likely to produce the best welfare-consequences: more satisfaction or at least less distress than any other act that might be performed instead.*

(Honderich 1969: 87)

As I have argued, the key assumptions of the post-utilitarianism paradigm, which are foreign to classical utilitarianism, are (a) the rejection of the utilitarian emphasis on pleasure and pain; and (b) the assumption that moral theory is top-down rather than bottom-up. These assumptions then lead to the creation of a seriously flawed theory of deterrence, which replaces utilitarianism in the realm of punishment, and a limited notion of retribution. The post-utilitarian paradigm then enables one to use the inadequacies of deterrence theory to reject classical utilitarianism itself. Honderich thus harvests in the theory of punishment what the Idealists sowed in moral philosophy generally.

The rejection of utilitarianism

The point of this investigation should now be clear, but its relevance to contemporary discussions of utilitarianism may not be obvious. In the article by H.J. McCloskey, from which the passage quoted at the beginning of this chapter was taken, McCloskey cites only one work prior to his own, W.D. Ross's *The Right and the Good* (1930; see McCloskey 1965b: 253). Not only did Ross base his argument on the post-utilitarian paradigm and state directly that utilitarianism involved the punishment of the innocent, but he wrote the foreword to Ewing's book, which had been published a year earlier (see Ross 1930: 56–7; Ewing 1929: v–vi). McCloskey's thesis was then used by J.J.C. Smart in his *defence* of utilitarianism, from which most recent discussions have been derived.¹⁰ This mutation from a critique of utilitarianism to its defence has led to further confusions in discussions of utilitarianism and an inability to appreciate the pedigree of the arguments. The punishment of the innocent and the use of scapegoats now reappear as problems within utilitarianism in which act utilitarianism is seen to be somewhat deficient and requires correction by rule utilitarianism (see Barrow 1991: 157ff), or as problems created by bizarre examples (see Ten 1987: 18ff). None of this has much to do with classical utilitarianism which tends to be forgotten in these discussions (except that act utilitarianism is now wrongly equated with classical or Benthamite utilitarianism). But classical utilitarianism may well have dealt with the problem of punishing the innocent several centuries ago.

INDIVIDUAL SACRIFICE AND THE GREATEST HAPPINESS

It is now a philosophical commonplace to assert that classical utilitarianism allows for and may even require the sacrifice of the happiness of some members of society, if such a sacrifice increases the total amount of happiness.¹ In the last chapter the idea that classical utilitarianism allowed for the punishment of the innocent as part of a theory of deterrent punishment was considered and rejected, but a distinction was made there between punishing the innocent and sacrifice as a means of maximizing happiness generally in society. This latter theme will be considered in this chapter.

It is generally believed that a major weakness in utilitarianism may be ascribed to a failure to defend individual moral rights as a matter of justice, or, as put by John Rawls, a failure to ‘take seriously the distinction between persons’ (Rawls 1972: 27). The belief is based on a view of utilitarianism as a purely aggregative doctrine concerned with the efficient administration of the elements of happiness, that is to say, of pleasure and the absence of pain. I hope to challenge this view of the utility principle and argue that Bentham’s principle of utility was formulated differently, and this formulation has been widely misunderstood. It will be argued here that Bentham’s main objection to the doctrine of moral rights was directed at overcoming a radical subjectivism he found at the foundation of most moral theories. This subjectivism, he believed, could lead to the sacrifice of the happiness of some for the sake of the happiness of others. The principle of utility was intended to provide an objective standard that would avoid such subjectivism. This standard would be mainly used by the legislator to reconcile individual interests in the public interest in light of secondary principles of universal applicability. These secondary principles are in turn justified by the principle of utility.

I then turn to the ideas of maximization and minimization and argue that Bentham’s use of the terms ‘maximize’ and ‘minimize’ was intended to suggest distributive rather than simply aggregative ideas. I examine the possibility that Bentham’s idea of distributing happiness embodies a strong, substantive commitment to equality, and argue that this commitment would not allow for the sacrifice of the lives or security of some for the sake of increasing the happiness of a greater number. The chapter concludes with a critique of H.L.A. Hart’s

examination of both the utility principle and equality in Mill's account of justice and rights (Hart 1982: 98f). I argue that Mill, in fact, proceeds correctly from Bentham in showing how moral rights might easily arise within classical utilitarianism, if the problem of the status of the utility principle were discounted. Furthermore, I attempt to suggest why Bentham could not have accepted Mill's formulation of this utilitarian version of the doctrine of moral rights within the context of his own formulation of the principle of utility.

Bentham's ultimate principle

Throughout his career Bentham was concerned with how he expressed his ultimate philosophical principle. He began by calling it 'the principle of utility' but eventually thought that 'happiness' expressed more clearly than 'utility' the end he sought to realize in ethics and politics (see Bentham 1996: 11n). He then wrote of 'the greatest happiness of the greatest number' as the ultimate end of action, and he is still well-known for the use of this phrase. Towards the end of his life, however, at some point between 1827 and 1829, he began to substitute 'the greatest happiness principle' for 'the greatest happiness of the greatest number', mainly because he was unhappy with the way the phrase, 'greatest happiness of the greatest number', might be construed to mean that the greater number ought to be free to oppress the lesser number, if the result was to increase overall happiness (see chapter 14 and Rosen 1983: 200–3).

Bentham's approach to the problem of his utilitarian theory being misunderstood is open to an obvious objection. By simply reformulating the ultimate principle he was in effect dismissing the criticism and treating the whole problem as one of presentation. Many critics of utilitarianism would not be happy with such a restatement, as they would feel that the problem is more deeply a part of utilitarianism itself. However much one might introduce refinements into utilitarianism, there is something in the doctrine which inevitably leads to the sacrifice of individual happiness in order to increase happiness generally. To be a utilitarian, as many also believe, one must go even further and sacrifice justice and rights to increase utility or happiness.

I hope to argue that Bentham's conception of the principle of utility would preclude such sacrifice. The starting point will be the contrast found in the early chapters of *IPML* between two principles: the principle of utility on the one hand and what he called the principle of sympathy and antipathy on the other (see Bentham 1996: 11–16, 21–33). When Bentham stated and developed the principle of utility in *IPML*, he argued that there were two opposing principles, the principle of asceticism and the principle of sympathy and antipathy. As the principle of asceticism is simply an inversion of the utility principle, there is no difference in structure and no need to examine it further.² The principle of sympathy and antipathy, however, which encompasses virtually all other moral theories, is set forth as a major contrasting principle to that of utility. By examining this contrasting principle we shall see

more clearly how Bentham saw utility itself as the basis of a unique moral and political theory.

Bentham characterized the principle of sympathy and antipathy as follows:

I mean that principle which approves or disapproves of certain actions, not on account of their tending to augment the happiness, nor yet on account of their tendency to diminish the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them: holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking out for any extrinsic ground.

(Bentham 1996: 25)³

Bentham admitted that the prescriptions of the principle of sympathy and antipathy would often coincide with the principle of utility, largely because we usually approve of those arrangements which are justified by utility and dislike those which utility opposes. Nevertheless, the coincidence does not always occur, and he provided examples in the field of punishment where feelings of sympathy and antipathy could lead to more severe or more lenient punishments than would be prescribed by the principle of utility. For example, one might feel antipathy and wish to punish an action if it happens directly to oneself or one's family, but feel more inclined to disregard it or treat it leniently if it occurs at a distance and with no direct effect on oneself (see Bentham 1996: 31).

At times, Bentham admitted that the principle of utility could become confused with sympathy and antipathy where the latter are motives for action. We may act from a motive of sympathy, but such an action must be distinguished, in his view, from 'the ground or reason which warrants a legislator, or other by-stander, in regarding that act with an eye of approbation' (Bentham 1996: 32). The latter approbation is not necessarily a motive for action, and the confusion is introduced when the approbation is transferred from the act or law to the motive itself. Sympathy may be a motive which often produces good effects, but it does not follow that it is the right ground for action in any particular instance. Only utility, for Bentham, can serve as such a principle, and utility must 'regulate' all motives including those of sympathy and antipathy (Bentham 1996: 33).

The doctrines of natural and moral rights, as the foundation of legislation, would be classed by Bentham under the heading of the principle of sympathy and antipathy.⁴ We invoke them, he argued, because we approve of them and that is taken as a sufficient reason for their institution. As he put it, we disclaim 'the necessity of looking out for any extrinsic ground' (Bentham 1996: 25). But what ground would justify approbation of a doctrine of natural or moral rights? To answer this question we need to look at how Bentham depicted the opposing principle of utility.

By utility he meant 'that property in any object, whereby it tends to produce

benefit, advantage, pleasure, good, or happiness ... or ... to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered' (Bentham 1996: 12). Note first that utility is a property not in the individual who invokes the principle, but in the object, that is to say, any object such as an action, law, rule, physical object, set of ideas, and so forth. If utility belongs to the object, the principle itself belongs to the subject. Besides serving as a foundation or starting point, the principle is depicted by Bentham as a 'sentiment of approbation', which, when applied to an object, approves of its utility (Bentham 1996: 12n). To invoke the principle it is clearly not sufficient simply to approve of the action, law, or object. That would be an invocation of the opposing principle of sympathy and antipathy. To invoke the principle of utility, one must approve of certain properties outside oneself and consider these in a special manner.

The status of pleasure and pain

One problem which immediately arises and goes to the heart of the utility principle is the status of pleasure and pain. On the one hand, feelings of pleasure and pain seem to lead to feelings of approbation and disapprobation, and to that subjective judgement that Bentham linked with the principle of sympathy and antipathy. My wife is assaulted; I feel intense pain whenever I think of the assault; I propose the death penalty. Hence my feelings of intense pain may lead to a very severe penalty for the assault, and may err on the side of severity. On the other hand, Bentham proclaimed, as we know, that pain and pleasure are our 'sovereign masters' and that 'the *principle of utility* recognizes this subjection' (Bentham 1996: 11). Furthermore, in later life Bentham tended to replace the utility principle with the greatest happiness principle precisely to emphasize the close link between pleasure and pain and his principle. If pleasure and pain are at the heart of both the principle of sympathy and antipathy and the principle of utility, how do the principles differ? How does the principle of utility escape the subjectivism he found as a fatal flaw in the principle of sympathy and antipathy and hence in most other philosophical theories?

Bentham took great care to assert that happiness (meaning pleasure and the absence of pain) is not based simply on subjective experience. In *IPML*, for example, he adopted the perspective of the legislator whose task it is 'to rear the fabric of felicity by the hands of reason and law' (Bentham 1996: 11).⁵ It is the legislator who takes happiness as his sole end, and for whom Bentham devised the extensive classification of pains and pleasures (Bentham 1996: 34, 38). As individuals, it is arguable that we already know what causes us to feel pleasure and pain. But we do not possess the knowledge and insight to determine in a larger sense what makes a community (and each member of it) happy. This 'knowledge' is not only a matter of learning more, but also one of adopting a different perspective. The legislator should not consult his own feelings of plea-

sure and pain but look to a conception of happiness which can govern a whole society.

In so doing, the legislator would consider abstractly the pleasures and pains of all members of society, or more accurately, all those whose interests were to be taken into consideration. But how would these interests and the pains and pleasures associated with them be considered without the legislator simply consulting his own feelings of pleasure and pain?

Bentham's answer was that he was dealing with pains and pleasures differently, that is to say, as 'the *ends* which the legislator has in view', rather than as feelings which determine action (Bentham 1996: 38). He did not deny that feelings of pleasure and pain motivate actions, and considerations of utility may enter at this level. But he was mainly concerned with pleasure and pain as the 'instruments' of the legislator, where they may be used to fashion laws and policies which guide and compel members of society to maximize happiness. Bentham's elaborate classification of pleasures and pains and the surrounding chapters in *IPML* concerned with sanctions, measurement, and circumstances influencing sensibility were meant to supply the legislator with the means of determining the utility of a law or policy. In this material Bentham did not dictate which pleasures and pains the legislator should employ to maximize happiness. He wanted to link his account of pleasure and pain more closely to what humans actually experienced, and not exclude any pleasures and pains actually felt as elements of human experience. His categories of pleasure and pain reveal both a wide range of actual experience and different sensibilities among different people. Although individual members of a society seek different pleasures and have different levels of sensibility, at the same time there is considerable agreement at certain levels of generality as to what makes people happy. Bentham's recognition of the variability of feelings of pleasure and pain thus leads away from the employment of the principle of sympathy and antipathy to those general ideas about happiness which most people share.

The task of the legislator is not to impose policies and laws on the community simply because he or she approves or prefers them, but to determine principles and policies in which most members of society find happiness. The test of the selection is that they contribute to happiness, as means to ends. Here, the legislator presents reasons so that the selection might be questioned and debated.

For Bentham, therefore, pleasure and pain are at the heart of his utilitarianism, but they are also at the heart of doctrines opposed to the utility principle. The key point is that pleasure, pain, and happiness are seen by Bentham as providing the external grounds for deciding the value of laws and policies, and such a conception is presented paradoxically by emphasizing the highly variable and subjective character of much individual experience. The legislator has the difficult task of determining what general laws and policies increase happiness for all concerned, a task which cannot be achieved simply by calculating and adding up pleasures. Instead, he or she must look for secondary principles shared by most people and justify these in terms of their advancing human happiness.

The legislator's task is one of justifying certain proposals, and the justification takes the form of relating means to ends, and showing that some means produce greater happiness than others.

Secondary principles and rights

Among the best-known secondary principles that Bentham employed are the four he discussed in relation to the civil law (concerned with the distribution of duties and rights): security, subsistence, abundance, and equality. In a typical passage he declared:

In every country, and for every race, at every time, – of the all-comprehensive and only defensible end – the *greatest happiness* of the greatest number – of the four most comprehensive particular and subordinate ends, viz. *subsistence, abundance, security, and equality* – with their several divisions and subdivisions, will the description be found the same: only of the *means* best adapted to the accomplishment of those great ends, in this or that country or for this or that race, at this or that time, will the description, in this or that particular, be found, in a greater or less degree, different.

(Bentham 1998: 291–2)

In Bentham's view, in every society and at all times, everyone wants security as a means to happiness. And security can be construed in terms of protection from pain and the opportunity to pursue various pleasures. Although the means by which security is achieved will differ considerably from society to society, it may be seen as a universally regarded means to happiness.⁶

If security is everywhere the means to happiness, did Bentham admit an individual moral right to security as also a means to happiness? Such a claim would appear to be a legitimate step from the recognition of security as the main subordinate end. Indeed, one might argue that as the civil law was concerned with the distribution of duties and rights, Bentham would hold that there ought to be a legal right to security. A moral right to security would be similar to rights to life and liberty, which the civil law might translate into various legal rights. Nevertheless, Bentham did not wish to take this step and make the connection, which would place moral rights in a superior position to legal rights. Why, one might ask, is a right to security somehow defective, while security as an end subordinate to that of happiness is sound?

Bentham's answer might very well reflect his distinction between the two principles, sympathy and antipathy on the one hand and utility on the other, which has already been discussed. The claim to a right to security represents in Bentham's view primarily the feelings of the claimant that he or she should be protected from certain pains. On its own, the claim to a right to security can never transcend this subjective feeling. As it cannot do so, such a claim cannot be

easily reconciled with any other claim, so that my feelings about my right to security might well be in conflict with claims by others to a similar security. Even claims of rights by some on behalf of others would not escape from this subjectivism. From this perspective securing my right might even require the sacrifice of the rights of others. In other words, to claim a moral right to life and liberty (security) may require that sacrifice of others. Hence, from Bentham's perspective it is not utilitarianism, but a theory of moral rights which could lead to the sacrifice of the innocent.

The principle of utility, however, takes as its starting point the greatest happiness in society, which is then formulated in terms of individual happiness. Such a formulation does not start with subjective claims, but with the recognition that if each person is to share in the happiness of society, each should have an interest in that happiness. Where the end is security, the individual's interest should be in security. But why then did Bentham still deny from this perspective that a moral right to security could exist? He did so because society cannot reconcile disparate claims to various rights from the point of view of the individual. The whole point of the utility principle is to provide an external standard with which individual claims can be reconciled. Absolute claims to rights prevent this very reconciliation.

It is worth noting that the philosophical issues arising from the contrast between the two principles (utility, and sympathy and antipathy) are different from the most important issue which separates modern rights theorists from utilitarians. The former argue that the latter must necessarily sacrifice individual rights in the maximization of happiness. I have argued that the issue for Bentham is rather the weakness of subjective standards for morals as opposed to an objective one. But so far the issue of maximization and its role in the sacrifice of individuals has not been examined. Even if the principle of utility can provide an objective standard, the maximization of happiness, which is dictated by that standard, might nonetheless require the sacrifice of individual happiness, if not of the individual.

Maximize and minimize

It is not generally known that Bentham was the first writer to use the words 'maximize' and 'minimize'. From his writings they and a number of variants have become important terms in moral and political philosophy as well as in economics and related disciplines. The terms do not seem to appear in his earliest works such as the *Fragment on Government* or *IPML*. In *IPML* he used phrases referring to, for example, a 'tendency to augment' or to 'produce' happiness (Bentham 1996: 12). These do not indicate if such augmentation is meant to be simply aggregative or involves some sort of distribution. When he discussed the notion of a 'maxim', which comes from the Latin *maxima*, he noted that *maxima* refers to the most extensive, and is used in the same sense as a rule (see Bentham 1977: 190–1). In this sense a maxim is the most extensive rule. By the

early 1820s, when he was writing *Constitutional Code*, Bentham made great use of the verbs ‘to maximize’ and ‘to minimize’. At the outset, he stated that the object of his code was the greatest happiness of the greatest number. Then, he stated the ‘correspondent fundamental principle’: ‘*the greatest happiness principle*’. Finally, he turned to the ‘correspondent all-comprehensive and all-directing rule’: ‘*maximize happiness*’ (Bentham 1983a: 18f). It is significant that the injunction to maximize happiness occurs in conjunction with a rule. If Bentham had coined a new word, he used it in a way which was not too remote from its Latin root. If a maxim is a rule, the rule to maximize happiness is one which considers the most extensive application of happiness, that is to say, that happiness is to be extended to the greatest possible number of people rather than to fewer people.

