The Fire-Raisers: Bentham and Torture
Jeremy Davies

The last decade has seen an intense debate, unprecedented since the late eighteenth century, about the ethical status of interrogational torture.[1] In the wake of a highly influential discussion by Alan Dershowitz, Jeremy Bentham has been a frequent point of reference in that debate, his writings on torture taken as the origin of the 'ticking bomb' argument in defence of the practice.[2] In its commonest form this argument holds that, given variously specified conditions, the police or state intelligence services would be morally justified in inflicting extreme physical pain on a terrorist whom they believed to be withholding information about the location of a bomb that was shortly to go off in a crowded city. The argument is sometimes deployed in the service of a broader contention that there should be no absolute legal prohibition on torture; for Dershowitz, it provides one reason for introducing a system of judicial 'torture warrants'.

The historical record yields, at best, only very tenuous analogues to the ticking bomb scenario. That scenario can serve as a thought experiment able to unsettle absolutist assumptions about the immorality of torture, but it has little purchase as a descriptor of past events.[3] If the argument for interrogational torture involves a certain abjuration of the history of torture, then tracing its genealogy may seem redundant. The repeated invocation of Bentham on the permissive side of the torture debate might therefore be a merely decorative gesture. Conversely, it may be that Bentham is being recruited as a source of authority to a degree that has never quite been made explicit. The permissive or 'utilitarian' argument has much to gain from a direct endorsement by the first thoroughgoing utilitarian philosopher.[4] Bentham was profoundly influenced by the greatest of the Enlightenment polemicists against torture, Cesare Beccaria, and he was in turn a mentor of John Stuart Mill, one progenitor of the modern political liberalism within which torture has come to be regarded with a unique abhorrence.[5] If the route from Beccaria to Mill passes through a position that gives principled support to the legalization of some kinds of torture, then — the implication might be — a nation that tortures is not abandoning Enlightenment values, but fulfilling the imperatives of the Enlightenment with all the seriousness that they demand.

For this reason, it matters greatly to the contemporary torture controversy that we should seek to understand Bentham's views about physically painful interrogation. Is it indeed the case that his understanding of the ethics of torture was the same as that of interrogational torture's current defenders?[6] If his torture writings embody a different set of assumptions, might they provide a way to open out the terms of the modern legal and philosophical debate — terms that have often been intensely constricted, even predictable? The general editor of Bentham's collected works rightly cautions that our grasp of Bentham's theory of torture, based as it is on fragmentary texts found within massive, abandoned projects of legal criticism, is so far necessarily incomplete. 'In order to understand properly what Bentham had in mind', he observes, 'we need to know much more about the context in which he assumed torture would operate.' And, he says, we cannot yet trace in detail how Bentham's thinking about torture developed over time.[7] Nevertheless, some preliminary assessments can be made. It is possible to identify clear distinctions between Bentham's first analysis of torture and the view that he held later in his career. His later writings anticipate the contemporary permissive standpoint on interrogational torture in many more respects than has previously been realized, while his early writings — even though they too defend torture under certain conditions — are more profoundly incompatible with that standpoint than has as yet been appreciated. The first part of the following discussion reassesses Bentham's place in the history of the permissive theory of torture. The second part seeks to show that bodily pain has an unexpected importance for his philosophy in general. I call attention to an ambivalence in Bentham's early torture writings over the question of whether or not interrogational torture is always effective. His indecisiveness about whether or not sufficiently intense physical pain is guaranteed to determine the behaviour of its victims goes to the heart of his thought.

I

Bentham's torture writings were first brought to light by W. L. and P. E. Twining in 1973.[8] The known material consists principally of four separate discussions, each intended as a subsection of a larger work but left unpublished by Bentham. The first two are associated with his work on penology in the late 1770s: that is, they represent the Bentham of the *Introduction to the Principles of Morals and Legislation* (1780), his foundational

text of utilitarian philosophy and his most enduringly influential volume. 'Of Compulsive operations, and herein of Torture' (a draft in Bentham's own hand) and 'Of Torture' (a copyist's manuscript with minor revisions by Bentham) are dated tentatively by the Twinings — who published them in full — respectively to 1777 and to some point within the following three years.[9] Twenty-five years later, in the spring of 1804, Bentham took up the issue again, as part of his study of the laws of evidence. Bentham dated the short fragment 'Of Torture' and the more substantial draft 'Means of extraction for extraordinary occasions' to March 1804 and 27 May 1804 respectively.[10] These two texts have not been published, with the exception of three crucial sentences from the latter, which were printed in a footnote to the work of the Twinings and seized upon by Dershowitz.

The two pairs of texts have the same fundamental orientation. They endorse interrogational torture when the practice is justified by utilitarian calculation. Torture is in itself an evil because it causes pain to its victim, but it is justifiable if it increases the quantity of happiness in the community at large. The only way in which it might do so is by inducing the victim to give up information that will prevent or bring an end to a serious crime: torture must be concerned with the future rather than with the past (UC 46/67). However, beyond these basic principles it is the differences between Bentham's early and late approaches that stand out. Judicial torture had been absent from English law since 1166, and when Bentham wrote the first 'Of Torture' it had been 'abolished within a few years in several of the most absolute governments in Europe'.[11] Pushing against this historical current, between the late 1770s and 1804 Bentham developed a great many of the characteristic features of the modern permissive argument.

The principal element of that modern argument is a robustly specified version of the ticking bomb scenario, which must meet a whole series of conditions before it can claim to describe circumstances in which performing torture is intuitively the right thing to do. Bentham's 1770s texts developed a version of that scenario which fulfils some of the necessary criteria, specifying, for instance, well-founded beliefs that the victim possesses the required information and that torture is the only practical means of extracting it. As we will see, this version of the ticking bomb story is nevertheless strikingly inadequate: it lacks at least four central properties of the modern scenario. Yet by 1804, the 'Means of extraction' fragment incorporated all four. Firstly, a calculus of harms that bears overwhelmingly towards the use of torture: Bentham envisages the interrogation of a

single man to prevent the torture of 'a hundred innocent persons'. Secondly, the imperative pressure of time: an emergency that cannot 'await the slow formalities of justice'. Thirdly, the guarantee of independent factual verification of the information extracted — in this case, through the rescue of the hundred innocents. Fourthly, an unexceptionable motivation for the act, such that torture is employed strictly 'for the purpose of rescuing' those innocents rather than as a way of giving the man tortured his deserts.

