

# An Introduction to the Principles of Morals and Legislation

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[Brackets] enclose editorial explanations. Small ·dots· enclose material that has been added, but can be read as though it were part of the original text. Occasional •bullets, and also indenting of passages that are not quotations, are meant as aids to grasping the structure of a sentence or a thought. Every four-point ellipsis . . . . indicates the omission of a brief passage that seems to present more difficulty than it is worth. Longer omissions are reported between brackets in normal-sized type.—The numbering of paragraphs in small bold type is Bentham's.—The First Edition of this work was *privately printed* in 1780 and first *published* in 1789. The present version is based on 'A New Edition, corrected by the Author' [but not changed much], published in 1823.

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## Glossary

**affection:** In the early modern period, ‘affection’ could mean ‘fondness’, as it does today; but it was also often used, as it is in this work, to cover every sort of pro or con attitude—desires, approvals, likings, disapprovals, dislikings, etc.

**art:** In Bentham’s time an ‘art’ was any human activity that requires skill and involves techniques or rules of procedure. ‘Arts’ in this sense include medicine, farming, painting, and law-making.

**body of the work:** This phrase, as it occurs on pages 95, 119 and 138, reflects the fact that Bentham had planned the present work as a mere introduction to something much bigger, the body of the work. See the note on page 4.

**cæteris paribus:** Latin = other things being equal.

**caprice:** whim; think of it in terms of the cognate adjective, ‘capricious’.

**difference:** A technical term relating to definitions. To define (the name of) a kind K of thing ‘by genus and difference’ is to identify some larger sort G that includes K and add D the ‘difference’ that marks off K within G. Famously, a K *human being* is an G *animal* that is D *rational*. The Latin *differentia* was often used instead.

**education:** In early modern times this word had a somewhat broader meaning than it does today. It wouldn’t have been misleading to replace it by ‘upbringing’ on almost every occasion. See especially **18** on page 39.

**event:** In *some* of its uses in this work, as often in early modern times, ‘event’ means ‘outcome’, ‘result’. Shakespeare: ‘I’ll after him and see the event of this.’

**evil:** This noun means merely ‘something bad’. Don’t load it with all the force it has in English when used as an adjective (‘the problem of evil’ merely means ‘the problem posed by the existence of bad states of affairs’). Bentham’s half-dozen uses of ‘evil’ as an adjective are replaced in this version by his more usual ‘bad’, as he clearly isn’t making any distinction.

**excite:** This means ‘arouse’ or ‘cause’; our present notion of *excitement* doesn’t come into it. An ‘exciting cause’ in Bentham’s usage is just a cause; he puts in the adjective, presumably, to mark it off from ‘final cause’, which meant ‘purpose’ or ‘intention’ or the like, though in fact he uses ‘final cause’ only once in this work.

**expensive:** When Bentham speaks of a punishment as being ‘too expensive’ he means that it inflicts too much suffering for the amount of good it does. See the editorial note on page 92.

**fiduciary:** Having to do with a trust.

**ideal:** Existing only as an idea, i.e. fictional, unreal, or the like.

**indifferent:** Neither good nor bad.

**interesting:** When Bentham calls a mental event or ‘perception’ *interesting* he means that it hooks into the *interests* of the person who has it: for him it isn’t neutral, is in some way positive or negative, draws him in or pushes him back.

**irritable:** Highly responsive, physically or mentally, to stimuli.

**lot:** In Bentham’s usage, a ‘lot’ of pleasure, of pain, of punishment etc. is an episode or dose of pleasure, pain, etc. There is no suggestion of *a large amount*.

**lucre:** In a now obsolete sense, ‘greed for profit or gain’ (OED).

**magistrate:** In this work, as in general in early modern times, a ‘magistrate’ is anyone with an official role in government. The phrase ‘the magistrate’—e.g. in paragraph 41. on page 40—refers to the whole legal=judicial system or to those who operate it.

**material:** When on page 43 Bentham speaks of ‘consequences that are material’ he means consequences that *matter*. He uses the phrase ‘material or important’.

**member:** Any part or organ of an organic body (not necessarily a limb). When on page 7 Bentham writes of a community as a ‘fictitious body composed of the individuals who are. . . as it were its members’, this is a metaphor.

**method:** On pages 2 and 4, and throughout chapter 16, Bentham uses ‘method’ in the sense of ‘system of classification’.