In the very next article of the Code Bentham used ‘maximize’ and ‘minimize’ more freely. The means to happiness as the ‘all-comprehensive object’ are two: ‘aptitude maximized; expense minimized’. The ‘correspondent principles’ are: ‘the official-aptitude-maximization principle’ and ‘the expense-minimization principle’. Finally, the ‘correspondent rules’ are ‘maximize appropriate official aptitude’ and ‘minimize official expense’ (Bentham 1983a: 19). To maximize and minimize are not confined here to rules alone, but they seem to refer to extending the means to happiness, and in this sense to maximize suggests a distributive as much as an aggregative idea. For example, to maximize aptitude means that the abilities of government officials should conform to the requirements of various positions and that political arrangements should be designed so that those officials will act as much as possible to perform the duties of the offices to which they have been assigned. To interpret Bentham’s use of ‘maximize’ in this context as purely aggregative, that is to say, to be calling for the greatest amount of aptitude (whatever that would mean), would not make any sense. Aptitude relates to individuals and to positions and the conformity of the one to the requirements of the other. To maximize aptitude means to ensure that this conformity is extended throughout the government.

Nor when he sought to minimize expense was he referring to a general overall decrease in total expense. His main proposal was that each official with appropriate ability or aptitude should compete to take on a position at the lowest salary. Although the implementation of such a rule might result in a decline in the overall cost of government, such an aggregative decline is not what Bentham called for in his principle and rule. To minimize expense means to reduce expenditure over the largest number of positions and not necessarily to reduce overall expenditure. Nevertheless, aggregative consequences may follow from the distributive ones, and the two may well be linked together. His maxim operated in every government office to see if expense might be diminished.

That Bentham was concerned with the distribution of pleasure and pain rather than solely with its aggregation is clear as early as *IPML*. Consider the famous lines of Bentham’s mnemonic verses, which were probably composed in 1780:

Intense, long, certain, speedy, fruitful, pure –
 Such marks in *pleasures* and in *pains* endure.
 Such pleasures seek, if *private* be thy end:
 If it be *public*, wide let them *extend*.
 Such *pains* avoid, whichever be thy view:
 If pains *must* come, let them *extend* to few.

(Bentham 1996: 38)

One distinction which is generally ignored in these verses is that between the private perception of pleasure and pain and the public perception. If one is a legislator and one's task is to promote happiness in the public sphere, one's concern is not with the perception and aggregation of private pleasure, but with the extension of pleasure throughout society. Hence, in its public sense, which is the sense in which Bentham mainly employed it, the principle of utility is concerned with the distribution of happiness and the extent of that distribution.

Equality and rights in Bentham and Mill

In spite of his emphasis on distribution rather than on aggregation, one can still wonder if Bentham's notion might nevertheless oblige or allow the legislator to support certain policies which will sacrifice individual happiness where a more extensive happiness can be established. In a reference to the maxim ascribed to Bentham by Mill, 'everybody to count for one, nobody for more than one' (Mill 1969: 257), Hart concluded:

But this egalitarian aspect of Bentham's utilitarianism though it serves to exclude irrelevant prejudices in the computation of the general welfare as the measure of right and wrong cannot serve as a foundation for individual rights. As many contemporary philosophers, hostile to utilitarianism, have been concerned to show, it in principle licenses the imposition of sacrifices on innocent individuals when this can be shown to advance net aggregate welfare. Such sacrifices may be licensed because the egalitarianism embodied in the maxim 'everybody to count for one and nobody for more than one' is only a weighting principle, to be used in calculating what will maximize aggregate happiness; it treats persons as equals by securing that in the determination of what measures are required by the general welfare equal weight must be given to the equal happiness of all persons. But it is not a principle requiring the equal treatment of different persons and it may yield grossly inegalitarian results ... Individual persons and the *level* of an individual's happiness are for the utilitarian only of instrumental, not intrinsic importance. Persons are merely the 'receptacles' for the experiences which will increase or diminish aggregate welfare. So utilitarianism is 'no respecter of persons' in a sinister as well as a benign

sense of that expression, and its egalitarian aspect provides no foundation for universal rights.

(Hart 1982: 98f; see also Skorupski 1989: 287f, 325ff)

Hart's conclusion, which reflects a widely accepted view today, is mistaken in several respects. First, it ignores Bentham's conception of the utility principle as essentially distributive in character and the importance of equality to that distribution. Second, it fails to see the importance Bentham gave to overcoming the radical subjectivism he found necessarily part of doctrines of natural and moral rights. It is this, rather than a confused conception of rights defined in terms of sanctions and enforcement, which led him to turn away from a doctrine of rights, which he would have dismissed and relegated to a position under the principle of sympathy and antipathy.

As for the first point, I have already argued above that Bentham's commitment to maximization was mainly a commitment to a distributive rather than an aggregative principle. This emphasis on distribution is reflected in his earliest writings where the legislator is depicted as being concerned in the public sphere with extending happiness. Bentham's idea of utility was also meant to embrace a principle of equality. He clearly established that the principle of utility meant the provision of an equal quantity of happiness to all concerned (see Rosen 1983: 202f, 211ff). Thus, to extend happiness (i.e. its maximization) is to distribute it equally, and Bentham apparently adopted a principle of equal distribution. At times, this aim could not be realized, and then Bentham argued that happiness should be distributed so that equal distribution was approximated. He depicted this approximation in terms of the greatest happiness of the greatest number. Furthermore, equality not only was envisaged as the distributive principle embedded in the concept of utility, but also appeared as a substantive end of legislation. Equality, for Bentham, was more than a formal principle, i.e. equal things for equal people, depending on other principles such as need, desert, or merit for what distribution was being considered. As a formal principle the outcome is usually unequal. Bentham believed that equality was also a substantive principle to be approximated as closely as possible. Hence, in saying that equal amounts of happiness should be extended to all, he was referring to an equal or near equal outcome.⁷

My account of equality seems to counter Hart's suggestion that equality is only a weighting principle used in calculating aggregate happiness. Hart fails to see the significance of Bentham's texts, because he has already accepted the common critique of utilitarianism that it is wholly concerned with increasing 'net aggregate welfare'. He is then led to the position that the 'egalitarian aspect provides no foundation for universal moral rights'. He notes that J.S. Mill in fact did use these egalitarian premises as the basis of a theory of moral rights, but Hart dismisses Mill's approach as being confused. In my view Mill proceeded correctly on the basis of Bentham's egalitarian premises in the development of a theory of moral rights. Although my object here is not to present an analysis of

Mill, it is worth seeing how he read Bentham. Concerning equality and impartiality in the idea of justice, Mill wrote as follows:

This is the highest abstract standard of social and distributive justice; towards which all institutions, and the efforts of all virtuous citizens, should be made in the utmost possible degree to converge. But this great moral duty rests upon a still deeper foundation, being a direct emanation from the first principle of morals, and not a mere logical corollary from the secondary or derivative doctrines. It is involved in the very meaning of Utility, or the Greatest-Happiness Principle. That principle is a mere form of words without rational significance, unless one person's happiness, supposed equal in degree (with the proper allowance made for kind), is counted for exactly as much as another's. Those conditions being supplied, Bentham's dictum, 'everybody to count for one, nobody for more than one,' might be written under the principle of utility as an explanatory commentary. The equal claim of everybody to happiness in the estimation of the moralist and the legislator, involves an equal claim to all the means of happiness, except in so far as the inevitable conditions of human life, and the general interest, in which that of every individual is included, sets limits to the maxim; and those limits ought to be strictly construed.

(Mill 1969: 257f; 1998: 105–6)

Mill continued by claiming for 'all persons' 'a *right* to equality of treatment, except when some recognized social expediency requires the reverse' (Mill 1969: 258; 1998: 106). The latter limitation is not meant to contradict the assertion of a moral right, but simply to point to the impossibility of achieving such equal treatment in a given society. At the point where Mill referred to Bentham's dictum, he appended a note to criticize Herbert Spencer's view that the principle of utility has to 'presuppose' a principle that 'everybody has an equal right to happiness' (Mill 1969: 258n; 1998: 105n–6n). According to Mill, Spencer was wrong in seeing this principle of equality as an additional presupposition, when it is in the principle of utility itself (see Hollander 1985: ii.650; cf. Crisp 1997: 79–80). Bentham would have accepted most of what Mill wrote on the place of equality and justice in the principle of utility, though he might not have asserted that 'everybody has an equal right to happiness'.

The reason Bentham might not have accepted Mill's formulation of the utility principle in terms of an 'equal right to happiness' is not, as Hart has suggested, that his insistence on the connection between enforceable obligations supported by sanctions led him to reject such a move. His rejection of the doctrine of moral rights goes back to the fundamental distinction he made in *IPML* between the principle of utility and the principle of sympathy and antipathy, and his belief that the utility principle and the perspective of the legislator could overcome the subjectivism he found in assertions of doctrines of

natural and moral rights and other proposed foundations of morals and legislation. Although one of the difficulties with the claim to possess moral rights was that the claim was not necessarily enforceable, it was not the only difficulty, and to accept the doctrine of moral rights would in his view undermine all that he had been trying to achieve in establishing the objective status of the principle of utility.

Nevertheless, as we have seen, Bentham did believe that the end of happiness and subordinate ends such as subsistence, abundance, security and equality applied 'in every country, and for every race, at every time', and he could have translated these 'ends' into moral rights with little difficulty, as Mill later did. But Bentham thought that the doctrine of moral rights was at best confused and at worst undermined the principle of utility and its claim of being the only objective standard of right and wrong. The confusion arose because the pleasure-pain dimension of the utility principle could be easily treated as a subjective notion falling under the category of sympathy and antipathy. To rescue utility from the mere sympathies and antipathies of its advocates, Bentham created the objective system presented from the perspective of the legislator who had to reconcile subjective preferences within the framework of the utility principle. He did this first by acknowledging the diverse character of pleasure and pain, the numerous circumstances affecting sensibility, and the different ways individuals responded to similar pleasures and pains. In effect, he fully acknowledged that there was no possible way that individual perceptions of pleasure and pain, however successfully they might be measured by the individual, could be added up to form the public interest. The legislator began with the end of utility or happiness, and then looked to those subordinate ends such as security and equality. These could be extended to individuals throughout society by the legislator, and various laws and institutions could be used to support equal treatment and equal rights. These could also be justified in terms of the utility principle in a bottom-up fashion (see chapter 12).

Bentham thus might easily have written about moral rights within this perspective, but to do so he would have felt that he would only undermine what he was attempting to achieve with the principle of utility. When Mill wrote *Utilitarianism*, he probably believed that the argument about utility had been won, although he did take pains to distance himself from Spencer's belief that the utility principle required an additional presupposition concerning equal moral rights. This move revealed his proximity to Bentham on the role of equal distribution as part of the principle of utility and would clearly preclude modern criticisms of classical utilitarianism concerning the sacrifice of individual happiness simply for the sake of aggregating a greater amount of happiness.⁸

THE TYRANNY OF THE MAJORITY

A traditional criticism of utilitarianism has focused on its alleged inability to provide an adequate theoretical foundation for securing individual rights and the protection of minorities. The very phrase, ‘the greatest happiness of the greatest number’, has been interpreted as a clear declaration of majority ascendancy. This criticism may be traced to the heart of utilitarianism in J.S. Mill’s notion of the ‘tyranny of the majority’, which Mill regarded as a partial criticism of the utilitarian theory of government that he inherited from Bentham and James Mill. The object of this chapter is to examine the problem of majority rule and minority rights from the perspective of the classical formulation of utilitarianism, especially that of Bentham and to a certain extent J.S. Mill, and to suggest that many common criticisms of their approach to majorities and minorities are without foundation.

Majorities and minorities in practice

Classical utilitarianism addresses the relation between majorities and minorities on two levels, the practical and the theoretical. On the practical level the majority is a device that may be useful in making decisions, but no more important than other devices. Bentham, for example, was interested in the distinction between comparative and absolute majorities in his *Constitutional Code*, but he was far more interested in the distinction between open and secret voting and even in the use of chance or lot for reaching decisions (Bentham 1983a: 157–8, 317–21, 329–37). And, as a democrat, he was not especially committed to the idea of majority rule. All government, including representative democracy, was minority government, that of the ‘ruling few’ over the ‘subject many’. Representative democracy was considered superior to other forms of government, not because of a supposed ascendancy of the majority, but because it was able to make a ‘ruling few’ more accountable to the ‘subject many’ than other forms of government. Where Bentham criticized the doctrine of the separation of powers for allowing a minority veto of legislation, his criticism was based more on the link he saw between minority control and the operation of ‘sinister interests’ than on any commitment to ‘majority rule’ (see Bentham 2002: 409ff).

To emphasize Bentham's indifference to the concept of majority rule, consider the following passage that appears in manuscripts written as a commentary on the first Greek constitution (the Constitution of Epidaurus of 1 January 1822) that excluded Muslims and Jews from citizenship and office:

The exclusion put on this occasion upon so large a part perhaps the largest part of the existing population is at present it would seem an unavoidable arrangement but it is a highly deplorable one. It entails upon the country the existing division, reversing only the position of the condivident races. It places the Turks under the Greeks [*as*] the Helots were in under the Spartans, in the situation that the Protestants in France were in under the Catholics, in Ireland the Catholics under the Protestants, in the Anglo-American United States the Blacks under the Whites. In no country can any such schism have place but in point of morality and felicity both races are, in howsoever different shapes, sufferers by it: the oppressors as well as the oppressed.

To lessen the opposition of interests – to bring them to coincidence as speedily as is consistent with security should therefore be an object of constant care and endeavour.

(Bentham *UC*: xxi.192; see Rosen 1992: 85)

The first point to be noted is that Bentham's position does not depend on whether or not those excluded constitute a minority or a majority. In the examples that he provided some are oppressed minorities under majorities, and others are oppressed majorities under minorities (e.g. the Catholics under the Protestants in Ireland). Second, Bentham's remedies for this perhaps 'unavoidable' exclusion in Greece have no special reference to majorities and minorities. Both oppressors and oppressed, in his view, suffer from such an arrangement. The oppressors have no security against discontent and rebellion; the oppressed suffer indignity and are vulnerable to direct attack. Bentham recommended the accommodation of the Muslims and Jews within the state in a way that would not threaten Greek security, but would eventually lessen the hostility between these groups. In one example he argued that the Turkish community might be allowed to become citizens and be given the vote, but if they tended to outnumber the Greeks in too many electoral districts, the voting age for non-Greeks might be increased (Bentham 1990: 254–5). Although such an arrangement, he admitted, would not be perfect, it might reduce the mutual fear and hostility that would arise from total exclusion, and would allow the new Greek state to move towards granting equal rights for all. Bentham saw in this sort of position the combination of what he called 'self-regarding prudence' with 'effective benevolence', the latter being 'effective' so long as the former was recognized and secure (see Bentham 1983b: 249–81). In another example he assumed that the Greeks would be trained in the use of muskets and in European methods of warfare. Rather than keep the Turks completely disarmed

he proposed that they should be allowed swords and pistols so that they might be able to defend themselves without having the power to threaten the overall security of the Greeks (Bentham 1990: 255). Here again, he sought to combine ‘effective benevolence’ with ‘self-regarding prudence’, but this combination did not involve any special awareness that he was dealing with majorities and minorities.

Interests, security, and equality

The phrase, ‘self-regarding prudence’, evokes the idea of self-interest, and it is from the concept of an interest that we might best examine on a theoretical level the utilitarian approach to majority rule. Bentham may again be taken as the archetypal figure in classical utilitarianism. For the individual, every object of motivation creates an interest so that each person would seem to have an incalculable number of interests. Furthermore, each might be motivated by different goals and desires so that his interests will be not only difficult to calculate but also potentially subjective. Although not denying these difficulties with the concept of an interest, Bentham would have argued that the most important interests are those that individuals share with others, and, for purposes of legislation, these might be reducible to a few essentials, the most important of which is security. Each person has an interest in his own security, which for Bentham is so fundamental that all other interests are subordinate to it. Mill followed Bentham in recognizing the importance of security in his own account of utilitarianism:

Nearly all other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment; since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves.

(Mill 1969: 251; 1998: 98)

In this passage Mill brought together in characteristic manner many of the important ideas Bentham had associated with the idea of security. First, like Bentham, Mill accepted that security is the most important element in human existence and something no one can do without. Second, he saw that although individuals may seek a wide diversity of objects, and what one wants another does not, everyone wants security. Third, security is largely conceived as a negative idea in so far as it is realized by preventing pain and evil. To have security is to be free from something, for example, invasion, illness, or interference. Fourth, the importance of security is underlined by the fact that without it only direct and immediate pleasures can be enjoyed. All of one’s plans for the future, one’s

expectations and hopes, depend on security. The emphasis Bentham placed on security of expectation was shared by Mill. Finally, in so far as everyone has an interest in security, that is to say, this interest is shared equally, there is a clear link through security between equality and interests.

Each person in a society thus has an interest in security, and the advancement of security may be regarded as being in the general interest. Many different and complex governmental policies are part of the advancement of security, including protection against invasion, crime, famine, hunger, illness, oppression, and the abuse of power. For Bentham, each individual has an equal interest in security and the object of all individuals should be to maximize it. This is not to say what people actually do, as many individuals think that it is in their interest to create insecurity for others so long as they gain immediate benefits for themselves. Nevertheless, the only interests that can be maximized for everyone are those that everyone shares, such as security, and it is ultimately in the interest of each individual to advance the common interest, as in the long run one's own interests will also be furthered. Conversely, where individuals pursue their own interests in opposition to the general interest, they eventually run into conflict with other members of society.

The emphasis on the idea of security by both Bentham and Mill has many ramifications, only two of which will be considered here (see Kelly 1990: 71ff; Postema 1986: 147ff). The first is that in a political context Bentham's greatest happiness principle means mainly the maximization of security applied equally to all members of a given society. Although the object of legislation is to maximize the happiness of all members of society, that object in turn means to effect the maximization of security. Furthermore, as was evident in the passage concerning the Greeks and Turks, no one is secure unless everyone is secure.

Although Bentham clearly understood what he meant by the greatest happiness principle, and especially the link with security, he also realized that there might be some public confusion over the meaning of the principle. In particular, the phrase, 'the greatest happiness of the greatest number', might imply the happiness of the greater at the expense of the lesser number. In his 'Article on Utilitarianism', written for Perronet Thompson to use in his reply to Macaulay in the *Westminster Review*, Bentham attempted to clarify the meaning of this phrase and posed the following example: 'Number of the majority, suppose, 2001: number of the minority, 2000. Suppose, in the first place, the stock of happiness in such sort divided that by every one of the 4001 an equal portion of happiness shall be possessed. Take now from every one of the 2000 his share of happiness, and divide it anyhow among the 2001' (Bentham 1983b: 309–10). Bentham believed emphatically that the redistribution of happiness from the 2,000 to the 2,001 would produce a great loss of happiness, for 'such is the nature of the receptacle, the quantity of unhappiness it is capable of containing during any given portion of time is greater than the quantity of happiness' (Bentham 1983b: 310). What Bentham meant by this statement is not entirely

clear, but he felt that the point was self-evident, as he indicated in the next paragraph:

At the outset, place your 4001 in a state of perfect equality in respect of the means, or say instruments, of happiness – and in particular power and opulence: every one of them in a state of equal liberty, every one independent of every other, every one of them possessing an equal portion of money and money's worth: in this state it is that you find them. Taking in hand now your 2,000, reduce them to a state of slavery, and, no matter in what proportion, of the slaves thus constituted divide the whole number with such their property among your 2,001. The operation performed, of the happiness of the whole number, 4001, will an augmentation be the result? The question answers itself.