The crucial passage of 'Means of extraction for extraordinary occasions' in which the torture scenario emerges in its modern form is as follows. Although most of it has not previously been published, it is this sequence that secures Bentham's place in the history of the logic of the ticking bomb:

> To the advocate of vulgar errors, the slave of vulgar prejudices — to the proposer of popular and convenient morality, was [*sic*] upon the watch to make his profit of the public weakness — to the sentimentalist, to whom the welfare of the public is nothing, and to whom the favour of the public, that is of the unthinking, and therefore in a prodigious degree the more numerous, part of the public, is every thing, there is indeed no difficulty: the word *torture*, accompanied by an interjection, with or without an epigram or a passage of a play, cuts the knot at once.
>
> Considering the matter in an abstract point of view, […] it is impossible for a man, thinking attentively […] to deny, that on [certain occasions], compulsory applications however irresistible, and indeed the more irresistible the better, ought to be permitted to be employed […].
>
> Suppose an occasion to arise, in which a suspicion is entertained, as strong as that which would be received as a sufficient ground for arrest and commitment as for felony — a suspicion that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which if inflicted by the hand of justice, would universally be spoken of under the name of torture. For the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practicing or about to be practiced, should refuse to do so? To say nothing of wisdom, Could any pretence be made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon a hundred innocent persons to the same fate?[12]
>
> In military practice, actual cases not very widely distant from this supposed one, occurr probably but too frequently; and the decision is not difficult. Look to Ireland for example and see whether examples are not to be found. On occasions and for purposes such as the above without and against law, severities are exercised with little murmur and almost without notice,

severities, which, if instituted by law and exercised according to law, would universally be exclaimed against as grievances beyond endurance.

What then is to be done? Without some species of compulsive force, and that the most promptly as well as certainly efficient that human nature admitts of, one sees there is no bounds to the mischief that may be done: fire and water will not await the slow formalities of justice. For want of it, the mischief may be perpetrated, and a country laid in ruins: by the help of it, the mischief may be staid or prevented, and the country saved.[13]

Perhaps the most striking thing about these paragraphs is not simply the development, since the 1770s, of the four key properties of the ticking bomb scenario noted above. Instead, it is that those properties emerge in tandem with four other changes, none of which are necessary to the logical stipulation of a ticking bomb case, but each of which anticipates in a remarkable way the contemporary permissive discourse on torture. (1) New to 'Means of extraction' is the argument upon which Dershowitz places his greatest emphasis: that in certain circumstances, acts amounting to torture are (rightly) bound to take place whatever their legal status. It is mere sanctimony, Bentham insists, to 'exclaim' against them 'as grievances beyond endurance', and their legalization would at root be a liberation from judicial hypocrisy. (2) There is a freshly emphatic rhetorical contrast between the guilt of the suspect (who is, nevertheless, not being punished for that guilt) and the innocence of his actual or threatened victims. The nature of that guilt is especially worth noting. The proper subject of torture exists in the borderland between law-breaking and 'military practice'; he is at once a 'criminal' and an enemy soldier, or rather neither quite one nor the other — an unlawful combatant.[14] (3) The calculus of harms, which now at a minimum points consistently to the use of torture, can be inflated effortlessly to the point where the prospective victim becomes an existential threat to the state, such that the ruin or the salvation of the country itself might depend upon the 'want' or commission of torture.[15] (4) The torture scenario is embedded explicitly in its historical context. For actual cases in which torture is justified one need only 'look to Ireland'. In the aftermath of the 1798 Irish Rebellion, Bentham envisaged the use of torture specifically as a way of dealing with terrorism. The probable reason why 'Means of extraction' anticipates so powerfully the contemporary scene is that Bentham outlined his fully fledged version of the ticking bomb case as a direct response to a cycle of insurgency and counter-insurgency that had shaken the British imperium and that was still bloodily ongoing in 1804.[16]

In order to understand the full importance of the 'Means of extraction', we must compare that fragment to the analysis that Bentham had undertaken in the first part of his career. The texts of 1777 to 1780 explain the actual methods of torture that he had in mind. The later of the two fragments, 'Of Torture', suggests the rack (UC 46/64, 65), while the earlier, 'Of Compulsive operations', recommends that

> in cases where particular expedition is required, and the intelligence sought must to answer the purpose be given forthwith ~~the water torture~~ /pickeering or riding the wooden horse seem/ seems as good as any. These are punishments which for the severity of them seem calculated to leave as little pain behind them as any that can be assigned. (UC 46/57)

'Pickeering' is Bentham's occasional usage for the practice normally known as 'picketing'. In other contexts he identifies picketing and the horse not as torture techniques but as obsolete forms of punishment, which remained longest in use in military contexts.[17] He describes them as follows:

> The punishment of Pickeering is to be thus executed.
> […] 2. Under one foot is to be placed an iron spike, on which [the subject's] foot is to rest, and by which alone he is to be supported underneath
> 3. His other foot is to be held up, or kept from assisting its fellow, by […] an inflexible iron bar.
> […]
> The punishment of riding the iron horse is to be thus executed.
> 1. An instrument of the figure of the horse is to be provided but in the body part as thin as it can be so as to support the weight of a man.
> 2. On this instrument the offender is to be set astride; his hands being held behind him […].
> 4. To each foot may be fastened weights heavier or lighter. (UC 143/19)

In this manuscript — on the basis of the principle of 'characteristicalness', which holds that the deterrent value of punishment is increased by establishing analogies between offences and their punishments — Bentham proposes that picketing should be employed as a punishment for footpads, and the horse as a punishment for highwaymen. As stern as this sounds, it does not itself mean that Bentham advocates torture as a punishment for property crime. He notes that these techniques can be employed with varying degrees of severity, and he may well have envisaged that they would be used to punish robbers in a way that would fall short of torture on some definitions.

The question of what constitutes torture is not easy to answer satisfactorily. The early 'Of Torture' presents Bentham's definition:

> Torture, as I understand it, is where a person is made to suffer any violent pain of body in order to compel him to do something or to desist from doing

something which done or desisted from the penal application is immediately made to cease.[18]

For Bentham, unlike modern scholars, torture always involves the infliction of bodily pain, but 'violent' is intended loosely here. A mother who 'pinches' her child to make him stop 'playing with a thing which he ought not to meddle with' is engaging in torture (UC 46/63–64). A more important criterion is that this pain must be employed as a means of compulsion. The state can legitimately inflict penalties on individuals either as punishment, where deterrence is the major goal, or as a way of compelling some particular behaviour. 'I suppose no system of jurisprudence is without' a system for accomplishing the latter, Bentham writes (UC 46/58). The earliest torture essay suggests momentarily — 'In ordinary cases the best kind of torture is penitential Imprisonment' — that any such 'compulsive application' counts as 'torture' (UC 46/57). With this brief exception, however, imprisonment is understood as the infliction of 'chronical' pain and torture as the infliction of 'acute' pain, and they are regarded as the two possible means by which states can perform the necessary business of compulsion.