(Bentham 1983b: 310)

In other words, the happiness to be obtained by its redistribution from the minority to the majority would be small in comparison with the unhappiness to be felt by the minority by their reduction to slavery.

By the greatest happiness principle, Bentham clearly meant an equal distribution of pleasure or its equivalent (or an equal reduction of pain) to all members of society or to all of those concerned with an action. He used the greatest happiness of the greatest number as a secondary principle so that where happiness could not be distributed equally (for whatever reason) the distribution would be made equally (or as equally as possible) to the greatest number.

When one combines Bentham's conception of security (and especially security of expectation) with his formulation of the greatest happiness principle, his approach to the relation between majorities and minorities becomes clearer. The greatest happiness in politics and legislation effectively means the maximization of equal security to all members of society. Security means, for the most part, protection against pain, and this distribution of pain is the special province of the legislator who, given the varieties and the subjective nature of much pleasure, cannot possibly know what will provide pleasure for each member of society. The province of the legislator is the protection of each individual in society against the pains from which he or she, together with all other members, wishes most to be protected. This is the realm of security that is the main constituent of the greatest happiness principle. In the relation between security and happiness, security of expectation plays the key role. For both Bentham and Mill, the disappointment of settled expectations (such as the sudden reduction of an individual from citizen to slave) creates such pain and is so fundamental an injustice that it can never be justified on the grounds of the augmentation of happiness elsewhere.

Not all utilitarians would agree with this emphasis on security. In 'An Outline of a System of Utilitarian Ethics', J.J.C. Smart accepts that a sheriff in a small town might justify the arbitrary execution of an innocent man as a scapegoat in

order to prevent serious riots and widespread loss of life (Smart 1973: 69ff). Bentham would not have accepted such an execution as the utilitarian outcome, however, because he was not concerned simply with measuring the number of people who may be killed, as though the calculation of pain is equivalent to the calculation of the number of dead citizens. To execute anyone in society as a scapegoat would so threaten security of expectation that the action would seriously diminish the happiness of every other person. If one is executed as a scapegoat today, anyone else might be treated similarly tomorrow. No one could be secure in the basic expectation of life in the society. The happiness purchased by the execution of the scapegoat would be small change in comparison with the price to be paid in the threat to fundamental security. Nor would the prospect of widespread rioting and death outweigh the death of the scapegoat, as both would equally threaten fundamental security.

Popular sovereignty and majority rule

The second aspect of the utilitarian emphasis on security to be considered here is Bentham's idea of security against misrule, which means, in effect, the protection of the majority (or subject many) from the misrule of the minority (or ruling few). We might begin with Bentham's conception of a constitutional democracy where sovereignty is placed in the hands of the people. Throughout his writings on constitutional democracy, Bentham was careful to distinguish between the exercise of sovereignty (constitutive power) and the exercise of the powers of government (operative power) (see Bentham 1989: 6; Rosen 1992: 65–8). The effective power to make and execute laws is operative power and even the sovereign power in the state is dependent upon operative power. Constitutive power is defined by Bentham not as the power to make a constitution (for that belongs to operative power) but in a more limited manner as the power to choose and dismiss those who hold operative power. For Bentham, this power is especially apt in a democracy where the people may have little time and inclination to rule but have the capacity to choose their rulers and every opportunity to consult their interests in doing so.

That Bentham, as a utilitarian, distinguished between constitutive and operative power reflects his conception of individual interest leading to an equal security for all members of society. As few people have the leisure, inclination and knowledge to rule, individual interest is secured best by maximizing control over those who do rule. Securing their interests means in effect enhancing constitutive power which is achieved in the control of the 'ruling few' by the 'subject many'.

Given the nature of constitutive power, which at one point Bentham conceived as a power of patronage (Bentham *UC*: cxiii.4) (to choose and dismiss one's rulers), it would be inappropriate to confuse his idea of popular sovereignty with majority rule. Although it is true that the majority of the legislature determines the laws, subordinate executive and judicial branches carry them into

effect and ensure compliance. In addition, although the legislature is chosen by the majorities of constituents in various electoral districts, the majority of the people do not actually rule. Bentham takes great pains through the distinction between constitutive and operative power to prevent this misconception. He believed in popular participation in government and even saw (contrary to the views of some critics (see, for example, Pateman 1970: 19–20)) the moral benefits of such participation, but participation on its own is not ruling in the sense of making and enforcing legislation.

To see democratic government as majority rule creates a confusion that obscures the fact that even in a democratic government all ruling is in effect minority rule and the task of democratic constitutionalism is to secure the majority from misrule and oppression under a system of minority rule. In advocating popular sovereignty, Bentham advocated one means by which the abuse of power might be controlled or checked. The confusion of popular sovereignty in a constitutional democracy with majority rule, however, is commonplace. For example, it plays an important role in John Rawls's attempt to link his two theories of justice with practice in the context of constitutional democracy (Rawls 1972: 221ff). The principle of equal liberty (the first principle of justice) is succeeded by the principle of participation that posits an equal liberty of participation by the members of the society. In the context of constitutional government, this principle becomes the majoritarian principle that is in turn limited by constitutional devices designed to protect minorities. Rawls's conception of constitutional government is, therefore, a system that satisfies majority aspirations while protecting minority interests, and such a system reflects the more distant Rousseauian origins of this approach to politics. For Rousseau, the majority (the Lawgiver notwithstanding) actually rules with all of the people forming the legislative power in the state. Rawls proposes no such direct democracy. But Rawls's position only makes sense if, to use Bentham's terms, there is no difference between the possession of constitutive and operative power. Not only would Bentham argue that such a distinction is crucial to an understanding of constitutional democracy, but he would also contend that not to make the distinction obscures the important fact that constitutional democracy, like other forms of government (for example, monarchy and aristocracy), must exercise minority rule with the government to be regarded as any other ruling elite. The phrase 'majority rule' or the 'majoritarian principle', once removed from the context of direct democracy, becomes misleading and even dangerous if it implies a measure of direct popular control over government. Popular control in a representative democracy may be achieved in any number of ways, but 'majority rule' is not one of them.

Democratic despotism

Although accepting many of the arguments that appear in this chapter, Pedro Schwartz has contended that the direct consequence of Bentham's system of

constitutional democracy (whether intended or not) is to enhance 'democratic despotism' (Schwartz 1986: 74–103). In part, Schwartz is defending the theory of government rejected by Bentham, that is, the theory based on the social contract, separation of powers, federalism, direct limitations on legislative powers, checks and balances, and bicameralism. On another level he is suggesting that the very logic of classical utilitarianism and legal positivism, particularly in Bentham's thought, inevitably leads to a despotic system of government. As for the first criticism, based on Bentham's rejection of such doctrines as the social contract and the separation of powers, Schwartz does not doubt that Bentham intended to provide different securities for these institutions and practices long associated with individual liberty in the tradition of Locke and Montesquieu. He is sceptical, however, of Bentham's complete acceptance of political democracy not only as the basis of good government but also as being fully compatible with the protection of individual liberty. Schwartz reflects a long tradition of European liberalism that sees liberty and democracy largely as opposed ideas, and his criticisms of Bentham, though more contemporary in form, are reminiscent of Elie Halévy's similar criticisms of Bentham's so-called 'Jacobinism' which were written at the beginning of the twentieth century (see Halévy 1901–4; 1952; see also Rosen 1987b: 59–76). Nevertheless, Bentham was well aware of the problem of combining security with equality and democratic policies at the time of the French revolution, and strongly emphasized the greater importance of security. By the 1820s, with the model before him of the successful operation of a wide suffrage without any threat to the security of property in the various states of the United States, Bentham believed confidently that elementary security was compatible with political democracy so long as numerous checks or securities were introduced to protect the people from the abuse of power by government. He differed from Macaulay, who thought the export of democratic constitutions to Europe from the United States would threaten security of property in Europe (see Macaulay 1978: 120). Bentham's theory of interests led directly to the conclusion that with each person's interest in security, and with security of property being fundamental to such personal security, the introduction of political democracy could mean an enhanced security for the individual rather than its diminution. Like John Stuart Mill, who followed, he accepted democracy and then built into the constitutional system numerous means by which intelligent, accountable, and responsible government could be established within the democratic regime. The very notion of a representative constitutional democracy symbolizes Bentham's opposition to 'democratic despotism'.

The rejection of many notions regarded by Bentham's contemporaries as crucial to liberty and security, such as the separation of powers and bicameralism, was based not on a disregard for liberty and a taste for despotism, but on the belief that more effective securities could be devised that were also more compatible with a system of representative democracy. Bentham believed that the traditional institutional securities, as, for example, the separation of powers,

evolved to provide security and limited government under monarchies and aristocracies. While these regimes still existed, he did not propose to abolish such practices, but they would be inappropriate under representative democracy and might even operate to make it less successful in securing the liberties of the people. Bentham was clearly arguing within the tradition he was criticizing, and if he rejected some of the constitutional proposals of Locke and Montesquieu, he did not reject the goals of widespread security that they had sought. He attempted to replace them with new instruments in the context of a constitutional democracy, and if the new means were not as successful as the old, Bentham would have been the first to advocate returning to those he had rejected.

The experimental character of Bentham's theory is of crucial importance to rebutting Schwartz's contention that Bentham perhaps unwittingly favoured 'democratic despotism'. If Bentham rejected the separation of powers, for example, it was because he could show that the consequences of its practical application in the new context of representative democracy were not as beneficial as others had supposed. But his advocacy of other practices was subject to the same test and to a willingness to alter arrangements when other practices could be shown to be better on utilitarian grounds. It is important not to confuse Bentham's experimental and theoretical approach to constitutional democracy with more dogmatic ideologies that perhaps arose at the same time.

Furthermore, those, like Schwartz, who link Bentham's theory of democracy with 'Enlightened Despotism', are unaware of the more direct connection in his theory with the constitutionalism of Montesquieu and Lolme (see Rosen 1992: 40–58). Consider, for example, Bentham's placing in the *Constitutional Code* ultimate operative power in the state in a single legislative chamber, elected on the basis of universal suffrage. Here, if anywhere, we find the core of what might be called 'democratic despotism'. All other powers in the state are subordinate to this democratically elected legislative body. There is no opposition from another legislative chamber, an independent executive or judiciary, or another tier of state or local government. Although, apparently, whatever the legislature decides becomes law, the matter is not as simple as this brief sketch suggests. The tradition in which Bentham was writing provides an account of executive power that is analogous to that provided by Bentham of legislative power. For Montesquieu and especially for Lolme, one of the great strengths of the British constitution lay in the power held by the king in that he dominated all aspects of executive government and could not be challenged or have his power usurped by any other body in the state. Nevertheless, despite his enormous power, including his immunity from prosecution, his power was checked in one important respect, as the funds for his activities had to be voted by the House of Commons. In the same manner Bentham's legislature in the *Constitutional Code* has great power in the state and its legislative powers cannot be usurped by any other power. Nevertheless, like the king in the British constitution, in one important respect its power is checked, as it depends entirely on the votes of the people. Just as the

House of Commons could not equal the power of the monarch without disbanding the constitution so as to acquire executive power itself, the electorate or public opinion in Bentham's system could not have the powers possessed by the legislature without radically altering the constitution. Nevertheless, just as the control of the House of Commons over the monarch was effective, though indirect, so was the power of the electorate over the legislature in Bentham's system intended to be equally effective, though also indirect. For this reason he depicted the power of the legislature as 'omnicompetent' rather than 'omnipotent' (see Bentham 1983a: 41–2; Rosen 1983: 44–8).

Nor does Bentham's legal positivism lead, even unwittingly, to 'democratic despotism'. His theory of democracy, with the people sovereign, does not embrace the view that law is 'whatever the sovereign wills', and as Postema has argued, even his theory of law does not embrace this view (see Postema 1986: 218–62). From his earliest writings Bentham regarded sovereign power as capable of being limited, divided, and functionally distinguished within a constitutional system. In his democratic theory the people, though sovereign, do not make laws, and the legislature, though the source of legislation, is omnicompetent and not sovereign. It must also share its power functionally with the executive and judicial branches even though these branches are in principle subordinate to the legislature. Furthermore, Bentham was perfectly willing to see his Code adapted to a federal system and to place clear restraints on the legislature (in suggesting that its members meet educational qualifications before standing for office). These limitations on the omnicompetent legislature are compatible with Bentham's legal positivism, because it is a mistake to conflate an account of the formal source of a law with an account of political power in a state. Only such a conflation would allow one to see Bentham's theory of democracy as despotic because of the nature of legal positivism.

Tyranny of the majority

The final theme considered here is the extent to which classical utilitarianism allowed or accommodated what Mill called 'the tyranny of the majority'. Did Bentham anticipate Mill's attempt to correct this new threat to human well-being posed by the coming of popular politics, or did Mill see the need to call attention to the 'tyranny of the majority', partly because of the consequences of Bentham's own approach to democratic government? To answer both of these questions in the affirmative may seem contradictory. Nevertheless, although Bentham's theory of constitutional democracy may, in Mill's opinion, have enabled majority tyranny to develop, Mill also adopted a number of concepts prominent in Bentham that would lay the foundations for resisting majority tyranny. In his 1838 essay on Bentham, Mill depicted critically the political arrangements of Bentham's *Constitutional Code* as placing the people under the 'absolute authority of the majority of themselves' and referred to the influence of this authority as extending to 'the despotism of Public Opinion' (Mill 1969:

106–7). These strong comments extend Mill's criticisms of Bentham's political ideas in the 1833 essay, 'Remarks on Bentham's Philosophy', where he was concerned with Bentham's supposed failure to give sufficient attention to tradition, habit, and the different conditions of different people, and reflects the influence of Tocqueville's *Democracy in America* he reviewed for the first time in 1835 (see Mill 1969: 16–17; 1977: i. 156, 175–8, 200). Once he had read Tocqueville, he clearly linked Bentham's conception of a constitutional democracy with the notion of democratic despotism, if not majority tyranny.

Nevertheless, when Mill invoked the 'tyranny of the majority' in the introductory chapter of *On Liberty*, he made no direct reference to Bentham or to his theory of government (Mill 1977: i.219–20). Perhaps at this later period Mill had become sympathetic to other aspects of Bentham's political thought, as is apparent in his emphasis on security in *Utilitarianism*. Bentham's notion of security provided at least the legal framework within which individuality could develop, and security for Bentham was, as we have seen, another name for the idea of civil liberty (see Rosen 1987a: 122–6; cf. Long 1977: 115–18). Indeed, one might argue that Bentham's conception of security would favour and advance the cause of individuality more surely than any other concept of civil liberty discussed in the latter half of the eighteenth century. Furthermore, in the early *Fragment on Government* Bentham had already conceived of liberty of press and liberty of public association (two important ingredients of Mill's conception of liberty) as part of the very definition of a free constitution, and had linked these freedoms directly with security (Bentham 1988: 97–8). He continued to uphold these freedoms later in life as being as important in a democracy as in a free state generally.

We have already seen that it would be a misconception to regard Bentham's theory of constitutional democracy as embodying the idea of majority rule, and such a conception could not, therefore, lead to 'majority tyranny'. In as much as Bentham stressed the importance of an educated government service (including educational qualifications for members of the legislature), he clearly intended that government should consist of educated people whose opinions and policies would not simply reflect the majority of the electorate (see Steintrager 1977: 97–116; Rosen 1983: 195–9). It is arguable that Bentham made a greater provision for competence in public office in his *Constitutional Code*, which could oppose majority opinion in society, than Mill did in his *Considerations on Representative Government* (cf. Thompson 1976).

Perhaps the only link in Bentham with Mill's conception of the tyranny of the majority may be found in Bentham's emphasis on the importance of public opinion in society. If Mill sought to protect the individual from the stultifying effects of public opinion, Bentham saw in public opinion, and in what he called the public opinion tribunal, the main institutions that could represent the public interest and advance the strategy of reform. Where Mill resisted public opinion, Bentham seemed to defer to it as embodying the greatest happiness principle (see Bentham 1983a: 36). Nevertheless, when Bentham emphasized the importance

of public opinion, he was mostly considering issues that were not directly relevant to the problem of resisting majority tyranny as Mill saw it. Public opinion was, for Bentham, a force not controlled by government, and it could play the important role of acting in opposition to it (see Rosen 1983: 19–40). Since it possessed none of the power of government, it could not be corrupted in the same sense that government officials could be corrupted. Bentham conceived of public opinion as a critical force in society, not simply reflecting mass opinion but working through the press and institutions such as the jury system to advance the public interest and to change laws and government practices. He was well aware of the strength of what he called ‘sinister begotten prejudice’ that enabled sinister interests to thrive with impunity while the great mass of people supported government policies and especially wars that were wholly opposed to their interests. Not all expressions of the public are expressions of the public interest, but public opinion does have the capacity to be an independent force in society representing the public interest. The public opinion tribunal, as Bentham conceived it, was a judicial body that could judge and criticize laws and policies, and while accommodating the views of the people generally, it was linked fairly directly to educated critical opinion. This intelligent and critical opinion in society would tend to uphold Mill’s own principle of liberty, and he would probably address his own essay to it in the first place.

On closer examination of Bentham’s conception of public opinion, it is clear that the public opinion tribunal was not conceived as a stultifying defender of dominant class interest that Mill sought to oppose. To assume that it was is to confuse the public opinion tribunal with the notion of ‘sinister begotten prejudice’. Like Marx, Bentham believed that the interests of the ruling class led to the formation of a superstructure of ideological mystification through which allegiance was obtained for policies that were actually opposed to the interests of the people. ‘Sinister begotten prejudice’, for Bentham, would persist in a representative democracy, as those in power sought to protect their power and positions. Its force was limited by the general accountability of rulers to the ruled, established through elections and by the influence of the public opinion tribunal. If Mill (following Tocqueville) believed that democracy led to the tyranny of the majority, Bentham saw the tyranny of the majority present in any regime through the force of ‘sinister begotten prejudice’.

Bentham did not give his attention solely to the protection of the people from the excesses and abuses of government, as he upheld the importance of privacy and the protection of the individual in society. In his defence of liberty of the press, for example, he proposed that in place of the prevailing practice, where severe punishments were handed out for criticism of public officials and much smaller ones for the defamation of private individuals, he would reverse this order so that the private individual would be secure against libel and defamation, but no punishment could be imposed for criticism of a public official except for false or groundless defamation (Bentham 1821b: 12). Bentham proposed a strong legal framework to protect the liberty of the private individual, and he also

proposed abolishing the numerous offences that limited the freedom of consenting adults to enjoy unconventional pleasures so long as no harm was done to others (see Crompton 1985: 19ff, 251–83). Rather than seeing Mill's opposition to majority tyranny as a correction of or deviation from classical utilitarianism, it might better be seen as an important development within that tradition. Mill developed a new notion of social liberty that he welded to Bentham's idea of civil liberty as security, and created the classic defence of the individual against the pressures of society.

NEGATIVE LIBERTY

The phrase, ‘negative liberty’, has been prominently with us for a comparatively short time and may be found in Sir Isaiah Berlin’s celebrated Inaugural Lecture at Oxford on 31 October 1958 (Berlin 1958). This is not to deny that philosophers since Hobbes (and, indeed, if we follow Quentin Skinner (1984: 206ff), since Machiavelli) have conceived of liberty in negative terms. Nor, that part of the debate between the English Idealists and their opponents, such as Spencer and Sidgwick, was over the replacement of a *laissez-faire* conception of liberty with a more positive one (see Weinstein 1965: 150ff; Cohen 1960: 224–6). But the division of liberty into two sorts – one negative (meaning non-interference) and the other positive (meaning self-government) – with one defended against the other (though perhaps present in Benjamin Constant’s distinction between ancient and modern liberty, made 150 years earlier (Constant 1988: 309–28)), was given a particular force and character by Berlin’s use of the distinction. In making it, he clearly (though perhaps not as definitively as those who have discussed his essay), linked Hobbes and Bentham as together upholding negative liberty (Berlin 1958: 8 and n).

Berlin’s lecture and the subsequent inclusion of it as an essay in *Four Essays on Liberty* (1969: 118–72) have generated a considerable secondary literature, and the distinction between negative and positive liberty has passed into what might be called common philosophical understanding. It is now used in philosophical works without reference to Berlin or to his essay. Negative liberty, it seems, is so widely known and accepted that it has ceased to be a contestable concept. When the lecture was first reviewed, the *TLS* (20 February 1959) noted in a favourable allusion that it appeared in the centenary year of the publication of Mill’s *On Liberty*. As early as 1966 the lecture could be discussed as having ‘established itself as a minor classic of modern political theory’ (MacFarlane 1966: 77), and thirty years after publication, one can read an article entitled ‘One Voice More on Berlin’s Doctrine of Liberty’, which defends Berlin’s critique of positive liberty (Polanowska-Sygulska 1989: 123–7).

Throughout the debate over the meaning and significance of Berlin’s lecture, one aspect has remained not only unchallenged but also emphatically endorsed – that is to say, that Hobbes and Bentham shared the same view of negative liberty,

and this view is at the core of Berlin's conception. Hence, Charles Taylor, Berlin's successor to the Oxford chair, writes of 'the crude Hobbes–Bentham concept, that freedom is the absence of external obstacles, physical or legal' (Taylor 1979: 179). Skinner refers to Berlin's formulation of negative liberty as 'originally owed to Jeremy Bentham', and links it with 'the entire development of modern contractarian political thought' from Hobbes to Rawls (Skinner 1984: 194; see also Skinner 1998: 83n). John Gray concedes that 'it may be true that thinkers such as Hobbes and Bentham embraced a severely negative view of liberty' (Gray 1980: 523). William Weinstein has referred to a 'classical' or 'orthodox' concept of liberty which is negative in form and 'is associated before the nineteenth century with Hobbes, Locke, and Adam Smith, and in that century itself with the classical economists (e.g. Ricardo and McCulloch) and the utilitarian liberals (Bentham, James Mill, John Stuart Mill and Henry Sidgwick)' (Weinstein 1965: 145).

Although Berlin's ideas have been widely discussed, little attention has actually been paid to his treatment of negative liberty. He himself devoted most of his lecture to the critique of positive liberty, and most commentators have been concerned to provide some sort of reconciliation between the two (see, for example, MacCallum 1967: 312–34). But his conception of negative liberty is at the core of his whole argument, and if that is not coherent, the rest arguably cannot be defended.

Negative liberty in Hobbes and Bentham

Let us look at the idea of liberty in the two supposedly classic exponents of negative liberty, Hobbes and Bentham. Hobbes defined liberty in chapter 14 of *Leviathan* as follows: 'By LIBERTY, is understood, according to the proper signification of the word, the absence of externall Impediments.'¹ Hobbes's definition of liberty as the absence of external impediments to motion is usually re-stated as the 'absence of restraint'. Such a conception of liberty is immediately recognizable. We know that we are not free when we are in chains and are unable to move about as we please. The obstacle to our movement is physical and we are able to give a factual description of our lack of freedom (see Steiner 1974–5: 33–50; Gray 1980: 513–17). Such a view of liberty fits in well with Hobbes's theory of motion where liberty is equivalent to voluntary motion. So clear is this conception of liberty that it is usually adopted as one of the classic statements of 'negative liberty'.

Less clear, perhaps, is Hobbes's extension of the idea of liberty to what he calls 'the liberty of subjects', where he refers to civil laws forming 'artificiall chains' from the lips of the sovereign to the ears of the subject.² The liberty of the subject is two-fold. He is free to do what the sovereign has not forbidden by law; and he retains a right of nature to preserve himself. As for the first, Hobbes lists the following as examples: 'the Liberty to buy, and sell, and otherwise contract with one another; to choose their own aboard, their own diet, their own

trade of life, and institute their children as they themselves think fit; & the like' (Hobbes ch. 21, 1962: 163). This fairly extensive and open-ended list must be qualified, however, as the sovereign is given the authority at all times to restrain practices by law in these areas as well, if he or they (depending on the size of the sovereign body) so choose. The liberty of the subject in this first sense depends on the fact that the sovereign passes over or omits to legislate in these areas. As for the second sense of the liberty of the subject, this consists of the right of self-preservation and of not being obliged to place oneself in great personal danger. Here, again, the sovereign has the last word, but still the subject possesses this valuable right.

As David Raphael (1984: 27) has noted, 'Hobbes stands for authority rather than liberty', though he manages to provide considerable scope for liberty as well. Hobbes places the liberty of the individual, however modestly conceived, in clear juxtaposition to the authority of the state, and however powerful the state might be, there is a certain sphere of liberty that is retained by the individual. To this formulation of the idea of liberty those who wish to discuss negative liberty usually turn.

When Bentham defined liberty, he found the Hobbesian formula too narrow, because the idea of liberty as the absence of restraint did not seem to include constraint as well:

Were I obliged, were I constrained to walk 20 miles every day whether I would or no, although I were restrained in no one single aspect of my conduct further than was necessary to my walking of the twenty miles, although I might choose the time, the place, the company, I must confess I could not help looking upon myself as very far from being at perfect liberty.

(Bentham *UC*: lxix.58; see also Long 1977)

Not only did the absence of restraint seem too narrow to Bentham as a conception of liberty, but he also justified his own definition as not 'offending in any respect against the propriety of language' (Bentham *UC*: lxix.58). At one level Bentham might be taken as amending and extending Hobbes's definition which perhaps was too neatly adapted to the theory of motion.³ And his best-known definition of liberty, as the absence of coercion (including restraint and constraint) may seem strongly Hobbesian:

Liberty then is neither more nor less than the absence of coercion. This is the genuine, original and proper sense of the word Liberty. The idea of it is an idea purely negative. It is not any thing that is produced by positive Law. It exists without Law, and not by means of Law.

(Bentham *UC*: lxix.44)

There is, nevertheless, a major difference between Hobbes and Bentham. Unlike Hobbes, Bentham did not subscribe to a doctrine of natural law and, especially to natural right linked to self-preservation. For Bentham, duties establish rights, and, for rights to be meaningful, law must first establish duties (see Bentham 1988: 108n). Although he granted that liberty might exist where the law is silent, he argued that the most important spheres of liberty must be established within the framework of law. This might occur in the realm of civil liberty where the individual is restrained from interfering with other people's lives and property and hence is constrained to observe certain modes of behaviour. Or it might occur in the realm of political or constitutional liberty where arbitrary and even tyrannical rule is limited through constitutional constraints. Since he believed that liberty was a wholly negative idea, conceived ultimately as the absence of coercion, and that this idea was incompatible with law and administration, which depended on coercion or the threat of coercion, it would seem virtually impossible for Bentham to talk about the liberty of the subject in the sense that Hobbes does. For it is not possible to mark out the liberty of the subject prior to the establishment of a system of government and law, and with government and law, there can be little liberty in this negative sense of much political significance. Consider, for example, the way he poured scorn on the first article of the French Declaration of Rights of 1791 which declared that 'men are born and remain free and equal in respect of rights':

All men born free? All men remain free? – No, not a single man. Not a single man that ever was, or is, or will be. All men, on the contrary, are born in subjection, and the most absolute subjection: the subjection of a helpless child to the parents on whom he depends every moment for his existence. In this subjection every man is born, in this subjection he continues for years, for a great number of years – and the existence of the individual and of the species depends upon his so doing.

What is the state of things to which the supposed existence of these supposed rights is meant to bear reference? A state of things prior to the existence of government or a state of things subsequent to the existence of government? If to a state of things prior to the existence of government, what would the existence of such rights as these be to the purpose, even if it were true, in any country where there is such a thing as government?

If to a state of things subsequent to the formation of government, if in a country where there is a government, in what single instance – in the instance of what single government – is it true? Setting aside the case of parents and child, let any man name that single government under which any such equality exists, in which any such equality is recognized.

(Bentham 2002: 323)

Bentham appreciated in this last paragraph the extensive character of law and government in society and the absence of any extensive liberty (or, for that matter, equality) as the result of the most fundamental operations of government. The statement that the idea of liberty 'is an idea purely negative' seems to be given less standing in terms of a sphere of freedom in the state than Hobbes gave it. This, of course, left Bentham with a problem concerning the categories of civil and political liberty to which we shall now turn.

Bentham and Berlin on civil and political liberty

Many debates about liberty have centred around various categories which are often used to extend liberty into areas where it has not previously been accepted. Many of the quotations taken from Bentham thus far (except for the last which belongs to the period of the French Revolution) were written by him as a contribution to another important, though less known, debate over American independence in 1776 (see Hart 1982: 53–78). At this time a number of writers were lined up against the philosopher and theologian, Richard Price (perhaps best known nowadays as one object of Burke's attack in the *Reflections on the Revolution in France*). Price approached the problem of liberty by considering it under four categories: physical, moral, religious, and civil. Following Locke, Price gave the definitions of liberty in each of these categories both positive and negative dimensions. The positive dimension was expressed in terms of power, and the negative, in terms of non-interference.⁴

Although Price followed Locke in recognizing these positive and negative aspects to liberty, and, like Locke, he stressed the importance of reason, there were important differences between the two thinkers. As D.O. Thomas (1977: 193–5) has noted, Price replaced Locke's doctrine of consent with an emphasis on the continuous participation of the people in government and the more democratic belief that all men should have the right to participate. Price's more radical doctrine seems to have envisaged wide-scale change; according to his conception of liberty, most people lacked self-government and could be considered political slaves (Thomas 1977: 194–5; Price 1991: 23).

What so alarmed Price's readers and led to widespread controversy was the radical nature of his almost Rousseauian belief in self-government and participation, to the point that in a fully democratic government taxes were to be seen as 'free gifts for public services' by citizens to the state (Price 1991: 24). Those who sought to question Price's position on a philosophical level, such as Bentham, turned to his conception of liberty and to the categories he used to extend it. Hence, Bentham insisted that liberty was wholly a negative idea, the absence of coercion. Such an argument then undermined both Price's definition of liberty, and especially his attempt to extend it to civil and political liberty.

It might be thought that Berlin's position with regard to positive liberty is roughly similar to that of Bentham's with respect to Price's doctrine. But Bentham's position was far more complex. He was genuinely puzzled about the

way liberty as the absence of coercion could be translated at all into a category like Price's civil liberty. If liberty is the absence of coercion, and liberty and law are incompatible ideas, how can liberty be translated into these categories? For example, when Bentham talked about civil liberty, he meant security of persons and property from interference by other individuals and the state, but such security had to be established by the state itself through various laws and the courts. Bentham could see that the establishment of what was called civil liberty required a massive invasion of liberty as each individual was prevented by the threat of punishment from interfering in the affairs of other people. He thought that what others called civil and political liberty was so different from liberty as the absence of coercion that he gave these ideas a different name which he took from Montesquieu – 'security' – that is to say, security against misrule and security against interference, and he retained the word 'liberty' for the purely negative idea of the absence of coercion (see Rosen 1992: 25–39).

Bentham's solution to the problematic way individual liberty was extended to form civil and political liberty alerts us to a problem Berlin does not face, and one which constitutes a further ambiguity in his theory. He confuses the liberty which requires state interference (i.e. security of persons and property) with a conception of liberty which requires maximum non-interference (see McCloskey 1965a: 489–90). Berlin simplifies almost to caricature the crucial point regarding civil and political liberty by insisting on its calculation in terms of an answer to the question, 'How much am I governed?' (Berlin 1969: xliii). Presumably, the individual who is governed less has greater freedom than one who is governed more. But for Bentham, if liberty is wholly negative, and if liberty is also supposedly obtained by law, then the question of how much I am governed requires a different sort of calculation to obtain an answer. Civil and political liberty requires one to give up liberty in its straight-forward negative form and to accept civil and political liberty where the constraints involved are not greater than the freedom obtained. But such a calculation *in terms of liberty* was never attempted by Bentham. His solution was to resolve it in terms of the larger theory of utility. Security (as in security against misrule and security against interference) is established as the main sub-principle under utility, and the maximization of security is the main means of maximizing the greatest happiness in society. As scholars, including Kelly, Postema, and others, have pointed out, Bentham's principle of utility is not a crude maximizing principle, particularly because of the role of the secondary principle of security (see Kelly 1990: 71–103; Postema 1986: 168ff). By maximizing each person's security (i.e. freedom within the law), each person is free to seek his or her own happiness. The overall pursuit of happiness through structures of security then leads to the greatest happiness.

Berlin, however, seeks to make the calculation in terms of liberty, and he does so by oversimplifying the ideas of civil and political liberty. For to prevent individuals from taking my property, assaulting me, threatening my life, blackening my reputation, etc. requires a massive state machine of law courts, the media, police, firemen, the army and other services, whose job is to restrain

each individual (and other agencies of the state) to prevent interference in the lives and activities of other individuals. To prevent civil unrest which may threaten my person and property, a range of welfare services as well as a more equal distribution of property may also be necessary. Such restraint and expenditure is costly not only in the interference required to establish civil liberty, but also in the tax burdens required to achieve these ends.

There is a romantic view of liberalism, especially of nineteenth-century liberalism, that sees the individual living free from interference from the state. Berlin can even imagine that Frederick the Great of Prussia and Joseph II of Austria might have provided greater liberty for subjects than self-governing democracies (Berlin 1969: 129n–30n). He notes that subjects under these rulers ‘were less persecuted and felt the pressure, both of institutions and custom, less heavy upon them than in many an earlier or later democracy’ (Berlin 1969: 130n). His reference to these autocrats becomes clearer when he states that ‘the most eloquent of all defenders of freedom and privacy [was] Benjamin Constant, who had not forgotten the Jacobin dictatorship’ (Berlin 1969: 126). The allusion to Constant is not made to Constant’s distinction between ancient and modern liberty which Berlin does not explicitly discuss, but to the way Jacobin democracy continued to haunt Constant and encouraged him to become a leading liberal thinker of the nineteenth century. Similarly, the totalitarian democracies (so-called) of the communist world, as the cold-war rhetoric portrayed them in the 1950s, a portrayal that was false concerning democracy, as we have seen in retrospect, seem to have haunted Berlin, and following Constant, he seeks in the twentieth century to recover a concept of liberty that would be appropriate to this threat. This is the way Berlin begins the debate, that is to say, by attempting to extend the category of individual liberty so that it can deal with the threat of totalitarianism where liberty is conceived in terms of active devotion to a totalitarian state and the realization of a higher destiny as a result of such devotion. Against this conception Berlin places his idea of negative liberty and an account of the liberal tradition to which it is related. He does not follow Mill, for example, in applying a principle of liberty to a new situation – for Mill, that of society itself – nor does he clearly link liberty to any theory of politics – such as natural law, natural rights, utility, the social contract, etc. He simply defends a conception of liberty against other conceptions. But such a defence, however valuable it was in the ideological struggle of the cold war in the dark days of the late 1950s, seems inferior and flawed when compared to, say, Bentham’s more subtle account of liberty as a negative idea. For it fails to show how liberty as simple non-interference can be translated into the categories of civil and political liberty which depend on state interference to maintain such liberty.

Liberty and democracy

Although Berlin does not place liberty within a larger theory of politics – rights-based, for example, or utilitarian – he proceeds more as a historian and invokes

the names of major thinkers who conceived of liberty as a wholly or partly negative idea, such as Hobbes, Locke, Bentham, and Mill, or who were advocates of limited government in the nineteenth century, such as Constant and Tocqueville. This has led (and is perhaps what is most influential in Berlin's approach) to the identification of liberty as a negative idea with liberalism as a political doctrine. Such an identification has of course been challenged. Hobbes and Bentham (when he formulated his idea of liberty) were not liberal, thinkers such as Locke, Kant, and Mill adhered in part to positive conceptions of liberty, and the tradition of liberalism in the nineteenth century emphasized positive conceptions of liberty, as witness T.H. Green, as well as negative ones (see, for example Gray 1980: 523; Weinstein 1965: 145ff; Nicholson 1990: 122ff). But if Berlin's approach to liberty cannot rightly be linked to any tradition of discourse about liberty, and if it eschews discussion of the place of liberty within a larger theory of politics, what point does his discussion have beyond the ideological one of attacking totalitarian notions of liberty? This question was in effect posed by John Rawls in *A Theory of Justice*, where he sought to 'bypass the dispute' largely because the issue at stake was, in his view, about a conflict of liberties: 'This question', he argues, 'is clearly one of substantive political philosophy, and a theory of right and justice is required to answer it. Questions of definition can have at best but an ancillary role' (Rawls 1972: 201–2). John Gray, in what is the best philosophical defence of Berlin, has argued that although Berlin's approach is largely that of a historian of ideas, there is a philosophical core within it. Berlin's 'repudiation of monism in philosophy', writes Gray, 'undoubtedly constitutes his master idea' (Gray 1980: 524; see Gray 1995: 5–75). And Gray quickly notes the implications of this position: 'we must dismiss once and for all the reigning illusion of the Enlightenment, the chimera of a rational morality, and its step-child, the project of a science of politics' (Gray 1980: 524). If Rawls sees Berlin's defence of negative liberty as an incomplete approach to expounding the place of liberty and various liberties within a theory of politics, Gray interprets Berlin as seeing Rawls's approach as a chimerical attempt to go beyond the philosophical historian's account of the *variety* of concepts of liberty and liberalism.