Bentham's argument is that — popular prejudices aside — the acute method may well be preferable to the chronical. He acknowledges the perils involved: great care must be taken in making use of 'so terrible a power', and he approaches the 'difficult and invidious task' of defining its legitimate uses 'with trembling hand' (UC 46/67, 70). Nevertheless, because it will achieve its purpose more rapidly, torture promises to cause less total suffering than compulsion by imprisonment to the man whom it coerces. Compulsive imprisonment, as in a debtors' prison, is 'very frequently more than equivalent to Torture. It is not strictly speaking Torture but something worse' (UC 46/70). At times Bentham goes further still, in that he has reasons for thinking torture less morally exceptionable than punishment as such:

> The very circumstance by which alone what is called Torture stands distinguished from what is commonly called punishment is a circumstance that operates in its favour. This circumstance is, that as soon as the purpose for which it is applied is answered, it can at any time be made to cease. […] Of punishment, in order to make sure of applying as much as is necessary you must commonly run a risque of applying considerably more: Of Torture there need never be a grain more applied than what is necessary. […] If Torture deserves to be reprobated, Punishment does still more. (UC 46/64)

Elsewhere, however, Bentham sets aside the argument that torture is more readily admissible than punishment in favour of the claim that torture is best understood as itself a

kind of punishment. His position is remote from the modern permissive theory of torture, which almost always relies upon a scrupulous distinction between the interrogational and punitive uses of bodily hurt.[19] Yet Bentham's logic is simple. Torture punishes a man's criminal refusal to speak: 'The offence he is punished for is his contumacy in not giving the information which has been required of him' (UC 46/60). 'Every moment that he persists in his refusal he commits a fresh offence […] for which it is at least as fit that he should be punished as for any other' (UC 46/65).

Bentham is in two minds, then, as to whether torture is best described as an act of compulsion contradistinguished from punishment, or instead as one particular type of punishment. One reason for this might be the special status that bodily pain has in his penological theory. Most punishments, he notes, need cooperation or at least resigned obedience from the person punished: this is certainly true of imprisonment, and especially of penalties such as hard labour. Any punishment that 'requires an uninterrupted source of fresh exertions of the will' also 'requires a constant application of fresh motives' — motives that it must be possible to produce instantly, in 'any degree however small'. As is 'universally understood', 'such motives a constant fund it is only simple afflictive punishments can supply'. This is why overseers are always given the power of 'inflicting organical pain' on forced labourers (UC 159/239). Again, Bentham writes that any 'active punishment' depends upon a supplementary penalty that varies freely in degree and to which all men are vulnerable. 'These characters unite in none but simple afflictive punishment' (UC 159/242). In Bentham's terminology, simple afflictive punishment is that which 'subject[s] the patient to pain of body; but without producing thereon any more than a temporary effect'. 'How variously soever the causes may be diversified, the effect is still one and the same; viz. organical pain.'[20] Punishment and compulsion are not, after all, properly separate from one another: the former relies upon the latter, at least in potential. 'Organical pain' is the tool of compulsion that underwrites punishment in general. Because torture, for Bentham, is always the infliction of 'pain of body', it shares in the conceptual privilege that he accords to physical hurt. Deliberately inflicted bodily pain lies at the heart of his analysis of penal practice, as the irreplaceable medium between punishment and compulsion. The extreme version of this mediating power, torture will take on further complexities because of its unique potency as a means of compulsion.

In the last stages of the 1777 analysis 'Of Compulsive operations' Bentham reflects on the 'extreme force and efficacy' of bodily pain as an inquisitorial tool (UC

46/61). The 'slippery slope' argument, now often made and often countered, that the legalization of torture in exceptional cases would lead to its becoming routine, is not relevant here.[21] Bentham assumes that if legalized in any instance torture would indeed be used routinely, and in a way that would transform the relationship between investigating magistrates and the populace. In the absence of torture, the people among whom crimes are committed 'have a kind of negative upon the law', a power of obstruction about which Bentham is necessarily ambivalent (UC 46/62). Partiality towards the offender or against the law, or a fear of such partiality among others, may make witnesses refuse to cooperate with an investigation. A magistrate forbidden the use of torture is, in the crucial first stage of a criminal enquiry, 'merely passive'. By contrast,

> [torture's] efficacy is so great, that by the help of it a few weak lights will commonly be sufficient to enable the magistrate of himself to unravel the most intricate and fine-spun web of delinquency, whether consummated or projected. Armed with this he can extort information from the person who for a certainty is able to afford it: without this, he is forced to go a begging for it among persons who let them be ever so well disposed to yield it, may or may not have it in their power. (UC 46/61)

On the other hand, the danger posed by torture

> is then that the magistrate when armed with such effectual powers may in spite of the people give execution to laws repugnant to the interest as well as to affections of the people; that the magistrate in short may find the same facility in the establishment of tyranny or usurpation as in the maintenance of a beneficent and rightful government. (UC 46/62)

Once Bentham has set out the consequences of judicial torture in these terms, one might expect the latter consideration, the threat of 'tyranny or usurpation', to trump the former. Not so: an ingenious regulation promises a better solution. 'The remedy', Bentham concludes decisively, 'is to confer this power […] in the case of such delinquencies as are offences against individuals, but to withhold it in the case perhaps of most which are offences against the government.' In other words, 'those whom the letter of the law may have proscribed under the name of traitors, libellers, or sowers of sedition' should be precluded from torture, because such 'may in fact be the best friends and defenders of the people'. Torture should be permitted only in the case of those suspected of domestic, non-political crimes, typically acquisitive in nature. 'In favour of an incendiary a murderer for hire, a housebreaker, a highwayman, a thief, a ravisher neither the people in general nor any person in particular can have any partiality which ought to be indulged' (UC 46/62).

We see here just how far Bentham's defence of torture in the 1770s diverges from the arguments put forward by legal scholars such as Dershowitz, Oren Gross, and John Alan Cohan who have found in his later torture writings of 1804 a model of Enlightenment pragmatism. Although Bentham is always prepared to countenance painful interrogation, his early arguments are remote from present-day assumptions in the ethical grounds on which they defend the practice, the procedural framework that they envisage, and the identity of those whom they would render liable to suffer. Bentham's belief that political criminals or enemies of the state, as distinct from prisoners of war, might be interrogated under more stringent legal protection than common malefactors is unrealistic. Nonetheless, the remarkable fact is that in 'Of Compulsive operations' Bentham excludes from torture precisely that class of wrongdoers — traitors and seditionaries — most closely analogous both to the terrorists, insurgents, or unlawful combatants for whom Dershowitz and others advocate such methods of interrogation, and to the 'criminal' military foe envisaged as the subject of torture in the 1804 'Means of extraction'. It is striking, too, after every allowance is made for the bloodiness of the late eighteenth-century penal code and for the brutality with which that code was applied, that one of Europe's great penal reformers advocated the normalization of torture in the investigation of a range of offences remote from the exceptional case of the ticking bomb, even down to common property crime. 'Incendiaries, assassins, highwaymen and housebreakers are under every government, be the government what it may, the standing enemies of the people: against these', Bentham writes, 'the hand of government can never be too strong' (UC 46/62). Yet through Bentham's revisions to this argument a version of the modern utilitarian permissive theory was quite shortly to emerge. The 'liberal ideology of torture', in David Luban's phrase, is born when interrogational torture is understood to be prompted not by the state's general obligation to compel certain acts but by the moral anguish of an imminent catastrophe; when it is justified not because torture is a permissible type of punishment but because it is so unlike punishment; and when the legitimate subject of torture ceases to be a common or garden criminal and becomes an enemy of the state as a whole. These three transformative innovations can be dated in Bentham's thought to the quarter-century before 1804.