I am no philosophical disciple of Rawls and am sympathetic to Berlin's approach in so far as he places his emphasis on liberty. But I must reject it not only because it obscures the different ways in which liberty as a negative idea has developed, but also because it fails to grasp that the problems he poses can only be fully understood within systems of rational morality and politics. Bentham's account of civil and political liberty only makes sense from within the framework of his utilitarian philosophy, and within that framework he is able to resolve problems which Berlin finds conceptually disconnected or incoherent. As a result, where Berlin sees a conflict of ideas, such a conflict need not exist. Consider, for example, Berlin's argument about the relationship between individual liberty and democracy:

Freedom in this [negative] sense is not, at any rate logically, connected with democracy or self-government. Self-government may, on the whole, provide a better guarantee of the preservation of civil liberties than other regimes, and has been defended as such by libertarians. But there is no necessary connexion between individual liberty and democratic rule. The answer to the question 'Who governs me?' is logically distinct from the question 'How far does government interfere with me?' It is in this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists. For the 'positive' sense of liberty comes to light if we try to answer the question, not 'What am I free to do or be?' but 'By whom am I ruled?' or 'Who is to say what I am, and what I am not, to be or do?' The connexion between democracy and individual liberty is a good deal more tenuous than it seemed to many advocates of both. The desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area for action, and perhaps historically older. But it is not a desire for the same thing. So different is it, indeed, as to have led in the end to the great clash of ideologies that dominates our world.

(Berlin 1969: 129–31)

I have quoted Berlin at length because he has developed here an argument – an argument which contends that there is no necessary connection between negative liberty (as he conceives it) and democracy. This is so because presumably the two ideas are developed in response to different questions which in turn reflect different conceptions of liberty – negative and positive. Representative democracy, he concedes, has been defended by upholders of negative liberty, but the connection is not a strong one. On the contrary, the logic of democracy, for Berlin, is related to the freedom to lead 'one prescribed form of life' – which, from the perspective of negative liberty, is 'no better than a specious disguise for brutal tyranny' (Berlin 1969: 131). Even if we discard the cold war rhetoric that surrounds the allusions to 'the great clash of ideologies' and 'brutal tyranny', it is difficult to see how Berlin's account of the relationship between negative liberty and democracy can stand.⁵ It is true that he concedes that self-government may, on the whole, provide a better guarantee of the preservation of civil liberties than other regimes, but he fails to say that the two major philosophical approaches to representative democracy, from natural rights and from utilitarianism, make such an argument for self-government as the *only* guarantee of civil and political liberty. Given the necessity of state apparatus to defend invasions of civil rights and liberties, the only way to prevent oppression by the rulers themselves is by achieving accountable government through representative government – or, to put it simply, to have the opportunity to throw the rascals out. Both connections are firmly established in nineteenth century theories of representative government, and Berlin would not dispute this point. It is the

conclusion reached by Constant whom Berlin admires, and may account for Berlin's reluctance to discuss his theory in his lecture (see Constant 1988: 326–7).

Why does he then say that there is no necessary connection between individual liberty and democratic rule? If I wish to be free from interference, I would want to be able to ask the question, 'By whom am I ruled?', because if those who rule are corrupt or oppressive, I want to be able to remove them from office. Berlin has made several mistakes. He has equated democratic rule with what has been called 'democratic despotism' (see chapter 14) and not with representative democracy. But more importantly, he has not appreciated the philosophical connection between liberty and forms of government, because he has divorced his argument from the main traditional approaches to democracy through rights theory and utilitarianism. His own approach to liberty prevents him from seeing the obvious connections, and it is with some irony that we can observe ordinary people in the totalitarian states he rightly abhorred understanding clearly the need to be able to remove rulers through free elections, based on a wide suffrage, in order to secure political and civil liberty.

Negative liberty worth fighting for

Negative liberty, as conceived by Berlin, does not seem attractive in itself (see Cranston 1987: 254). From what I have said so far, one might wonder why men and women in their thousands are willing to fight and die for liberty. To be left alone to starve, to be homeless, to die of disease does not seem worth fighting for. Nor is it clear what additional benefits are secured by attaching other notions to negative liberty, as when Taylor calls it an 'opportunity concept' (Taylor 1979: 178ff). It is difficult to see any necessary connection between negative liberty, as conceived by Berlin, as non-interference, and the existence of opportunities. One might follow the other but not necessarily so. To say that negative liberty is an opportunity concept is like saying that existence is an opportunity concept (or, for that matter, if one believes in an after-life, non-existence). Though perhaps true in a trivial sense it provides no insight into the ideas of liberty, opportunity, or their connection. In the sense used by Berlin it is difficult to disagree with McCloskey that liberty would exist if one was in a coma and left alone (McCloskey 1965a: 494; see also 486–9). That hardly seems a liberty worth fighting for.

Those who fight for liberty are those who are intent upon resisting oppression and tyranny. And what they seek is not necessarily to be left alone by government, but another government which will not be tyrannical. Such a government will not simply be one with less power, but rather one which is less oppressive, whatever its power. And it is here that the category of 'constitutional liberty' comes into its own.

Constitutionalism is a theme of great antiquity, though the idea of constitutional liberty is of more recent vintage. I shall be accused of oversimplification, if I begin with Locke (as there is also the republican tradition from Machiavelli and

beyond), but the point I wish to make can perhaps be made most easily in this way. In Locke's *Second Treatise* we are presented with two ideas in embryonic form, which are crucial for the development of constitutional liberty (Locke 1965: 401–27). The first is the separation of powers (between legislative, executive, and federative) and the second is that the government has a trustee relationship with civil society and can be removed and replaced under certain circumstances. These ideas are often overlooked as critical discussion focuses on the doctrine of the social contract, and, from the point of view of constitutional liberty, we are indebted to Montesquieu for standing Locke on his head, and arguing that constitutional liberty best secures the civil liberty Locke establishes through the social contract. Montesquieu takes one of Locke's ideas – the separation of powers – and argues that the constitution best placed to secure civil liberty (i.e. the security of persons and property) is one which separates power, particularly legislative and executive power (Montesquieu XI.6, 1989: 156–66). To separate power is not necessarily to limit it. Montesquieu favoured a powerful, independent executive power so that the power of this branch could not be usurped by the legislative branch and vice versa. The separation of powers should lead to moderate government and the avoidance of tyranny, but not necessarily to limited government.

Bentham became highly critical of the separation of powers as a doctrine of constitutional liberty (Bentham 1988: 72–85; 2002: 405–18). He saw no clear link between the separation of powers and moderation, and thought that collusion between branches of government could and did lead to tyrannical government, while enforced separation could lead to undue resistance to change, and to corruption. He took the second of Locke's ideas and transformed it into a theory of representative democracy as the only way to achieve constitutional liberty, with individual security realized by making government increasingly accountable to the electorate and to the pressures of public opinion (see Rosen 1983; 1992: 25–76). Constitutional liberty here means democratic accountability rather than limited government. Bentham arrived at this position by applying utilitarian theory to problems of government. This application was not done in any rigid or mechanical way but creatively by showing how the notion of security could also be used to establish political or constitutional liberty, as security against misrule. In addition, he was prepared to argue that representative democracy was a necessary, if not sufficient, condition for constitutional liberty.

NOTES

2 Utility and justice: Epicurus and the Epicurean tradition

- 1 Bentham seems reluctant in his early years to associate himself publicly with Epicureanism. See Bentham 1996: 19. His attitude seems to have changed in later years, especially after Frances Wright (1822) dedicated her Epicurean book to Bentham. See Bentham 2000: 38 and n. But see also an earlier reference in Bentham 1994: 82–3. Compare J.S. Mill's reference in *Utilitarianism* to a clear tradition from Epicurus to Bentham associating utility with pleasure (Mill 1969: 209; 1998: 54). See also chapter 10 in this volume.
- 2 Hume 1932: i.33. On this passage and on Hume's relationship with Francis Hutcheson, see Moore 1988: 33–4, 38; 1994: 27–9, 55; 2000. Not everyone who mentioned Horace saw him as setting forth an Epicurean position. Shaftesbury, for example, granted that some of Horace's lines on philosophy 'have the Air of an EPICUREAN *Discipline* and LUCRETIAN *Stile*, yet, by the whole taken together' he was not an Epicurean. See Cooper 1999: ii.225n. See also Rivers 2000: 92–3.
- 3 Nor have commentators paid much attention to the theme. See, for example, Scarre 1994: 219–31; 1996: 39–47. For an exception, see Alberti 1995: 161–90. For the surviving writings of Epicurus, see Epicurus 1926.
- 4 By comparison, as Bailey (1928: 528) noted, 'most modern hedonistic systems have preferred to abandon egoism in favour of a social utilitarianism aiming at the "greatest happiness of the greatest number".' See also Cicero I.xx, 1999: 68ff.
- 5 Locke 1954: 265, 267. See also Locke 1997: 238 in which Goldie notes that this material 'marks a turn in Locke's thinking towards an hedonic account of the psychological groundwork of ethics'. In 1678 Locke, for example, wrote:

That the happiness of man consists in pleasure whether of body or mind, according to everyone's relish, and *summum malum* is pain, or dolour of body and mind; that this is so, I appeal not only to the experience of all mankind, and the thoughts of every man's breast, but to the best rule of this, the Scripture, which tells that at the right hand of God, the place of bliss, are pleasures for ever more; and that which men are condemned for is not for seeking pleasure, but for preferring the momentary pleasures of this life to those joys which shall have no end.

(Locke 1997: 271)

- 6 Bayle 1984: ii.779–80. See Wootton 1997: 220: 'Bayle's praise of the moral character of Epicurus and Spinoza caused much offence'.

- 7 Cf. Rawls 1972: 27. See also Molivas 1994, where it is argued that throughout the eighteenth century theories of utility and the social contract happily co-existed.
- 8 Gassendi 1699: 326–7. As J.S. Mill wrote in his essay, ‘Nature’: ‘The Stoics and Epicureans, however irreconcilable in the rest of their systems, agreed in holding themselves bound to prove that their respective maxims of conduct were dictates of nature’ (Mill 1969: 376).
- 9 Pufendorf 1729: 84. See Hochstrasser 2000: 69–70. For an interpretation of Pufendorf that ties him more closely with Epicureanism, see Hunter 2001: 148–96.

3 Reading Hume backwards: Utility as the foundation of morals

- 1 See, for example, the various articles in Norton 1993a. A recent exception is Darwell 1994: 58–82, esp. 76, which concludes that Hume ‘open[ed] up a space for philosophical utilitarianism even if he did not himself ‘occupy it’. Darwell’s argument consists mainly of a contrast between Hume and Francis Hutcheson out of which the ‘space’ mentioned above emerges. Unfortunately, the account of Bentham’s utilitarianism is very limited, and displays little acquaintance with recent Bentham scholarship. For another contrast between Hume and Hutcheson, printed in the same collection, which indirectly sheds more light on Bentham’s indebtedness to Hume through a contrast between Stoicism and Epicureanism, see Moore 1994: 23–57. For a recent philosophical study of Hume’s utilitarianism, see Crisp 1998.
- 2 References to the *Enquiry* will be to Hume 1998 and to section and paragraph numbers; references to the *Treatise* to Hume 1978 and to page numbers.
- 3 Haakonssen 1981: 5–6, 8, 41. See also Capaldi 1992: 294–5, 304–5, and especially 365–6, where a very general conception of utilitarianism is advanced without specific references in the notes or bibliography, which is then used to distinguish Hume’s idea of utility.
- 4 See, for example, the depiction of utilitarianism by Capaldi 1992: 365–6; see also Gauthier 1998: 21–2, 26ff. A more sympathetic interpretation appears in Whelan 1985: 207, 211ff. However, Whelan’s analysis is somewhat confused, because he fails to take the *Enquiry* seriously as a successor to the *Treatise*.
- 5 See Anon 1753: 33: ‘You think there is something new, and at the same time, simple and neat, in this manner of stating the foundation of virtue. Not altogether new, I must observe; for Mr. *Hutcheson* [*sic*] led the way by resolving all the several virtues into benevolence, as our author has done into utility; which in his sense of it, is much the same.’
- 6 See, for example, the argument in favour of private charity as opposed to public support in Tocqueville 1997.
- 7 For example, the mistaken view of Aristotle as an empiricist is as much based on a false contrast with Plato (as an idealist), as it is on any material in Aristotle’s own writings.
- 8 For Hume, at least one contemporary linked his thought with Epicureanism. According to Balfour (1989: 123), ‘our author’s scheme of morality is, in effect, no other than the antient scheme which excluded religion, which Epicurus first reduced to some form and clothed with a tolerably decent dress’. See also Balfour 1989: 163.

4 The idea of utility in Smith’s *The Theory of Moral Sentiments*

- 1 See also Plamenatz 1958: 22, 111, 112ff, where Hume is proclaimed as ‘the founder of utilitarianism’, and Smith, as well as Malthus and Ricardo, are listed as classical

- economists who were utilitarians. Although *TMS* is mentioned, it is not treated as a utilitarian work (Plamenatz 1958: 112).
- 2 See Haakonssen 1996: 159–60. See also Campbell 1984: 133–4, where a distinction is made between Smith's idea of utility and a 'mechanistic approach' found in Bentham.
 - 3 Of course, to write of 'utilitarianism' in the context of Smith is anachronistic. See Haakonssen 1996: 273.
 - 4 See, for example, Fitzgibbons 1995: 45–57; Brown 1994: 90n; Campbell and Ross 1981: 73–92.
 - 5 Cf. Cooper 1999: ii.113–14. While he saw a connection between justice, a sense of wrong, and resentment, Shaftesbury, for example, did not argue that justice was somehow based on resentment, or was created by it, even though he considered feelings of resentment so strong that one would sacrifice one's life to revenge a wrong. Smith emphasized utility rather than the strength of feelings of revenge.
 - 6 See Brown 1994: 112: 'Whereas the natural law tradition grounded law in the moral potentialities of individual moral agents, LJ [Lectures on Jurisprudence] and *TMS* separate moral judgment from the virtue of justice'.
 - 7 Cf. Ross 1995: 167 and Campbell and Ross 1981: 73ff, where it seems to be argued that Smith employed a different conception of utility from that of Hume rather than, as argued here, that he employed the same conception of utility but in a different manner to solve problems in Hume's theory. See also Macfie 1967: 45–8, which links Smith to Hutcheson and Stoicism rather than to Hume. Nevertheless, the philosopher Dugald Stewart, writing in 1794, could appreciate Smith's use of utility in relation to Hume's. See Smith 1982a: 279, 289.
 - 8 The relevant portion of the letter, dated 28 July 1759, is reprinted in Smith 1982c: 46n. The whole letter appears in Smith 1987: 42–4.
 - 9 Cf. Ross 1995: 183, where the emphasis is placed on differing conceptions of sympathy employed by Smith and Hume rather than on the role of pleasure and pain in their respective accounts of justice, sympathy, and utility. See also Heath 1998: 53–72, where the element of utility is also ignored.
 - 10 For an early discussion see Moore 1976: 110ff. See also Tuck 1979: 174ff; Schneewind 1998: 79ff; Reid 1990: 138–9, 208, 314–15, 377; Haakonssen 1996.
 - 11 Cf. the discussions of Stoicism and Epicureanism in Hume in Stewart 1991: 273–96; see also Sher 1985: 199–201.
 - 12 The editors of *TMS* comment that this view 'is an unusual one for an opponent of utilitarianism to accept' (Smith 1982c: 305n).
 - 13 See, for example, 'A Table of the Springs of Action' in Bentham 1983b: 3–115.
 - 14 See Bentham 1983b: 3–115; 1996; 1824; 1997; Champs 1998.

5 Helvétius, the Scottish Enlightenment, and Bentham's idea of utility

- 1 Cf. Smith 1965: 13–14, 116; Smith 1993: 275–89; Cumming 1955: 17–18, 80–2, 223, 227; Gay 1973: i.11, 53–4, ii.75–6, 459; Crocker 1963: 244–5, 262, 272; O'Neal 1996: 92, 180; Dakin 1939: 286; Wade 1977: ii.266–7, 289, 290; Knight 1968: 86–7. Wootton 2000: 307–36 has recently explored Helvétius's radicalism and republicanism in an excellent discussion, but he omits to consider his role in the utilitarian tradition.
- 2 Helvétius I.III, 1988: 35; 1809: 19; II.III, 1988: 62n; 1809: 44n; II.XIX, 1988: 169n; 1809: 139n–40n. See also Hume 1932: i.304: 'I had a letter from him [Helvétius] a

few days ago, wherein he tells me that my name was much oftener in the manuscript, but that the censor of books at Paris obliged him to strike it out.’

- 3 It is true that in the later *De l'homme* Helvétius expressed sentiments which might be taken as a qualification of these earlier remarks: ‘When the public welfare requires the misfortune of an individual, every compassion is due to his misery; there are no means to alleviate it that should not be employed; it is then that the justice and humanity of a prince should be exerted: all the unfortunate have a right to his beneficence; he should commiserate their sufferings’ (Helvétius Sect. 9, Ch. XIV, 1773: ii.278; 1777: ii.328).
- 4 See Bentham 1996: 3, where he linked some passions to motives but provided no analysis of them, and Bentham 1996: 111n, where he referred to the ‘entangled’ character of terms like ‘passions’, ‘appetites’, and ‘affections’.
- 5 Cf. Schneewind 1998: 423 who fails to see this crucial difference between Bentham and Helvétius on the limits to legislation and an autonomous sphere for ethics. See also chapter 11 in this book on the use Alexander Bain and J.S. Mill made of Bentham’s argument.
- 6 See Cumming 1955: 169: ‘In *De l'homme* Helvétius applied himself to prove the possibility of an equal distribution of happiness among individuals; he considered himself the first to have done this.’ See Helvétius Sect. 8, Ch. XXVI, 1773: ii.222; 1777: ii.264. See also Wootton 2000: 322–30.