II

Did Bentham think that torture is always effective? Did he believe that sufficiently extreme bodily pain exerts an authority over the will that it is impossible to resist? The varying answers that can be found in the early torture essays point towards the full importance that the idea of physical pain has for his philosophy. My concern from here on is with 'Of Compulsive operations' and 'Of Torture', the texts of the 1770s, and their flirtation with the concept of a psychological absolute. Bentham's flat statement in the conclusion to 'Of Compulsive operations' that torture's efficacy is great enough to allow a magistrate equipped with torture simply to 'extort information' from his suspects seems to condense an earlier remark in the same essay. Bentham writes that 'when a man finds himself urged by a kind of punishment which he has reason to imagine to be irresistible, he will naturally in order to avoid it do what is required of him at once' (UC 46/58). It is hard to reconcile either statement, however, with one that follows almost immediately on from the latter. Here Bentham tells us that if, for an offender,

> the pain of seeing the discovery made should be so great as that rather than incur it he would endure any extremity of torture, […] he may take his choice and submit to the evil of the torture if that appears to him the less, and so exempt himself from the greater. (UC 46/58)

This is to all appearances a ringing declaration that the absolute coercion, as opposed to the relative coercion, of a reasoning person is impossible under all circumstances. To compel infallibly the decisions that someone makes would seem impossible if he is always able to determine privately his own best interests in this way, even though his choice may be reduced to one between torture and a still greater evil. Perhaps — to take a view still more plainly incompatible with the essay's ending — torture is not even the most reliable means of coercion. Early in 'Of Compulsive operations' we read that 'Afflictive Imprisonment promises to be more universally efficacious at the long run than even what is commonly called torture. The former breaks the spirits: Torture raises a passion, which in persons of firm temperaments may support them' (UC 46/57). The 1778–80 fragment 'Of Torture' is equally unambiguous: 'Torture is not of all methods of compulsion the most certain in its efficacy.' Solitary confinement 'seems rather more certain' as a means of compulsion, because it 'debilitates' where torture 'stimulates' (UC 46/67).

Nevertheless, both essays also accommodate precisely the opposite thesis. It emerges when Bentham discusses what will prove to be a crucial topic: the willingness of criminals to disclose the name of their accomplices. Firstly, in 'Of Compulsive operations', he notes that in certain countries,

> when [a] prisoner is apprehended, his accomplices make off to another country and by that means free their own of the danger of suffering by them any more. […] Why? because Torture is either avowedly or in effect actually made use of. They know therefore that they shall *for a certainty* be discovered. (UC 46/60, emphasis added)

Secondly, in 'Of Torture':

> In countries where Torture is absolutely forbidden a malefactor scarce ever betrays his accomplice; for why should he? To restrain him from doing it he has the motives of sympathy and the sense of honour; to urge him to do it he has none at all. Should he do it he could have no excuse either to himself or to the little circle of his acquaintance who in his imagination constitute the tribunal of the public. Establish Torture, and you give him *the compleatest of all Excuses, irresistable Necessity*. (UC 46/69, emphasis added)

The phenomenon that Bentham countenances here, a confession produced by 'irresistable Necessity', is rejected explicitly in the later writings on evidence of which his 1804 torture fragments form a part. The *Rationale of Judicial Evidence* (finally published in 1827) reports that 'Instances have been known in which delinquents have endured the very extremity of torture, rather than disclose their coadjutors'.[22]

Bentham's 1770s manuscripts, by contrast, bear witness to the superimposition of two profoundly different ways of understanding torture. His undecided account of the consequences of acute bodily pain has implications for much more than his discussion of the ethics of interrogation. The early torture writings bring to light an ambivalence that is of fundamental significance for Bentham's entire philosophy. On one view, the infliction of physical pain is a swift but imperfectly reliable means of compulsion, faced down more easily than prolonged imprisonment. A sufferer 'may take his choice' and refuse to yield to it; the same is perhaps true of any kind of compulsive operation, the subject remaining always free to choose the least bad of the options available to him. On a contrary view, 'torture' describes the introduction of a veritable absolute into psychological analysis — an absolute that Bentham may finally be unable to disavow. Torture supersedes the will; it acts with limitless force, to exceed all equivalents. A criminal's betrayal of his accomplices, prevented in all other circumstances by his 'sense of honour', will then become a mechanical inevitability. 'The quantity of Punishment be it ever so great is still

determinate', as Bentham puts it, but torture is, as a means of compulsion, infinite. 'The quantity of Torture is indeterminate: it is determinate neither in intensity nor duration' (UC 46/65).

Bentham proposes torture as an unfailing means of educing the names of a criminal's accomplices. This is in fact his early version of the ticking bomb scenario, the version that fails to match the criteria now usually thought necessary to a watertight case in which torture is self-evidently the right course of action. Specifically, the scenario to which he keeps returning — putting it forward as a decisive illustration twice in each of the early analyses of torture — is that of an attempted arsonist who conceals the identity of his escaped co-conspirator. In this situation, Bentham says, 'which is a very common one, I see not I must confess what reason can be alledged against' the use of torture (UC 46/59). His most concise presentation of the case is as follows:

> Two men are caught setting a house on fire; one of them escapes: set the prisoner on the rack, ask him who his Accomplice is, the instant he has answered you may untie him. Torture then when not abused, Torture considered in itself is in this point of view less liable to exception than punishment is. (UC 46/65)

The scenario reflects other references in Bentham's work to incendiarism as an especially heinous offence, and it is no doubt influenced by the French practice of *torture préalable*, which allowed specifically for the examination under torture of condemned law-breakers 'about other crimes and criminals', and which was regarded as 'much less objectionable than ordinary judicial torture'.[23] (The practice was not abolished along with other uses of torture in France, and remained legal until 1788.)[24] Even so, it is by no means clear that torture would be justifiable in this case on Bentham's own utilitarian criteria. He writes elsewhere that the suffering caused by torture may be to its victim 'more terrible than twenty deaths'; the public benefit that outweighs this suffering ought to be correspondingly large.[25] Yet Bentham never stipulates that his fire-raisers must threaten a widespread conflagration, or even put anyone's life in danger. He does not stipulate that the escapee will certainly renew his attempt, only that he may possibly do so. Nor does he give reasons for thinking that if this man is caught no one else will attempt the crime. As he says, the escapee 'may perhaps or perhaps not' be caught if his accomplice yields his name; he might in any case have been found without recourse to torture (UC 46/68). The most basic structural problem with the thought experiment is that Bentham disregards the likelihood that the prisoner will lie about the identity of his accomplice, even though

Beccaria, with whom Bentham is taking issue directly here, raised that objection explicitly in *On Crimes and Punishments* (1764):

> if it has been demonstrated that [torture] is not a proper means of discovering truth, how can it serve to discover the accomplices, which is one of the truths required [?] Will not the man who accuses himself, yet more readily accuse others?[26]

The likely benefits of interrogation under torture here are relatively marginal. As a justification for the institutionalization of torture for thieves and house-breakers, the example is extremely weak. It is worth considering the possibility that when Bentham places great and repeated emphasis on the case of the fire-raisers, it is in part because of some further, latent significance that the scenario has for him.

I suggest that the problem of Bentham's contradictory claims about the effectiveness of torture is linked to the problem of why his defence of torture turns upon the pragmatically unhelpful scenario of the fire-raisers. To begin to clarify what is at stake in both cases we should consider the changing motivations implied in the fire-raiser's story. He is distinguished first by his crime. Arson is inherently an act of malice. In almost all cases it will bring its perpetrators very little direct benefit relative to the scale of the crime, so it suggests wanton destructiveness or angry nihilism, harm for harm's sake. It might appear a motiveless offence, explicable not in terms of self-interest — because it runs so plainly counter to the criminal's material interests — but as sheer vandalism. The difficulty in inducing the man to give up the name of his accomplice stems from a different impulse: that of 'friendship and a kind of honour not uncommon amongst the most profligate Malefactors'. A magistrate might offer to spare his life in exchange for his cooperation in bringing his friend to justice. 'But will he accept of such terms? very likely not: […] so strong even among the most atrocious malefactors are sometimes the sentiments of sympathy and honour' (UC 46/68). Here too, his behaviour seems purposely at odds with his own interests, his self-sacrifice now extending to his very life. Perhaps, then, his motivation is more consistent than it first appears. His attempt at incendiarism implies a sense of wronged justice manifesting itself as a desire for revenge; not otherwise explained, it seems to stem, just like his loyalty to his accomplice, from a 'sense of honour' that outweighs private concerns (UC 46/69).

Honour was a loaded concept for Bentham in thinking about torture.[27] His intellectual debt to *On Crimes and Punishments* was very great, especially at this stage of

his career.[28] Beccaria's treatise is by far the most significant point of reference in the early torture essays — largely implicit in 'Of Torture', but addressed explicitly and at length in 'Of Compulsive operations'. The text with which Bentham was obliged to take issue as the most significant existing polemic against torture was also one that he admired greatly as a critique of public policy with a strongly utilitarian emphasis. Beccaria's philosophy was not, however, a systematic utilitarianism like Bentham's, but an amalgam drawing on both the utilitarian philosophy of Helvétius and Rousseauan contractarianism.[29] Beccaria's inclination towards the view that the law derived its existence from a fundamentally limited social contract came to the fore in his discussion of honour:

> Honour, being produced after the formation of society, could not be a part of the common deposite, and therefore, whilst we act under its influence, we return, for that instant, to a state of nature, and withdraw ourselves from the laws, which, in this case, are insufficient for our protection. (Beccaria, pp. 36–37)

Beccaria concludes that a free society must allow in affairs of honour for 'a momentary return to the state of nature, and original equality', so the law should not touch a man who has to fight a duel to defend his name (Beccaria, pp. 37–39). Bentham regarded such analysis of the law by reference to a make-believe general contract, involving the 'common deposite' of a part of their freedom by the members of a society, as an absurdity. This distinction between a law of justice that descends from a social compact and a law of honour that remains keyed to a state of nature is from his perspective an unenlightened remainder from Beccaria's contractarian sources. Beccaria himself, however, identifies honour as a phenomenon that exists permanently beyond the law; it belongs to a realm of action that is produced by society but from which society must retreat in order to preserve itself. The 'sense of honour' implies for Beccaria a suspension of normal utilitarian law, just as it appears to imply a suspension of the law of self-interest in the case of the fire-raiser who exacts private justice upon his enemy.

To see why all such suspension of the law is so antithetical to Bentham's thought we should turn to his grounding distinction between two kinds of entities. 'Real' entities are those which can be perceived or inferred actually to exist in the world: rocks and trees, pleasures and pains. Loyalty and honour, by contrast, are 'fictitious' entities, as are such things as rights and duties. They also exist, but only as abstractions that in themselves do not bring concrete images to mind. Statements about fictitious entities are meaningful only if they can be translated or paraphrased into statements that refer solely to real entities. A

paraphrase that gave meaning to a statement about 'the sense of honour', for instance, would describe a complex of pleasures and pains: the pleasurable feelings of self-esteem consequent on the fulfilment of obligations, obligation being itself another fictitious entity that would in turn be cashed out in terms of pleasure and pain. Pleasure and pain are the only real entities that have the special property of motivating voluntary actions. Honour, like loyalty, is nothing if not a structure of thoughts about pleasure and pain.

All actions must have a cause, and this can only be the pursuit of pleasure or (in essence the same thing, for Bentham) the avoidance of pain. Such pursuit presupposes a calculation — which can be unconscious and erroneous — about what course of action will lead to the greatest excess for us of pleasure over pain; we can only perform the actions that come out on top in such calculations, or we would effectively be preferring pain to pleasure.[30] One implication of this account of motivation is that all motivating pleasures and pains are, in principle, commensurable with one another. Bentham does not hold that the relative values of different kinds of pleasure and pain can always be judged perfectly, or even with much accuracy. He does hold that any pleasure or pain felt by one person bears some definite if unknown proportion to any other pleasure or pain felt by the same or another person. 'Every pleasure [and pain] must be more or less *intense*', and the relative values of the affects that we experience consist of this intensity multiplied by their duration.[31] Because the intensity of every affective state must have some determinate ratio to that of every other, all affects can hypothetically be measured on a single scale. Any given motivation will be overcome by a contrary one that comes higher on that scale.[32]

'The same process [of calculating values] is alike applicable to pleasure and pain, in whatever shape they appear', Bentham writes (*Principles of Morals*, p. 40). His work includes innumerable taxonomies of the different kinds of pleasure and pain. If each kind produced its own, autonomous category of the good, hedonistic utilitarianism would have no hope of the objectivity that Bentham ascribes to it: utilitarians like others would face at least 'as many different standards of right and wrong as there are men' (*Principles of Morals,* p. 16). For that reason, the principle of commensurability among pleasures and pains is fundamental to Bentham's philosophy. His descriptive psychological hedonism is the basis for his normative ethical hedonism, and so for the whole theory of legislation and government that is based in turn on his ethics. The question of how Bentham can move from his claim that pleasure and pain determine actions to his claim that they determine what is right and wrong is famously vexed, but it is both safe and sufficient to say here

that he understands his utilitarian ethics and his politics to follow strictly from his psychology.[33]

In short, Bentham's ethical system is justified not by a limited social contract, as Beccaria's sometimes is, but by supposedly universal psychological maxims. It is axiomatic for him that the sense of honour cannot bring about the suspension of ordinary psychological laws. Bentham does not believe that the fire-raiser's crime or his loyalty can be attributed to anything other than his own interests: to his pursuit of pleasure and avoidance of pain. This is not to say that he has any difficulty in providing an explanation for the fire-raiser's behaviour. His psychology does not involve the claim that all actions are selfish. For Bentham motives can be either 'self-regarding' or 'extra-regarding' in orientation. The incendiary is driven principally by the latter class of motives, which stem from the pleasures and pains of 'antipathy' and 'sympathy'. These kinds of pleasure and pain cause actions in the same way as any others, even though their immediate orientation is towards other people rather than oneself. What motivates the fire-raiser is the thought of the antipathetic pleasure that seeing his enemy's chattels burn would bring, and his sympathetic investment in the well-being of his partner.