7 Bentham and Smith on liberty

- 1 See Bentham 1952–4: i.123–207. See also O’Brien 1975: 275; Hollander 1973: 257n. An exception is Kelly 2000, to which I am indebted; see also Sigot 2001: 67–73; Leloup 2000. The best recent study of Smith and Bentham with regard to the role of the entrepreneur in society is Pesciarelli 1991: i.203–18. Pesciarelli fully recognizes the importance of the debate and Bentham’s role in it. He gives Smith greater credit for a defence of the entrepreneur than I do, but he acknowledges Bentham’s view that the projector is ‘the active agent of development’ (Pesciarelli 1991: i.212). Unfortunately, he omits to consider the role of the money-lender in the equation. Pesciarelli also believes that Smith could not have accepted Bentham’s position without a major revision in his moral psychology and particularly his account of prudence in the final edition of *TMS*, which was published in 1790 (see Pesciarelli 1991: i.215–17). It does not make much sense to speculate concerning Smith’s reaction to Bentham’s work. To say that Smith was ‘unconvinced’, as Skinner does, is pointless, because there is no direct evidence of any reaction by Smith (see Skinner 1992: 234–5).
- 2 See Bentham 1996: 4–5 and nn. Bentham also referred here to the earlier *Fragment* in which his discussion of a ‘natural classification’ of offences first appeared (see Bentham 1988: 25ff). Such a classification would enable him to distinguish between genuine and spurious offences.

8 William Paley as a utilitarian

- 1 For accounts of the theological background to Paley’s thought, see Young 1998; Rivers 1991 and 2000; Hilton 1991; Crimmins 1990.

9 Liberty, utility, and the reform of the criminal law

- 1 See Radzinowicz 1948–86: i.269–76; Gay 1973: ii.427–33. This is not to suggest that the reform of the criminal law was confined to the Enlightenment. See, for example, Langbein 1977; Beattie 1986: 450–637; Green 1985. As for the state of the criminal

- law prior to and during the eighteenth century, see the brief discussion in Maestro 1942: 1–22.
- 2 Despite an examination of the theme of liberty, Shackleton 1961: 284–301 virtually ignores this material in book XII. But see Pangle 1974: 139–42; Richter 1977: 94–6.
 - 3 André Morellet (Beccaria 1766), urged on by D’Alembert, translated the work into French, and this version was soon translated into English (Beccaria 1767) and into other languages. Beccaria received the admiration of many writers, including Diderot, Helvétius, de Buffon, Rousseau, and Hume. Voltaire wrote a commentary (*Commentaire sur le livre des délits et des peines*, 1766) which was often published with Beccaria’s treatise. See Maestro 1942; 1973: 38ff. For the influence of Beccaria throughout Europe, see the materials provided by Venturi in Beccaria 1965. See also Maestro 1942: 124–51; Draper 2000.
 - 4 Romilly was a close friend of Bentham to whom he was introduced in 1784 (Bentham 1981: 17n). Bentham claimed that Romilly ‘was among the earliest, and, for a time, the only efficient one of my disciples’ (Bentham 1993: 257), and his speech and pamphlet against Paley drew on Bentham’s unpublished work, ‘Law versus Arbitrary Power, or a Hatchet for Dr. Paley’s Net’ (Bentham *UC*: cvii.199–266). On Bentham and Paley, see Schofield 1987 and Crimmins 1987.

10 J.S. Mill’s hedonism

- 1 See also, for example, Feldman 1997: 108ff, where the contrast between Bentham and Mill forms the starting point for an argument to establish what should not be controversial, that G.E. Moore was wrong in stating that Mill’s doctrine was not a form of hedonism. The exercise is not entirely pointless, however, when one considers the large number of thinkers Feldman rightly criticizes along the way. But there is, as will be argued, no reason for Feldman to accept without investigation that ‘Millian qualified hedonism is inconsistent with Benthamic simple hedonism’ (Feldman 1997: 123; see Edwards 1979: 30ff). For some of the confusion in contemporary writing on Mill’s hedonism, see Brink 1997: 149ff, 152ff; Anderson 1997: 124ff.
- 2 All page references to Mill’s *Utilitarianism* will include the edition in the *Collected Works of John Stuart Mill* (Mill 1969) followed by the highly useful and accessible edition recently edited by Roger Crisp (Mill 1998).
- 3 Mill 1972: iv.1657. The allusion to pleasure was probably not meant to be ironic, as Mill was simply agreeing with two apparently opposing points of view set out by William Thomas Thornton (to whom he was writing) and Frank Harrison Hill. According to Hill, one read Carlyle at an early period in life, but with maturity and the passage of time, one did not return to him. For Thornton, Carlyle seemed not to be a great influence at any stage in life, but he always read his work (in this case the *French Revolution*) with enjoyment. Mill was thus in agreement with both, but, clearly, he found Carlyle much more attractive as a writer and thinker earlier in life, particularly in the period following his mental crisis.

11 J.S. Mill on justice and liberty

- 1 Carlyle, whose life of Sterling was published in 1852, prior to both *On Liberty* and *Utilitarianism*, made the following remark concerning Sterling’s belief in utilitarianism in the 1820s: ‘I do not find that Sterling had, at that stage, adopted the then prevalent Utilitarian theory of human beings. But neither, apparently, had he rejected it; still less did he yet at all denounce it with the damnatory vehemence we were used to in him in a later period. Probably he, so much occupied with the negative side of things,

had not yet thought seriously of any positive basis for his world; or asked himself, too earnestly, What then *is* the noble rule of living for a man?' (Carlyle 1852: 48). Of interest here is the distinction between negative and positive in Carlyle and Sterling, suggesting that Mill's attraction to Socrates's *negative* dialectic had an additional resonance besides a regard for truth in freedom of expression.

12 Punishment of the innocent

- 1 For a lucid account of recent thinking on this and related issues, see Ten 1987: 13ff.
- 2 Nor was it an issue for Kant, who feared that the guilty would go unpunished or be insufficiently punished with the adoption of utilitarianism rather than that the innocent would be punished. See Kant 1970: 155.
- 3 The history which is neglected includes not only that of theories of punishment but also that of utilitarianism itself. See, for example, Smilansky 1990: 256–61, where utilitarianism is reduced to a primitive kind of 'cost analysis'.
- 4 Paley (1819: ii.27) challenged a traditional legal maxim that 'it is better that ten guilty persons escape, than that one innocent man should suffer', by arguing that the burden of proof might be adjusted so that fewer guilty persons escaped punishment. However, he hastened to add: 'I do not contend that the life or safety of the meanest subject ought, in any case, to be knowingly sacrificed: no principle of judicature, no end of punishment, can ever require *that*.' But he then suggested that if an innocent person was unintentionally killed, the person 'may be considered as falling for his country'. In his recent Ph.D thesis Luis Martin (1999: 157ff) has pointed out two examples prior to Bradley where the issue of punishing the innocent has arisen in connection with utility. The first is a newspaper article written in 1815, which criticized Paley's position, and the second, a critique of J.S. Mill on free will and determinism, written by P.P. Alexander, where the issue of punishing of the innocent is raised. One might also mention another critic of Paley, Thomas Gisborne, who raised in 1798 the problem of punishing the innocent in relation to deterrence (Gisborne 1798: 187–8) and doubtless the critical literature surrounding Hume might turn up further examples. Martin argues that these earlier examples have a special significance in undermining my argument concerning the importance of a new doctrine of deterrence which arose from the post-utilitarian paradigm and which allowed for the punishment of the innocent. Martin believes that historically and philosophically the problem is a deeper one within utilitarianism from the outset. These various authors, however, may simply have anticipated the detachment of deterrence from the classical utilitarian doctrine as a whole. The full exposition of this separate idea of deterrence then developed with British Idealism and the post-utilitarian paradigm. I still believe that the doctrine of punishing the innocent is foreign to classical utilitarianism in most of its forms, and certainly to Bentham's theory of punishment.
- 5 See also Bradley 1952: 32n:

I was once told of a west-country sportsman who, on starting for the field before the day's work was begun, used regularly to tie up his dogs to a gate and thrash them, and at intervals during the day's sport repeat the *nouthetesis* [admonishment]. Whether it was wise to correct for no fault is a question for the dog-breaker, but surely no man in his senses would call it punishment. And yet it was good utilitarian punishment. And that is what is meant, when it is said that such punishment is the treating a man like a dog.

The context for these remarks was a discussion of free will and responsibility and a critique of J.S. Mill's utilitarianism.

- 6 On the 'pragmatism' in British Idealist moral and political thought, see Nicholson 1990: 185ff.
- 7 See, for example, Crossley 1975–6: 200–13; for a subtle and thoughtful essay on Bradley and punishment, see also Johnson 1984: 99–116.
- 8 Much of Bentham's work on the theory of punishment was done in the 1770s, though published later by Etienne Dumont in French editions, e.g. Bentham 1802, Bentham 1811. The exception is, of course, *IPML*, which was printed in 1780 and published in 1789. That Ewing saw his own work as a successor to that of Bentham is clear from his original plan to entitle the book, *The Morality of Punishment and Reward*, reflecting Bentham's belief that punishment and reward should be considered together. See Ewing 1929: vii and Bentham 1811, translated by R. Smith as Bentham 1825 and Bentham 1830. Although Ewing's *The Morality of Punishment* contains a major chapter on reward with numerous references to Bentham, the main focus is on punishment and the title was adjusted accordingly.
- 9 See the introduction, bibliography and the articles collected in Acton 1969.
- 10 See Smart 1973: 69–73. Smart cites an earlier paper of McCloskey 1963: 599, although he probably had in mind also McCloskey 1957: 466–85.

13 Individual sacrifice and the greatest happiness

- 1 The most commonly cited statement of this opinion appears in Williams 1973: 98f. That it has become a commonplace remark may be seen, for example, in the recent comment by Vallentyne 1995: 207 that 'traditional act utilitarianism holds, for example, that it is morally obligatory to torture or kill an innocent person, when doing so increases the happiness of others more than it decreases the happiness of an innocent person'. Not all philosophers accept this view. See for example, the recent discussion of 'Jim and the Indians' in Bedau 1997: 71ff.
- 2 See Bentham 1996: 17–21. Bentham appreciated the importance of asceticism in religion and politics, but as a philosophical principle he concluded that it was 'at bottom ... the principle of utility misapplied' (1996: 21).
- 3 In a footnote added after the main text had been printed, Bentham reflected further on this key opposing principle and expressed the view that it might have been more accurately characterized as 'the principle of *caprice*', or, as he called it a few lines later, 'the *phantastic principle*' (Bentham 1996: 21n).
- 4 Bentham did not in fact list natural or moral rights under the principle of sympathy and antipathy. It was probably the case that no prominent earlier writer had claimed that such rights were the foundation of morals and legislation. But Bentham did list moral sense, common sense, understanding, rule of right, fitness of things, law of nature, law of reason, right reason, natural justice, natural equity, good order, truth, and doctrine of election. There is little doubt that he would have classed natural or moral rights under this heading. For the well-known remark that natural rights were 'simple nonsense' and natural and imprescriptible rights, 'rhetorical nonsense, nonsense upon stilts', see Bentham 2002: 330. In *Constitutional Code* Bentham refers to moral rights as follows: 'A thick cloud envelopes the discourse, under it endless confusion reigns' (Bentham 1983a: 188n).
- 5 By adopting the perspective of the legislator Bentham did not mean to suggest that the principle of utility did not serve as a criterion of rightness for an individual's actions. But the criterion of rightness is not simply equivalent to individual perceptions of the sum of one's pleasures.

- 6 For the best philosophical account of these subordinate ends, and especially security, see Kelly 1990.
- 7 For Bentham, the principle of equal distribution was subordinate to the principle of equal security of expectations which set limits to the practical pursuit of substantive equality by means of compulsory redistribution and the attendant goal of 'levelling down'. See Kelly 1990. Nevertheless, in the example provided by Crisp 1997: 169, Bentham, for example, would have chosen the equal rather than the unequal outcome, provided no issue of security had been raised. That is to say, he would choose 100 units of welfare equally distributed between two groups over 110 units unequally distributed, where the majority receives more at the expense of the minority.
- 8 When this paper was first published as an article in *Utilitas*, as part of a symposium to celebrate the 250th anniversary of Bentham's birth, the editor invited comments from three scholars, which were published with it (see Postema 1998: 144–58; Harrison 1998: 159–64; Kelly 1998: 165–7). These important comments were of a diverse nature – criticizing my argument, criticizing Bentham, and extending and developing my original insight regarding equality and distribution. The first part of this book might be seen as a response to some of the criticisms presented there, particularly, to the problems of distinguishing between distributive and aggregative elements within the utility principle.

15 Negative liberty

- 1 Hobbes 1962: 99. This definition is repeated in chapter 21: 'LIBERTY, or FREEDOME, signifieth (properly) the absence of Opposition; (by Opposition, I mean externall Impediments of motion;) ... For whatsoever is so tyed, or environed, as it cannot move ... we say it hath not Liberty to go further' (Hobbes 1962: 161).
- 2 Hobbes 1962: 162–3. Among the numerous books and articles which discuss Hobbes's idea of liberty, see Pennock 1965: 101–16; Wernham 1965: 117–39; Watkins 1972: 213–32; Gauthier 1979: 62–6, 129–32, 140–4.
- 3 See Hobbes 1962, ch. 21, where he also appeals to common understanding.
- 4 Price 1991: 21ff. For example, by physical liberty, he meant 'that principle of spontaneity, or self-determination, which constitutes us agents, or which gives us a command over our actions, rendering them properly ours, and not the effects of the operation of any foreign cause'. Similarly, he defined civil liberty as 'the power of a civil society or state to govern itself by its own discretion or by laws of its own making, without being subject to any foreign discretion, or to the imposition of any power'. The main theme in these various conceptions, as Price acknowledged, was that of 'self-direction' or 'self-government', and the line between liberty and slavery was marked by the imposition of restraints on self-government.
- 5 When Berlin's lecture was first published, Noel Annan (1959: 323) complained that it was constructed 'in the shape of a spell for use in the Cold War – a spell which is designed to ward off the evil angel of positive freedom that points the way to totalitarianism and tyranny'.

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INDEX

- Acton, H.B. 71, 262n
Africa 108
Albee, E. 58
Alberti, A. 18, 256n
Alcibiades 203
Alexander, P.P. 261n
America *see* United States of America
Anderson, E. 260n
animals 22, 24, 135
Annan, N. 263n
Annas, J. 17
approbation 31, 32, 33–8, 40, 47, 51, 52,
60, 66–7, 74, 75, 76, 78, 79–80, 222–3
aptitude 227; *see also* maximization and
minimization
Aquinas, T. 71
Aristides 22
Aristotle 5, 16, 18, 20, 22, 25, 26–8, 48,
56, 65, 70–1, 99, 107, 113, 119, 126,
130, 167, 188, 198, 203, 257n
asceticism 127–8, 129, 130, 133, 180–4,
203, 221, 262n; *see also* Puritanism
Austin, J. 3

Bacon, F. 177
Bailey, C. 16, 18, 256n
Bain, A. 189–90, 196, 197, 259n
Balfour, J. 43, 257n
Banbury, C. 161
Barbour, R. 182
Baring, Sir F. 114
Barker, E. 133, 136, 137, 141, 143
Barrow, R. 219
Bayle, P. 3, 20, 256n
Beattie, J.M. 160, 259n
beauty 72, 74, 75, 79, 86, 88, 102, 104
Beccaria, C. 59, 120, 133, 144, 147–52,
156, 157–9, 161, 162, 163, 164, 216,
260n
Bedau, H. 262n
beneficence 24, 62, 63, 77–8, 121, 127,
138, 188, 195–6, 197, 259n
benevolence 30, 39–42, 43, 44, 45, 46, 54,
56, 77, 84, 124, 185, 195, 233–4, 257n
Bentham, J. 1, 2, 3, 4, 5, 6, 7–8, 15–16, 24,
28, 29, 30, 33, 36, 48–57, 58–9, 80–1,
82–3, 87–8, 90, 92–3, 95–6, 114–30,
131, 132–4, 136–40, 143, 144, 147,
152–7, 159–64, 166–83, 185, 191, 192,
194–6, 197, 201, 202, 210, 211–13,
214, 216, 218, 220–31, 232–44,
245–50, 252, 255, 256n–63n
Berger, F. 167–8, 186, 189, 193–4, 197,
198, 206
Berlin, I. 95, 191, 245–6, 249–54, 263n
Bernier, F. 20–1, 23
Berry, C. 65
Blackstone, W. 3, 117, 118–19, 136, 137,
143, 158, 161, 163, 164
Blamires, C. 157
Bosanquet, B. 211–13, 217
Botany Bay 160
Bowring, J. 163
Bradley, F.H. 211, 261n, 262n
Bricke, J. 31
Brink, D.O. 260n
British Idealism 211–14, 215, 217, 219,
245, 261n, 262n
Brown, D.G. 186, 198
Brown, J. 131, 133
Brown, V. 258n
Brutus, Lucius Junius 84–6, 88
Buffon, Comte de 260n
Burke, E. 249
Burns, J.H. 52, 82
Butler, J. 133