The only thing that is especially distinctive about acts produced by extra-regarding motivations is that they have hitherto nearly always been misinterpreted as disinterested. On the contrary:

> no human act ever has been or ever can be *disinterested*. For there exists not ever any voluntary action, which is not the result of the operation of some *motive* or *motives*, nor any motive, which has not for its accompaniment a corresponding *interest*.[34]

The only acts that can be said with some 'propriety' to be disinterested demonstrate 'not the absence of *all* interest […] but only the absence of all interest of the *self-regarding* class' (*Table of the Springs of Action*, p. 100). This is true of acts carried out purely for the sake of the pleasures of sympathy. Equally, vandalistic crimes like incendiarism that are born of antipathy should not be misunderstood as the consequence of sheer criminal malignity:

> Those who are forward to refer the propensity to transgress a prohibition of any kind to an unaccountable perversity, and unnatural corruption in human nature, as if it were not reconcilable to the known dominion of the ideas of pain and pleasure over the human mind, do an injustice to man's nature, in favour of their own indolence.[35]

A man who misinterprets actions motivated by sympathy as disinterested must do so in the case of his own sympathetic motivations. That misinterpretation itself must of course be caused by the pursuit of pleasure. Such misinterpretation becomes an illusion that has the power to affect actions themselves as well as how people understand them. The power of honour as a motivating force is increased by the fact that it gives honourable men pleasure to think that they behave with honour for its own sake. This illusion that extra-regarding motivations are delinked from personal interest brings with it the further illusion that such motivations may have absolute force. A person who is pleasurably convinced that their honourable behaviour is independent from self-interest has no reason to think that any change in their self-interest will affect their decision to behave honourably. This view is incompatible with Bentham's psychology, and hence too with the ethics and the system of government that Bentham makes reliant on his theory of motivations.

Bentham, then, must respond to this challenge. He needs to show that the universal concern with maximizing the excess of pleasure over pain is itself what ultimately sustains even its own mystification. In order to do so, he must be able to argue that all motivations — where the hard case is extra-regarding motivations of enormous potency — will give way if they are opposed by stronger ones. It is in this respect that the scenario of the fire-raisers is crucially important to Bentham's utilitarianism as a whole. His philosophy inherently requires a kind of illustration very similar to the one that he did in fact stage repeatedly in his early fragments on torture. All inducements towards any course of action, including extra-regarding ones however powerful, must be susceptible to being balanced out by countervailing motivations. If torture alone can make the fire-raiser name his accomplice, then the infliction of intense bodily hurt is uniquely capable of demonstrating in practice the 'known dominion of the ideas of pain and pleasure over the human mind'. Bentham's torture writings are not just treatments of one problem in applied ethics. On the contrary, 'torture' in effect names an indispensable part of his psychological theory. It is the procedure whereby an apparently unconditional preference for one particular course of action can be proved to be dependent upon the agent's balance of interests. It is the way in which the principle of commensurability among pleasures and pains is shown to be valid. This is why the torture writings of the late 1770s are of great moment for any comprehensive understanding of Bentham's thought. One further consequence is an unexpected circularity: if extreme physical pain plays an essential role in underpinning

Bentham's philosophy, then an ethical system that justifies torture under certain conditions is itself justified in part by torture.[36]

Bentham proposed the scenario of the fire-raisers in 'Of Compulsive operations' in 1777 before 'Of Torture' returned to describe it in more detail a few years later, so he must have reflected on it at some length. Even so, he may not have been aware at this stage of the far-reaching significance for his philosophy of a situation in which a man's concern with the fictitious entities loyalty and honour can be resolved (both for onlookers and for the man himself) into a concern with the real entities pleasure and pain only through the intervention of physical hurt. He was to become aware, however, of the importance of a similar case. One way of reading the fire-raiser is as a precursor to another of Bentham's most troublesome characters, the 'Lazy Hand', whom he confronts in *Pauper Management Improved*, written in the late 1790s. By the time of this later text, Bentham recognized that the refusal or state of exception represented by the fire-raiser meant, if it could not be mastered, at least the symbolic overthrow of the utilitarian polity.

In a discussion of the rule that able-bodied workhouse inmates should perform their labour before being fed, Bentham came across the problem of a suppositious inmate who simply refused to work. Could the managers, wishing to avoid the 'danger of inordinate severity', really permit themselves to starve so obstinate a man to death? Or rather, what would the consequences be if they could not do so?

> If in any community sufferance, whether inflicted in the way of punishment or of coercion, has its determinate limits — and those limits known: — any member who has the resolution — (call it fortitude or call it obstinacy — by a good name or a bad one — it makes no difference) — any member who has the resolution to endure the punishment, is not only independent of the government of that community, but himself sovereign of it, and a despot.[37]

The rhetoric might seem overheated, even paranoid. A stubbornly idle pauper who obtains an unearned meal by refusing to work for such a long time that his overseers must give in and feed him does not, on the surface, become the sovereign or despot of his community. Yet this remarkable passage does seem to describe something enduring in Bentham's thought. The man whose powers of will exceed the powers of coercion within his society is at once inside that society and outside it. The hand's laziness is not taken to be absolutely irresistible: again, Bentham is not dealing with a challenge to his psychology as such. But it is, so to speak, locally absolute. A utilitarian community that limited 'sufferance' to a level inferior to the resolution of some of its members would turn those

members into aliens. The principle of commensurability among motivations upon which the community was based would effectively cease to apply in the case of such men. The loyal fire-raiser and the lazy hand are akin both in their passive refusal to cooperate, and in the penalty that they face in consequence: physical pain amounting to torture. Bentham declares in his writings on the Panopticon prison that overseers who use food deprivation as a means of control 'should speak honestly, and call it *torture* […] it is applying the rack to the inside of the stomach, instead of the outside of a limb'.[38] Yet the legislator must reserve to himself this right of irresistibly painful coercion not just for practical reasons but as a matter of principle. Physical pain is the way in which he must demonstrate the psychological truth that provides the ultimate justification for his own authority. What cannot be accommodated by the utilitarian theory of commensuration and calculus is an act of will that is unconditional, absolute.

A paradox emerges. Bentham's aversion to the possibility of unconditional or unsurpassable motivations leads him to describe torture as the imposition of an 'irresistable Necessity' upon its sufferers. Torture is 'determinate neither in intensity nor duration': it is capable of indefinite multiplication. It appears to be a kind of causation that is different in nature to that by which action is determined in all other cases: there is no choice between or calculation of prospective pleasures and pains if torture is precisely the disabling of such calculation by necessity. It is as if torture proves that there are no absolutes in Bentham's psychology only by becoming itself an absolute. Bentham seems to adopt implicitly something like Beccaria's description of what it is like to undergo intense bodily pain:

> Every act of the will is invariably in proportion to the force of the impression on our senses. The impression of pain, then, may increase to such a degree, that occupying the mind entirely, it will compell the sufferer to use the shortest method of freeing himself from torment. His answer, therefore, will be an effect, as necessary as that of fire or boiling water. (Beccaria, pp. 62-63)

For Beccaria, when self-interest becomes altogether overpowering in this way it has the effect of destroying the self. Bentham too is drawn to the belief that physical pain is uniquely capable of 'occupying the mind entirely', and thereby capable of overruling the hedonistic choice procedures by which the mind operates under all other circumstances, and imposing as a necessity a single predetermined outcome.

Bentham's position remains a nuanced one, however. Torture is different from the prospective absolutes among extra-regarding motivations in that it is quantitatively rather

than qualitatively exceptional. In certain cases 'the utmost continuance that can be given to it should be limited by law', and this would seem to produce a type of torture that can be outfaced (UC 46/66). Torture is not inherently irresistible, even though it is capable of becoming so if it is allowed to continue unchecked. Moreover, we have seen that Bentham insists torture should never be superfluous: unlike punishment, 'there need never be a grain more applied than what is necessary' (UC 46/64). Given that the amount required can be measured so precisely, torture must in some sense be commensurable with the motives that stand against it. The maximum quantity that may legitimately be imposed is just sufficient to demonstrate the finitude of all other motivations; torture outweighs other prompts to action by an indefinitely small amount.

Nevertheless, a number that is only just greater than any finite number is still infinite. When the topos of 'irresistable Necessity' comes to light and torture imposes upon a criminal 'the compleatest of all excuses' for betraying his accomplices — which is to say that it destroys his will and renders him incapable of exercising any kind of choice — the torture writings introduce into Bentham's thought a remarkable phenomenon with which it does not seem possible for him to dispense. There seems to be no way to resolve the inconsistency between passages like this on the one hand, and on the other hand his claims that torture (because it 'stimulates' the motivations that it seeks to override) is less effectual than coercive imprisonment, and his rationalist assertion that the torture victim 'may take his choice and submit to the evil of the torture if that appears to him the less, and so exempt himself from the greater' (UC 46/58). As it is presented in the late 1770s, torture is simultaneously absolute and non-absolute in Bentham's psychology, and this contradiction is the visible trace of a fundamental property of his thought. The torture writings imply that the very principle of commensurability among motivations as such may contain a contradiction in terms.

It is worth emphasizing that the analysis pursued here cannot be applicable to utilitarian justifications of torture in general, given how distinctive Bentham is in the way in which he predicates his normative hedonism upon hedonistic psychology. Indeed, the equivocation visible in the early torture essays cannot be seen in the 'Means of extraction' of 1804, because there torture is legitimized by a state of emergency that justifies simply trying whatever works. The 'most promptly as well as certainly efficient' compulsive force is needed, regardless of whether that efficiency is absolute or only relative. The 1804 text achieves coherence by narrowing and abstracting its object of enquiry, by

disembedding torture from the wider theory of punishment. 'Means of extraction' is essential to documenting the prehistory of the torture debate that has raged both inside and outside the academy for the past decade, but it is still more important as a part of the material that elucidates the changes in Bentham's thinking on torture from the 1770s onwards. Tracing the course of those changes reveals how the ticking bomb case emerged from within a very broad set of philosophical concerns. Recognizing how the early torture writings illuminate Bentham's utilitarian system might now help us to identify the ethical frameworks within which the ticking bomb scenario can best be situated and understood.

---

[1] The context of that debate is set out in *The Torture Papers: The Road to Abu Ghraib*, ed. by Karen J. Greenberg and Joshua L. Dratel (Cambridge: Cambridge University Press, 2005). The main lines of the debate itself can be traced in *The Torture Debate in America*, ed. by Karen J. Greenberg (Cambridge: Cambridge University Press, 2006); and *Torture: A Collection*, ed. by Sanford Levinson, rev. edn (Oxford: Oxford University Press, 2006).

[2] Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), pp. 131–63. See also Oren Gross, 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience', *Minnesota Law Review*, 88 (2003–04), 1481–1555 (pp. 1497–98); Vittorio Buffacchi and Jean Maria Arrigo, 'Torture, Terrorism and the State: A Refutation of the Ticking Bomb Argument', *Journal of Applied Philosophy*, 23 (2006), 355–73 (pp. 357–59); John Alan Cohan, 'Torture and the Necessity Doctrine', *Valparaiso University Law Review*, 41 (2006–07), 1587–1632 (pp. 1590–91); Bob Brecher, *Torture and the Ticking Bomb* (Oxford: Blackwell, 2007); Claudia Card, 'Ticking Bombs and Interrogations', *Criminal Law and Philosophy*, 2 (2008), 1–15; Alex J. Bellamy, 'Torture, Terrorism, and the Moral Prohibition on Killing Non-Combatants', in *Terrorism and Torture: An Interdisciplinary Perspective*, ed. by Werner G. K. Stritzke and others (Cambridge: Cambridge University Press, 2009), pp. 18–43 (pp. 20–21); Jeremy Waldron, *Torture, Terror, and Trade-offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010); and Fritz Allhoff, *Terrorism, Ticking Time-Bombs, and Torture* (Chicago: University of Chicago Press, 2012). See also Rod Morgan, 'The Utilitarian Justification of Torture: Denial, Desert, and Disinformation', *Punishment and Society*, 2 (2000), 181–96.

[3] Brecher, pp. 14–39; David Luban, 'Unthinking the Ticking Bomb', in *Global Basic Rights*, ed. by Charles R. Beitz and Robert E. Goodin (Oxford: Oxford University Press, 2009), pp. 181–206.

[4] See Jean Bethke Elshtain, 'Reflection on the Problem of "Dirty Hands"', in *Torture*, ed. by Levinson, pp. 77–89.

[5] David Luban, 'Liberalism, Torture, and the Ticking Bomb', *Virginia Law Review*, 91 (2005), 1425–61.

[6] See especially Dershowitz; Gross; Stephen Kershnar, 'For Interrogational Torture', *International Journal of Applied Philosophy*, 19 (2005), 223–41; Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006); Cohan; Allhoff.

[7] Philip Schofield, *Bentham: A Guide for the Perplexed* (London: Continuum, 2009), p. 148.

[8] W. L. and P. E. Twining, 'Bentham on Torture', *Northern Ireland Legal Quarterly*, 24 (1973), 305–56 (repr. in *Jeremy Bentham: Critical Assessments*, ed. by Bikhu Parekh, 4 vols (London: Routledge, 1993), II, 512–65).

[9] 'Of Compulsive operations, and herein of Torture', University College London Library, Bentham Papers (hereafter UC), box 46, sheets 56b–62; 'Of Torture', UC 46/63–70.