- calculation and calculus 30, 32, 50, 51, 56,
 64, 85, 143, 146, 147, 148–9, 150, 152,
 153, 155, 158, 162, 174, 214, 224, 228,
 234, 250; *see also* reason and rationalism
 Calvinism 203, 206
 Cambridge University 131–2, 133
 Campbell, T.D. 60, 64–5, 258n
 Capaldi, N. 257n
 capital 101, 106, 111, 117, 122, 125, 128,
 153
 Carlyle, T. 167, 169–72, 174, 175, 180,
 183, 187, 203, 205, 206, 260n–1n
 Carneades 25
 Champs, E. de 258n
 charity 62, 134, 188, 257n; *see also*
 beneficence; benevolence
 chastity 33, 55; *see also* virtue(s) and vice(s)
 China 112–13
 Christianity 44, 46, 55, 133, 138, 161, 182,
 202–3, 205; *see also* God(s); religion(s)
 Cicero 5, 17, 48, 76, 173–4, 179, 180, 182,
 256n
 civilization 73, 99, 102, 137, 149, 158, 164,
 184, 201, 202
 Clarke, M.L. 133
 classical economics *see* economics and the
 economy
 Clay, D. 18
 Cohen, M. 245
 Coleridge, S.T. 170, 201
 commerce and commercial society 107,
 113, 114, 116–17, 119, 158
 conscience 79, 133
 consent 21–2, 23–4, 120, 123, 141, 151,
 249
 consequences and consequentialism 5–6,
 61, 74, 77, 80, 117, 132, 135, 150, 157,
 158, 162, 217; unintended
 consequences 100, 101, 104–6, 125
 Constant, B. 245, 251, 252, 253–4
 Cooper, A.A. *see* Shaftesbury
 cost–benefit analysis 179, 261n; *see also*
 calculation and calculus
 courage 55–6, 205; *see also* virtue(s) and
 vice(s)
 Cowling, M. 198
 Cranston, M. 148, 254
 crime(s) *see* offence(s)
 Crimmins, J. 131, 132, 137, 259n, 260n
 Crisp, R. 6, 197, 230, 257n, 260n, 263n
 Crocker, L. 84, 258n
 Crompton, L. 244
 Cropsey, J. 97, 102
 Crossley, D. 262n
 Cudworth, R. 79
 Cumming, I. 258n, 259n
 Dakin, D. 258n
 D'Alembert, J. 260n
 Danford, J.W. 36, 42
 Darwell, S. 175, 257n
 Davis, J.R. 102
 death penalty 144, 146–7, 150–1, 156,
 157–60, 164, 223
 deception 102–3
 Demetriou, K. 203, 204
 democracy 117, 160, 170, 203, 204, 232,
 237–44, 249, 251, 252–4; *see also*
 government; sovereign and sovereignty
 Democritus 19, 100
 Demosthenes 22
 Denne, S. 161
 Descartes, R. 19
 desert 71, 187, 188–9, 209–10, 212,
 216–17, 229
 despotism 162, 238–44, 254; *see also*
 tyranny
 deterrence 150, 151, 156, 157–9, 162,
 209–11, 213, 214, 215–16, 218, 219,
 220, 261n; *see also* punishment(s) and
 reward(s)
 DeWitt, N.W. 16–17, 18, 48, 49
 Dickens, C. 10, 169
 Diderot, D. 260n
 Digby, J. 24–5
 distribution and redistribution 8, 10, 22,
 47, 94, 98, 99, 101–2, 104, 105, 110,
 113, 127, 198, 209–10, 215–16, 220,
 225–31, 235–6, 259n, 263n; *see also*
 justice and injustice; maximization and
 minimization; utility
 division of labour 104–6, 107–8, 112, 137
 Donner, W. 166, 191, 198
 Draper, A. 120, 152, 164, 260n
 Dumont, E. 157, 175, 262n
 eccentricity 205–6
 economics and the economy 96, 97–113,
 114–30, 139, 153, 155–6, 170, 180,
 196, 258n
 Eden, W. 160–1, 164
Edinburgh Review 15
 education 46, 106, 196, 241, 242
 Edwards, R. 260n

- Elliot, G. 161
 empiricism 36–9, 41–2, 49, 53, 57, 84,
 142, 143, 201; *see also* experience
 Emsley, C. 163
 England 77, 111, 112, 113, 117, 123, 154,
 156, 158, 161, 163; *see also* Great
 Britain
 Enlightenment 2–3, 136, 144, 147, 162–3,
 252, 259n; British 143; Enlightened
 Despotism 240; French 2–3; Scottish
 2–3, 58–9, 71–2
 entrepreneur *see* projector(s)
 Epicureanism 1, 2, 3, 6, 7, 10–11, 15–28,
 36, 42, 47, 48, 49, 59, 72, 77, 83, 104,
 113, 126, 127, 129, 131, 133–4, 143,
 167, 168, 172–4, 178, 179, 180, 181–4,
 186, 188, 206, 256n, 257n, 258n; *see
 also* Epicurus
 Epicurus 10–11, 16–19, 20, 22, 23–5, 28,
 77, 99–100, 172, 174, 179, 256n; *see
 also* Epicureanism
 equality 7, 10, 22, 24, 44, 47, 61, 65–6,
 69–70, 71, 73, 93–4, 96, 101, 102, 107,
 109, 110, 113, 127, 137, 148, 187,
 188–9, 218, 220–1, 225, 228–31, 235,
 236, 239, 248, 251, 259n, 263n; *see also
 justice and injustice*
 Euclid 201
 Europe 107, 108, 137, 147, 162, 239
 Ewing, A.C. 214–19, 262n
 excitement 168, 184; *see also* tranquillity
 expectation(s) 94, 125, 126, 179, 187, 192,
 194, 205, 235, 236–7, 263n; *see also
 security*
 expense 227; *see also* maximization and
 minimization
 experience 40, 41, 42, 51, 166, 180, 201,
 223, 224; *see also* empiricism

 fairness 187
 false consciousness 57, 89, 243
 federalism 239, 241
 feeling(s) 3, 4, 5, 46, 51, 53, 56, 63, 73,
 189, 190–3, 259n; *see also* passion(s)
 Feldman, F. 175, 260n
 Fenélon 56
 Fitzgibbons, A. 258n
 Fleischacker, S. 152
 Foucault, M. 10, 163
 France 19, 77, 84, 95, 111, 146, 162, 195,
 233, 239, 248, 249, 251, 258n
 Franklin, B. 104
 Frederick the Great 251
 frugality 74, 111, 112–13, 116, 119, 124,
 126, 128, 129, 159

 Gassendi, P. 2, 3, 19–24, 100, 257n
 Gattrell, V.A.C. 157
 Gauthier, D.P. 31, 257n, 263n
 Gay, J. 131
 Gay, P. 151, 162, 258n, 259n
 Germany 143, 170
 Gisborne, T. 132, 142–3, 261n
 Glossop, R.J. 37
 God(s) 4, 15, 78, 95, 99, 104, 132–9,
 141–3, 148, 163, 170–1, 173, 180, 181,
 182, 183, 203, 256n; divine law 24; *see
 also* Christianity; religion(s)
 Godwin, W. 3, 131, 132, 160–1
 Goldie, M. 256n
 government 24, 27, 72, 95, 109, 140, 184,
 196, 197, 232, 238, 239–44, 248–51,
 253–5; constitutional 112–13, 116–17,
 144, 196, 198, 237–8, 247, 254–5;
 suffrage 93, 96, 240; *see also* democracy;
 separation of powers; sovereign and
 sovereignty
 Grahame, J. 117–18
 Gray, J. 186, 198, 199, 246, 252
 Great Britain 19, 82, 107, 116–17, 122,
 136, 140, 143, 144, 157, 240; *see also
 England; Enlightenment*
 Greece 99, 106, 203–5, 233–4, 235
 Green, T. 132
 Green, T.A. 259n
 Green, T.H. 211–13, 252
 Griswold Jr., C.L. 28, 62, 71, 102, 103
 Grote, G. 174, 182, 203–4
 Grotius, H. 16, 25–8, 71–2, 107, 143, 188,
 192

 Haakonssen, K. 27, 29, 31–2, 34, 58–9,
 100, 257n, 258n
 Halévy, E. 58, 163, 239
 Hamburger, J. 198
 Hannay, R. 114
 Hanway, J. 161
 happiness and unhappiness 1, 2, 5, 7, 8,
 20, 23, 34–42, 45, 47, 49, 50, 51–2,
 53–4, 57, 61, 63, 68–70, 73, 79, 84, 88,
 89, 90, 93–6, 98–9, 102, 103, 104, 105,
 108, 112, 113, 115, 121, 126, 127–8,
 132, 133, 134, 136, 138–9, 141–3,
 167–72, 180–4, 185–6, 188, 194–5,

- 196, 206, 209–11, 220, 221–31, 235–7;
greatest happiness principle 95, 147,
152, 174, 220, 221, 225, 232, 235–6,
250, 256n, 259n, 262n; *see also*
maximization and minimization;
pleasure(s) and pain(s); utility
- Hare, R.M. 152
- harm and harm principle 9, 10, 113, 189,
190, 195, 198, 216, 250; in Bentham
115, 118, 127, 195; in Epicureanism
26, 126; in Epicurus 17, 18, 23–4; in
Gassendi 21; in Grotius 26, 28; in
Hume 65; in Mill 189–90, 191, 197,
199, 206; in Smith 63–4, 65, 66; *see also*
justice and injustice; security
- Harrison, J. 32
- Harrison, R. 176, 263n
- Hart, H.L.A. 147, 152, 220–1, 228–9, 249
- Hartley, D. 3, 82
- Hay, D. 163, 164
- Hay, G. 114
- Heath, E. 258n
- Hegel, G.W.F. 212–13
- Helvétius, C. A. 1, 2, 15, 24, 59, 82–96,
133, 139, 147, 152, 167, 172, 178–9,
258n, 259n, 260n
- Hill, F.H. 260n
- Hilton, B. 259n
- Himmelfarb, G. 198
- Hoag, R. 168
- Hobbes, T. 3, 19, 24, 28, 51, 78–9, 82, 83,
107, 245–9, 252, 263n
- Hochstrasser, T. 257n
- Holdsworth, W. 164
- Hollander, S. 98, 167, 230, 259n
- Holthoon, F. van 31
- Homer 56
- homosexuality 147, 216
- Honderich, T. 209, 214–15, 218–19
- Hont, I. 71
- Hope, V. 72
- Horace 15–16, 25–6, 28, 127, 185, 256n
- Howard, J. 160–1
- humanity 34–5, 37, 38, 39, 41, 42, 43, 46,
47, 49, 75, 82, 86–8, 92, 93, 95, 138,
142, 149, 162, 171, 184, 259n
- Hume, D. 1, 2, 3, 6, 8, 15–16, 24, 25, 28,
29–57, 58–60, 64–7, 70–2, 74, 76–7,
79–81, 82–8, 92, 93, 107, 122, 131,
132, 133, 136, 137–9, 143, 167, 172,
185, 186, 194, 256n, 257n, 258n, 260n,
261n
- Hundert, E.G. 97
- Hunter, I. 257n
- Hutcheson, F. 3, 15, 25, 28, 30, 39, 58, 72,
77, 79, 83, 256n, 257n
- Ignatieff, M. 71, 163
- impartial spectator 63, 66–7, 84, 126
- impartiality 187, 188, 230; *see also* equality;
justice and injustice
- individual(s) and individuality 1, 6, 9, 30,
50, 51–4, 64, 65, 81, 92, 101, 106, 107,
110, 134, 135, 139–41, 145, 146, 148,
151–2, 159, 192, 194–6, 199, 202–6,
220–31, 234, 239, 242, 243, 247,
250–1, 262n; *see also* liberty; utility
- industry and industriousness 68–9, 74, 75,
101, 102, 105, 107, 111, 113, 126, 136
- Innes, J. 163
- intention(s) 101, 102–3, 104, 137; *see also*
consequences and consequentialism;
motive(s) and motivation
- interest(s) 38, 40, 57, 89, 92, 95, 109, 115,
142, 153, 178, 201, 224, 226, 230, 233,
234, 235, 237, 239; of greatest number
95; of mankind 40; public interest 43,
47, 51–53, 66, 83–4, 89, 90, 95, 100,
101–2, 104, 135, 139, 187, 220, 231,
243; self-interest 34–5, 43, 45, 47, 66,
77, 79, 82–6, 90, 139, 197, 220, 234;
sinister 232; *see also* invisible hand; self
and other regarding; social and society;
utility
- intuition(s) 193, 214, 215
- invisible hand 70, 80, 98–106
- Ireland 233
- Irwin, T. 174
- Isocrates 203
- Italy 111
- Jackson, A. 159
- Jebb, J. 161
- Jenyns, S. 131
- Jesus 133, 171, 183–4, 187, 200
- Jews 233
- Johnson, P. 262n
- Jones, H. 19
- Joseph II 151, 251
- Jupiter 99, 104
- justice and injustice 1, 7, 10, 11, 15–16,
42–3, 47, 65–6, 83, 126, 159, 185,
220–1; in Aristotle 26–8; in Bentham
54–5, 115, 126; and British Idealism

- 212; corrective or commutative justice 21, 26–8, 65, 71–2, 107, 188, 198; distributive justice 7, 21, 26–8, 38, 44, 65–6, 70–2, 94, 98, 107–13, 188, 198; in Epicurus 17–18, 23–5; and equity 15, 108, 137, 185; in Gassendi 21–3; in Grotius and Pufendorf 25–8, 71–2; in Helvétius 85, 87, 90, 259n; in Hume 32, 33, 38, 42–6, 47–8, 54, 60, 65–7, 70–2, 87, 139, 258n; in Kant 151–2, 191; in Mill 185–98; natural justice 1, 18, 42, 44, 137, 262n; in Paley 133, 137, 142; in Smith 60–7, 70–2, 87, 106–7, 113, 258n; *see also* distribution and redistribution; liberty; punishment(s) and reward(s); utility
- Kant, I. 30, 148, 151–2, 183, 191, 217, 252, 261n
- Kelly, P. 54, 121, 194, 235, 250, 259n, 263n
- Knight, I.F. 258n
- Knox, J. 202–3, 205
- labour 93–6, 101, 102–3, 107, 109, 136, 137, 150–1, 159, 163; productive and unproductive 108, 110–12, 161; *see also* division of labour
- Langbein, J.H. 163, 259n
- Law, E. 131, 133
- law(s) and legislation 26, 45, 50, 53, 57, 58–9, 66, 71–2, 83, 85, 86, 87, 89, 95, 107, 109, 110, 113, 114–30, 136, 137, 140, 143, 144–7, 151–2, 159, 184, 187, 194, 198, 204, 210, 217, 223, 225, 231, 234, 237, 239, 241, 242, 246–7, 248–50, 259n–60n; *see also* justice and injustice; legislator; liberty; right(s) and dut(ies); virtue(s) and vice(s)
- legislator 82, 85, 86–93, 95, 115, 118, 120, 121, 144, 148, 151–2, 195, 220, 223–5, 228, 230, 236, 238, 262n; *see also* law(s) and legislation
- Leloup, S. 259n
- Le Mahieu, D.L. 141
- Leopold, Grand Duke of Tuscany 151
- Leucippus 100
- liberal theory and liberalism 4, 10, 59, 198, 239, 251, 252
- liberty 162, 163, 204; in Beccaria 151, 162; in Bentham 80, 115–30, 175, 191, 194–6, 225–6, 234, 239–40, 242, 243–4, 245–50, 252; civil and political 1, 7, 93, 94, 99, 140, 141, 144, 145–57, 191–2, 194, 206, 226, 234–5, 242, 244, 248, 249–55, 263n; in Constant 245, 251; constitutional 145, 232–44, 254–5; of expression 91, 147, 196, 199, 200–2, 204–6, 261n; in Hobbes 245–9, 263n; as independence 46–7; and justice 1, 3, 7, 27, 42–3, 54–5, 59, 65, 71–2, 98, 107–13, 115, 126, 159, 187; and markets 1, 80, 110, 114, 123, 125, 196, 198; in Mill 168, 175, 182, 184, 185–206, 234, 242, 243; in Montesquieu 145–6, 159, 162, 260n; natural 64, 109, 139–41; negative and positive 191, 245–55; and pain and pleasure 6, 7, 168; in Paley 133–4, 137–42; perfect 109–13; of the press 196, 242–3; and public association 242; of religion 140–1; in Smith 64, 80, 105–7, 109–10, 113, 121, 122, 129, 196; and toleration 9, 140–1; and trade 198–9; *see also* government; individual(s) and individuality; security
- Lieberman, D. 164
- Locke, J. 3, 10, 19–20, 24, 28, 52, 54, 59, 82, 107, 132, 136, 137, 143, 239–40, 246, 249, 252, 254–5, 256n
- logic 170; of the will 56
- Lolme, J.L. de 240
- Long, A.A. 17, 19
- Long, D. 52, 59, 242
- Long, R. 168
- Louis XIV 195
- Lucretius 15, 18–19, 83–4, 256n
- luxury 40, 61–2, 68–9, 95, 134
- Lycurgus 25, 91
- Lyons, D. 185–6, 188, 191, 197
- Lysias 203
- Mabbott, J.D. 217
- Macaulay, T.B. 235, 239
- MacCallum Jr., G. 246
- McCloskey, H.J. 210, 219, 250, 254, 262n
- McCulloch, J.R. 98, 112, 246
- MacFarlane, L.J. 245
- Macfie, A.L. 59, 80, 100, 258n
- Machiavelli, N. 245, 254
- machine(s), *see* system(s)
- Mackie, J.L. 32, 33
- MacTaggart, J.M.E. 211–13
- Madan, M. 157–9, 164