[10] 'Of Torture' [1804], UC 74b/405–06; 'Means of extraction for extraordinary occasions', UC 74b/428–33.

[11] UC 46/63. The statutory abolition of torture in Austria had taken place in 1776. See Edward Peters, *Torture*, expanded edn (Philadelphia: University of Pennsylvania Press, 1996), pp. 59, 90–91; John H. Langbein, *Torture and the Law of Proof* (Chicago: University of Chicago Press, 2006).

[12] This paragraph was published in Twining and Twining, pp. 563–64n.

[13] UC 74b/428–30. Irregularities of spelling and punctuation have not been regularized in quotations from Bentham's manuscripts, but I have silently accepted manuscript deletions and interlineal insertions except in one striking case below.

[14] Compare Posner, pp. 6–12, 53–75.

[15] 'Means of extraction' is not original in this case: it follows the first 'Of Torture' (UC 46/67). As we will see, however, this possibility was ruled out explicitly in the earliest text, 'Of Compulsive operations'.

[16] Martial law would remain in force in Ireland until 1806. The bulk of the post-war atrocities were in fact the work of loyalist counter-revolutionaries. See Daniel J. Gahan, 'The "Black Mob" and the "Babes in the Wood": Wexford in the Wake of Rebellion, 1798–1806', *Journal of the Wexford Historical Society*, 13 (1990–91), 92–110; James G. Patterson, 'White Terror: Counter-Revolutionary Violence in South Leinster, 1798–1801', *Eighteenth-Century Ireland*, 15 (2000), 38–53; Thomas Bartlett, 'Clemency and Compensation: The Treatment of Defeated Rebels and Suffering Loyalists after the 1798 Rebellion', in *Revolution, Counter-Revolution and Union: Ireland in the 1790s*, ed. by Jim Smyth (Cambridge: Cambridge University Press, 2000), pp. 99–127.

[17] Jeremy Bentham, *The Rationale of Punishment,* ed. by Richard Smith (London: Heward, 1830), p. 78.

[18] UC 46/63. See also *The Works of Jeremy Bentham*, ed. by John Bowring, 11 vols (Edinburgh: Tait, 1838–43), I, 393–94, and compare the most carefully defended of recent definitions: '*Torture is the systematic and deliberate infliction of severe pain or suffering on a person over whom the actor has physical control, in order to induce a behavioral response from that person.*' See Paul D. Kenny, 'The Meaning of Torture', *Polity*, 42 (2010), 131–55 (p. 154), emphasis in original.

[19] As David Luban puts it, only in the case of interrogational torture is it 'possible to think of torture as a last resort of men and women who are profoundly reluctant to torture' ('Liberalism', p. 1436). See, however, Jeff McMahan, 'Torture in Principle and in Practice', *Public Affairs Quarterly*, 22 (2008), 111–28, in which

torture is justifiable partly because the ticking bomb terrorist makes himself 'liable to be tortured' — although he cannot *deserve* to be tortured (p. 117).

[20] UC 143/14; *Rationale of Punishment*, p. 79.

[21] Henry Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb', *Case Western Reserve Journal of International Law*, 37 (2006), 231–39.

[22] *Works of Jeremy Bentham*, ed. by Bowring, VII, 582.

[23] See *An Introduction to the Principles of Morals and Legislation*, ed. by J. H. Burns and H. L. A. Hart, The Collected Works of Jeremy Bentham (London: Athlone, 1970; repr. Oxford: Clarendon Press, 2005), p. 168; UC 159/127; and Langbein, pp. 16–17.

[24] Peters, pp. 90–91.

[25] *Works of Jeremy Bentham*, ed. by Bowring, VII, 522.

[26] [Cesare Beccaria], *An Essay on Crimes and Punishments* (London: Almon, 1767), p. 68.

[27] From a modern perspective Bentham's analysis of the relationship between torture and honour is distinguished by its failure to admit the possibility that torture may by its nature dishonour its victims: that it may degrade and dehumanize them.

[28] *Works of Jeremy Bentham*, ed. by Bowring, III, 286; H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), pp. 40–52; Anthony J. Draper, 'Cesare Beccaria's Influence on English Discussions of Punishment, 1764–1789', *History of European Ideas*, 26 (2000), 177–99.

[29] D. B. Young, 'Cesare Beccaria: Utilitarian or Retributivist?', *Journal of Criminal Justice*, 11 (1983), 317–26; Tony Draper, 'An Introduction to Jeremy Bentham's Theory of Punishment', *Journal of Bentham Studies*, 5 (2002) <http://ojs.lib.ucl.ac.uk/index.php/jbs/article/view/24> [accessed 31 October 2012].

[30] Bentham, *Principles of Morals*, ed. by Burns and Hart, pp. 11–41; Ross Harrison, *Bentham* (London: Routledge and Kegan Paul, 1983); Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press, 2006), pp. 1–50.

[31] Quoted in A. Goldworth, 'Jeremy Bentham: On the Measurement of Subjective States', in *Jeremy Bentham: Critical Assessments*, ed. by Parekh, II, 240–54 (pp. 242–44).

[32] See also Bikhu Parekh, 'Bentham's Theory of Equality', in *Jeremy Bentham: Critical Assessments*, ed. by Parekh, III, 645–63; and contrast Tom Warke, 'Multi-Dimensional Utility and the Index Number Problem: Jeremy Bentham, J. S. Mill, and Qualitative Hedonism', *Utilitas*, 12 (2000), 176–203.

[33] T. L. S. Sprigge, 'The Relation Between Jeremy Bentham's Psychological, and his Ethical, Hedonism', *Utilitas*, 11 (1999), 296–319.

[34] *A Table of the Springs of Action*, in *Deontology, together with A Table of the Springs of Action and the Article on Utilitarianism*, ed. by Amnon Goldworth, The Collected Works of Jeremy Bentham (Oxford: Clarendon Press, 1983), pp. 1–115 (pp. 99–100).

[35] *Rationale of Punishment*, p. 409. See Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (London: Penguin, 1989), pp. 66–67, on how Lockean empiricism enabled

penological reformers like Bentham 'to ascribe criminality to incorrect socialization rather than to innate propensities'.

[36] The example of torture is often used to make an argument against utilitarianism as a whole, the thesis being that utilitarians cannot adequately account for the feelings that we ought to have when compelled to perform instinctively abhorrent acts for the sake of some greater good (or — less convincingly — that they are too willing to endorse such acts). Classic examples are H. J. McCloskey, 'An Examination of Restricted Utilitarianism', in *Contemporary Utilitarianism*, ed. by Michael D. Bayles (New York: Doubleday, 1968), pp. 117–41; and J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), pp. 96–117. Its significance here is obviously different.

[37] Jeremy Bentham, *Pauper Management Improved*, in *Writings on the Poor Laws, Volume II*, ed. by Michael Quinn, The Collected Works of Jeremy Bentham (Oxford: Clarendon Press, 2010), pp. 129–30.

[38] *Works of Jeremy Bentham*, ed. by Bowring, IV, 154.