- Maestro, M. 260n
 majorities and minorities 232–44, 263n;
 tyranny of majority 2, 204, 205, 206,
 232, 241–4; majority rule 233, 242; *see*
 also government; sovereign and
 sovereignty; tyranny
 Malthus, T.R. 113, 134, 257n
 Mandelbaum, M. 166–7
 Mandeville, B. 78, 82, 83, 97, 107–8
 markets *see* liberty
 Martin, L. 261n
 Marxism 4, 10, 162, 243
 Maugham, R. 128
 maximization and minimization 7–8, 10,
 32, 50, 53–4, 59, 102, 155, 168,
 209–11, 216, 220, 224, 226–31, 235,
 250; *see also* distribution and
 redistribution
 Mayo, T.F. 19
 merit 44, 47, 65–6, 71, 75, 127, 229
 Mill, J. 3, 29, 169, 171, 196, 232
 Mill, J.S. 1, 2, 3, 5, 6, 7, 10, 15, 29, 33, 48,
 54, 58, 113, 114–15, 131, 133, 139,
 166–76, 180–4, 185–206, 221, 228–31,
 232, 234, 239, 241–4, 245, 246, 251,
 252, 256n, 257n, 259n, 260n–1n
 Mitsis, P. 174
 Molivas, G. 257n
 Montaigne, M. de 88
 Montesquieu, Charles–Louis de Secondat,
 Baron de, 10, 24, 54, 91, 95, 106, 107,
 120, 144–9, 152, 154, 156, 157–9, 160,
 162, 164, 216, 239–40, 250, 255
 Moore, G.E. 5, 260n
 Moore, J. 25, 28, 55, 57, 76, 256n, 257n,
 258n
 moral and political philosophy 3–9, 139,
 215, 218–19, 226; and Bauhaus theory
 32–3; and Bentham 80–1, 132, 226;
 and British Idealism 211–14; and
 economics 99; and empiricism 4; and
 Ewing 215; and Helvétius 82; and
 proof 4–5; and Scottish tradition 189;
 and Smith 76–81; *see also* empiricism;
 pleasure(s) and pain(s); utilitarianism
 morality *see* interest(s); justice and injustice;
 law(s) and legislation; pleasure(s) and
 pain(s); right(s) and dut(ies); utility;
 virtue(s) and vice(s)
 Morellet, A. 260n
 motive(s) and motivation 5, 47, 56, 63, 68,
 81, 104, 105, 155, 156, 195, 213, 222,
 224, 234; and interests 234; and passion
 3, 67, 259n; reason and passion 30; and
 utility 42–3, 79; *see also* consequence(s)
 and consequentialism; intention(s);
 interest(s); passion(s)
 Mounce, H.O. 30–1, 49–50, 51–3
 Muslims 233
- nature and natural law 4, 15–16, 19–20,
 22, 23, 24, 25–6, 28, 36, 42, 43, 44, 50,
 52, 55, 62, 69, 90, 104, 110, 111, 132,
 135, 138–9, 141, 143, 182, 190, 222,
 229, 246, 248, 251, 253, 257n, 258n,
 259n; natural equality 70; natural
 liberty 64, 109, 139–41; natural rights
 251, 253, 262n; naturalism 30, 49–50
 Neale, F. 116, 128
 need(s) and necessity 71, 72, 101, 135–6,
 137, 229
 Netherlands 111
 Newfoundland 136
 Newton, I. 100, 104
 Nichols, J.H. 19
 Nicholson, P.P. 252, 262n
 Norton, D.F. 31, 257n
- objective and subjective 220, 223–4,
 225–6, 229, 231, 234, 236
 O'Brien, D. 97–9, 100, 109, 112, 115,
 259n
 offence(s) 120, 144–64, 210, 216, 217,
 259n–60n
 O'Neal, J.C. 258n
 O'Rourke, K. 196, 197, 199
 Oxford University 131
- Packe, M. St. John 169
 Paley, W. 1, 2, 3, 55, 119, 120, 131–43,
 157–9, 162–4, 172, 259n, 260n, 261n
 Pangle, T. 260n
 panopticon 81, 161, 162–3
 pardon(s) 148–9, 158
 passion(s) 53, 60–3, 66–7, 89, 90–1, 93, 95,
 119, 121, 139, 142, 259n; *see also*
 feeling(s)
 Pateman, C. 238
 paternalism 1, 6, 115, 118, 121, 130, 196,
 199, 206; *see also* individual(s) and
 individuality; liberty
 patriotism 116
 Pearson, E. 132
 Penelhum, T. 39

- Pennock, R. 263n
 Pericles 202–6
 Pesciarelli, E. 259n
 Philips, D. 163
 Physiocrats 111
 Plamenatz, J. 167, 257n, 258n
 Plato 5, 15, 16, 17, 18, 22, 48, 88, 99–100, 126, 174, 201, 202, 203, 204, 257n
 Platonist(s) 42, 44, 206
 pleasure(s) and pain(s) 1, 3, 4, 5, 6, 7, 11, 15, 30, 58–9, 82, 124, 146, 209, 211–14, 215, 219, 220, 256n; in Beccaria 149, 150; in Bentham 30, 48–57, 80–1, 90, 92, 120, 127, 129, 130, 133, 153, 154, 166–73, 175–80, 181–3, 223–4, 225–31, 234–6, 262n; and British Idealism 211–14, 215; and Carlyle 170, 172; duration and intensity 134, 151, 177–8, 227–8; in Epicurus 16–18, 174; in Ewing 215, 218; in Gassendi 19, 22; and good and evil 48, 174; and health and disease 16–17; in Helvétius 83, 90–95; higher and lower 167, 168, 173, 175, 182; in Hobbes and Locke 19–20, 82, 132; in Hume 30, 33–57, 66–7, 138, 258n; in Mill 166–84, 185, 206, 234; and objectivity 179; in Paley 133–4, 136, 139, 141–2; pleasure machine 6; quantity and quality 6, 30, 166, 173, 174–80; in Smith 61–81, 83–7, 97, 102, 129, 258n
 plenty and scarcity 45, 66
 Polanowska-Sygulska, B. 245
 political and legal theory 9–11
 Postema, G. 235, 241, 250, 263n
 power 102, 105, 168, 194, 240–1, 249; constitutive and operative power 237–8
 prevention of crime 147, 153, 157–8, 161, 162; *see also* deterrence; punishment(s) and reward(s)
 Price, R. 249–50, 263n
 Priestley, J. 3, 133
 prison(s): imprisonment as punishment 144, 149, 150, 151, 155, 160–3; and palaces 61–2, 81; solitary confinement 161; *see also* panopticon; punishment(s) and reward(s)
 probity 121, 127
 prodigal(s) and prodigality 111, 122, 123, 124, 125, 129
 progressive state and progress 112–13, 125; improvement 124, 126; *see also* civilization
 projector(s) 122, 123, 124, 125, 126, 128, 129, 259n
 property 7, 9, 27, 43–5, 47, 54, 63, 65–6, 71, 72, 87, 93, 94, 103, 110, 112, 113, 127, 135, 136–7, 145, 146, 149, 150, 156, 158, 187, 189, 190, 239, 250–1; *see also* justice and injustice; liberty; right(s) and dut(ies); security
 proportion 120–1, 144–57, 159, 162, 216, 217; *see also* offence(s); punishment(s) and reward(s)
 propriety 60–2, 65, 75, 77, 78, Protagoras 100, 174
 prudence 56, 75, 77, 78, 119, 121, 124, 126–8, 129–30, 134, 233–4, 259n; *see also* interest(s); self and other regarding; virtue(s) and vice(s)
 public opinion 4, 92, 196, 241, 243
 Pufendorf, S. 16, 25, 28, 71, 78, 143, 257n
 punishment(s) and reward(s) 144–64, 261n, 262n; in Beccaria 147–52; in Bentham 56–7, 120, 132, 152–7, 175–6, 222, 261n, 262n; in Ewing 214–19, 262n; in Gassendi 22–3; in Helvétius 94; in Hume 57; of the innocent 2, 142–3, 209–19, 220, 261n, 262n; in Kant 151–2, 261n; in Mill 186–93, 197, 198; in Montesquieu 144–9; in Paley 132, 133, 135, 138, 139, 141, 143, 261n; severity and certainty 148, 152, 155, 156, 157–9; and sin 149, 152; talionic punishments 187, 212, 217; *see also* death penalty; deterrence; justice and injustice; offence(s); proportion; reform(s) and reformer(s); retaliation; retribution
 Puritanism 167, 172, 182–3, 187, 203, 206; *see also* asceticism
 Pythagoras 99

 quantity and quality 156; *see also* pleasure(s) and pain(s)
 Quinton, A. 58, 166, 210

 Radzinowicz, L. 151, 259n
 Raphael, D.D. 31, 60, 64, 102, 110, 247
 Rashdall, H. 213, 215
 Rawls, J. 10, 220, 238, 246, 252, 257n
 Raz, J. 10
 reason and rationalism 3, 4, 30, 40–2,

- 49–51, 53–4, 56, 78, 105, 146, 152, 173, 249, 252, 262n
- reform(s) and reformer(s) 57, 81, 94, 117, 144–64, 184, 210, 212–13, 214, 217, 218, 259n
- Reid, T. 72, 258n
- religion 77, 90, 92, 136, 140–1, 146, 147, 149, 154, 161, 163, 181, 195, 196, 212, 216, 257n; *see also* Christianity; God(s)
- republicanism 4, 91, 95, 113, 254, 258n
- resentment 60–4, 66, 67, 81, 258n
- retaliation 21, 62, 64, 146, 147, 156, 190–1, 212–14; *see also* punishment(s) and reward(s)
- retribution 151–2, 210, 212–13, 214, 215, 216–17, 218, 219; *see also* punishment(s) and reward(s)
- revolution 94
- Ricardo, D. 246, 257n
- rich and poor 11, 68–70, 71, 73, 93–5, 101–2, 108–9, 112, 134–5, 153–4, 155, 160, 184
- Richter, M. 260n
- right(s) and duties 7, 66, 71–2, 91, 106–7, 113, 116, 127, 135, 137, 139, 159, 171, 184, 185–6, 194, 196, 197, 198, 206, 225–6, 228–31, 232, 248, 249, 251, 253–4, 259n, 262n; moral rights 187–94, 220–2, 225–6, 228–31, 262n; perfect and imperfect rights and duties 26–7, 28, 71–2, 107, 135, 188–93, 197, 198
- Riley, J. 168, 199, 202
- Rivers, I. 97, 131, 132, 139, 256n, 259n
- Robbins, L. 97, 98–9, 110, 178
- Robertson, W. 83
- Robson, J.M. 167
- Rome and Romans 84–6, 88, 97
- Romilly, S. 158–9, 160, 163, 164, 260n
- Rosen, F. 54, 71, 93, 107, 159, 160, 194, 196, 229, 233, 237, 239, 241, 242, 243, 250
- Ross, I.S. 258n
- Ross, W.D. 219
- Rothschild, E. 76–7, 97, 100
- Rousseau, J.J. 24, 70, 148, 150, 202, 203, 238, 260n
- Russell, P. 57
- Russia 123
- sacrifice 24, 84–6, 87, 125, 126, 127, 129, 158, 159, 180, 183, 184, 185, 220–1, 226, 228, 231, 235–7, 258n, 261n
- St. Paul 183
- sanction(s) 92, 138, 187, 230
- Sarasohn, L.T. 19
- Say, J.B. 98, 112
- Sayre–McCord, G. 32
- scapegoat(s) 236–7
- Scarre, G. 16, 167, 174, 256n
- sceptic(s) and scepticism 42, 80, 84, 142, 170, 171
- Scheffler, S. 9
- Schneewind, J.B. 59, 71, 81, 131, 258n, 259n
- Schofield, P. 132, 137, 260n
- Scholasticism 19, 20, 22, 25, 27, 65, 70–2, 130, 201
- Schwartz, P. 113, 167, 238–40
- Scotland *see* Enlightenment; Great Britain
- security 23–4, 45, 47, 53, 54, 57, 64, 65–6, 68, 71, 94, 96, 99, 101, 102, 103, 105, 106–9, 112, 113, 121, 126, 127, 140, 145, 146, 148, 159, 162, 191–4, 196, 197, 199, 204, 206, 216, 225–6, 231, 233, 234–5, 236–7, 239–40, 242, 244, 250, 255, 263n; *see also* justice and injustice; liberty; property
- self and other regarding 34, 38, 56, 60, 74–6, 78, 80, 86, 90, 121, 127, 129–30, 141, 157, 174, 184, 200, 206, 233–4; *see also* benevolence; beneficence; interest(s); prudence
- Semple, J. 160–1, 163
- sentiment(s) *see* approbation; feeling(s)
- separation of powers 91, 105, 106, 117, 140, 145, 232, 239–40, 255; *see also* government
- Shackleton, R. 147, 260n
- Shaftesbury, Earl of 132, 256n, 258n
- Sher, R. 258n
- Sidgwick, H. 31, 58, 245, 246
- Sigot, N. 259n
- Skinner, A. 259n
- Skinner, Q. 245, 246
- Skorupski, J. 199, 229
- slavery 141, 160, 182, 236, 249, 263n
- Smart, J.J.C. 6, 219, 236–7, 262n
- Smilansky, S. 261n
- Smith, A. 1, 2, 3, 6, 28, 29, 31–2, 58–81, 82–7, 92, 97–113, 114–30, 139, 172, 196, 246, 257n, 258n
- Smith, D.W. 258n

- Smith, R. 262n
 Snares, F. 31
 social and society 17, 39, 41, 42, 46, 51,
 57, 64, 65, 66, 70, 73, 79, 95, 100, 101,
 102, 104, 106, 108, 109, 111, 112, 113,
 115, 117, 129, 132, 134, 135, 137, 148,
 150, 162, 176, 185, 190, 192, 194, 199,
 204, 206, 209, 220, 224, 236, 244, 249,
 251, 256n; unsocial passions 60–4, 66,
 81
 social contract 4, 8, 17, 18, 22, 23–4, 26,
 30, 49–53, 126, 132, 148, 150, 239,
 251, 255, 257n
 Socrates 10, 11, 25, 46–7, 49, 56, 99, 171,
 174, 180–3, 187, 200–1, 202, 203, 204,
 205, 206, 261n
 Sophists 204
 sovereign and sovereignty 24, 50, 64, 86,
 91, 148–9, 150, 154, 223, 237, 241,
 247; *see also* government; law(s) and
 legislation
 Sparta 25, 91, 203, 233
 Spencer, H. 230, 231, 245
 Spink, J.S. 19, 20
 Spinoza, B. 256n
 Stanley, T. 23–4
 stationary state 112–13
 Steiner, H. 246
 Stephen, L. 58, 132
 Sterling, J. 203, 260n–1n
 Stewart, D. 76, 114, 258n
 Stewart, J. 29
 Stewart, M.A. 258n
 Stoic(s) and Stoicism 3, 11, 22, 25, 28, 42,
 77, 100, 129, 133, 172, 174, 181–3,
 257n, 258n
 Styles, J. 163
 suffrage 117, 254
 suicide 141, 149
 sympathy and antipathy 29, 32, 34, 36, 39,
 41, 43, 47, 49, 55, 60, 66–7, 72, 77, 78,
 79–80, 83, 87, 92, 189, 190, 195, 222,
 258n; principle of 221–3, 225–6, 229,
 230, 262n; *see also* humanity
 system(s) 68–9, 71–2, 73, 75, 76–80, 81,
 102, 103–4, 139, 156, 157, 162, 164,
 169, 180
 Tarquinius Superbus 84
 Taylor, C. 246, 254
 Taylor, C.C.W. 19
 Taylor, H. 169, 197
 Ten, C.L. 198, 210, 219, 261n
 Thales 99
 Thespis 119
 Thomas, D.O. 249
 Thompson, D. 242
 Thompson, P. 235
 Thornton, W.T. 260n
 Thucydides 204
 Tocqueville, A. de 242, 243, 252, 257n
 toleration 140–1, 204
 torture 144, 147, 158, 209, 262n
 totalitarianism 251, 252, 254, 263n
 tranquillity 10–11, 16, 46–7, 56, 68–9, 77,
 115, 126–7, 134, 145, 146, 182, 184
 transportation 144, 145, 149, 154, 157,
 158, 160; *see also* punishment(s) and
 reward(s)
 treason 147; *see also* offence(s)
 truth 197, 199, 200–2, 206; *see also* liberty
 Tuck, R. 26, 258n
 Tucker, A. 131
 Tuell, A.K. 203
 Turkey 233–4, 235
 tyranny 44, 124, 140, 148, 254, 263n; of
 opinion 205; tyrannicide 40, 134; *see
 also* majorities and minorities
 United States of America 112, 113, 160,
 233, 239, 249
 usury 114–30, 141, 196
 utilitarianism: act and rule 7, 134–5,
 185–6, 219; classical 1–11, 30–1, 32–3,
 48, 58–60, 80, 82–3, 131–2, 138, 174,
 179, 180, 184, 185, 186, 197, 206,
 209–10, 212, 213, 214, 217–19, 220,
 231, 232, 234, 239, 241, 244, 252,
 256n, 257n, 258n, 260n, 261n;
 contemporary 1–11, 30–1, 32–3,
 209–10, 218–19, 226, 236–7; and
 democracy 253–4; hedonistic and
 non-hedonistic 5; and Marxism 10; *see
 also* pleasure(s) and pain(s);
 punishment(s) and reward(s); utility
 utility: and aggregation 220, 226–7, 228–9;
 in Beccaria 147–52, 162; in Bentham
 48–57, 81, 95, 115, 119, 124–6, 130,
 132–3, 152–7, 162, 164, 172, 181,
 221–31, 250, 258n, 262n; in Carlyle
 169–72; enlargement of 10; in
 Epicurus 18, 23–5; as a foundation
 1–11, 15–16, 42–3, 60–81, 84, 144,
 157, 164, 166, 185, 186–93, 251; in

- Gassendi 21–3; in Grotius and Pufendorf 25–8; in Helvétius 82–92, 147, 172; in Hume 29–57, 59–60, 65–7, 70–2, 74, 82–8, 97, 132, 257n, 258n; in Kant 152; in Locke 19–20; in Mill 166–84, 185–206, 228–31, 234–7; in Paley 131–43, 164, 172; and post-utilitarian paradigm 211, 214–19, 261n; public utility 45, 51–3, 55, 61, 66, 81, 84–91; and punishment of the innocent 209–19; 261n; in Say 112; and secondary principles 216, 218, 220–1, 225–6, 250; in Smith 58–81, 83–7, 97–104, 106, 258n; and social contract 257n; *see also* democracy; interest(s); liberty; punishment(s) and reward(s); utilitarianism
- Vallentyne, P. 209–10, 262n
- Vaughan, F. 19
- Venturi, F. 147, 151, 260n
- Vile, M.J.C. 140
- virtue(s) and vice(s) 5, 8–9, 15, 16, 74–5, 88–9, 116, 126, 132, 168, 257n; and attributive justice 27; in Bentham 49, 55–7, 87–8, 121, 127, 130; in Carlyle 170; in Epicurus 17–18, 24; in Gassendi 24; in Grote 174; in Helvétius 82–92; in Hume 32, 33, 36, 38–9, 40–9, 55–7, 82–8, 92, 132, 137–9, 257n; in Mill 174, 183, 190; in Paley 132, 134, 137–9; in Smith 62–7, 70, 84–7, 92, 123–4; *see also* justice and injustice; utility
- Vivenza, G. 77, 127
- Voltaire, F.M.A. de 84, 151, 162, 260n
- Wade, I.O. 19, 20, 258n
- war and peace 11, 45, 53, 66, 105, 107, 126, 137, 148
- Warke, T. 178
- Waszek, R. 77
- Watkins, J.W.N. 263n
- wealth 67–9, 70–1, 101–13, 114–30, 134, 155, 236; *see also* liberty; property; rich and poor; security
- Weinstein, W.L. 245, 246, 252
- Wernham, A.G. 263n
- Westminster Review* 15, 235
- Whelan, F. 31, 37, 257n
- Whewell, W. 133
- Williams, B. 262n
- Williams, H. 152, 156
- Wilson, G. 132
- Winch, D. 58–9, 70–1, 169
- wisdom 46–7, 126, 127, 173, 180
- Wisener, D. 82
- Wootton, D. 256n, 258n, 259n
- Wright, F. 256n
- Xenophon 201, 203
- Young, B.W. 259n