**mischief:** This meant ‘harm, hurt, damage’—stronger and darker than the word’s meaning today. Bentham’s ‘mischievous’ and ‘mischievousness’ are replaced throughout by ‘harmful’ and ‘harmfulness’, words that don’t occur in the original

**moral:** In early modern times ‘moral’ had a use in which it meant something like ‘having to do with intentional human action’. When Bentham speaks of ‘moral science’ or ‘moral physiology’ he is referring to psychology. In virtually all his other uses of ‘moral’ he means by it roughly what we mean today.

**nicety:** ‘precision, accuracy, minuteness’ (OED), sometimes with a suggestion of *overdone* precision etc.

**obnoxious:** ‘obnoxious to x’ means ‘vulnerable to x’.

**party:** Bentham regularly uses ‘the party’ to mean ‘the individual or group of individuals’. In assessing some action by a government, the ‘party’ whose interests are at stake could be you, or the entire community.

**peculiar:** This usually meant ‘pertaining exclusively to one individual’; but Bentham often uses it to mean ‘pertaining exclusively to one *kind* of individual’. The line he draws on page 108 between •properties of offences that are shared with other things and •properties that ‘are peculiar’, he is distinguishing (e.g.) •being-performed-by-a-human-being from (e.g.) •being-against-the-law’.

**positive pain:** Bentham evidently counts as ‘positive’ any pain that isn’t a ‘pain of privation’, on which see 17. on page 26.

**science:** In early modern times this word applied to any body of knowledge or theory that is (perhaps) axiomatised and (certainly) conceptually highly organised.

**sensibility:** Capacity for feeling, proneness to have feelings. (It’s in the latter sense that *quantity* comes in on page 29—the notion of *how* prone a person is to feel pleasure or pain.

**sentiment:** This can mean ‘feeling’ or ‘belief’, and Bentham uses it in both senses. The word is always left untouched; it’s for you to decide what each instance of it means.

**uneasiness:** An *extremely* general term. It stands for any unpleasant sense you may have that something in you or about you is wrong, unacceptable, in need of fixing. This usage is prominent in—popularized by?—Locke’s theory that every intentional act is the agent’s attempt to relieve his ‘uneasiness’.

**vulgar:** Applied to people who have no social rank, are not much educated, and (the suggestion often is) not very intelligent.

## Chapter 16: Classifying Offences

[This chapter reflects Bentham's concern with punishment, but is also driven by an interest in classification ('method') as such. It makes for wearisome reading—in full it would occupy 65 pages of the present text—and this version reduces it to about half that length, not using ellipses to indicate all the cuts. In a footnote that was attached to 16, Bentham charmingly admits that it ought to have been even more burdensome:

In this part of the analysis I have deviated somewhat from the rigid rules of the exhaustive method I set out with. . . . The benefit of sticking by them seemed so precarious that I couldn't help doubting whether it would pay for the delay and trouble. Such a method is indeed eminently instructive, but the fatigue of following it out is so great—to the author and probably also to the reader—that it might do more disservice in the way of disgust than service in the way of information. However good for us knowledge (like medicine) is, it's useless if it is made too unpalatable to be swallowed. . . .

The present version takes up the spirit of these remarks, using them as an excuse for severely reducing Bentham's prolixity. This won't be done at the expense of his prized 'method', though the preparer of this version doesn't agree with Bentham's statement, in that same footnote, that 'if there's anything new and original in this work, I owe it to the exhaustive method that I have so often aimed at'.]

### 1. Five Classes of Offences

·START OF FOOTNOTE·

This chapter tries to put our ideas of offences into an exact method. There are various •particular uses of method, but just one •general one, namely to enable men to understand—i.e. to be acquainted with the properties of—the things that are the subjects of it. Some of these properties are shared with other things; the rest are peculiar [see Glossary]. But the qualities that are peculiar to any one sort of thing are few in comparison with those it shares with other ·sorts of· things. Being told what its difference [see Glossary] is would not tell one much; it needs to be explained also by its genus. . . . When a number of objects. . . . are to be considered together as all having a certain agreement denoted by a certain name, the only way to give a perfect knowledge of their nature is by sorting them into a system of parcels, each of which is a part of the whole and perhaps a part of a part of the whole. And the only way to do this is by dividing groups into precisely *two* sub-groups, which are then divided into sub-sub-groups. and so on downwards. . . . To divide the whole group into (for example) *three* sub-groups would not serve the purpose, because all the mind can compare together exactly at the same time are *two* objects. So I shall try to deal in this way with

offences;

or rather, strictly speaking, with

acts having properties that seem to show that they ought to be counted as offences.

The task is difficult; we aren't yet able to do it properly, and perhaps we never will be. [Bentham stresses the language

problem: general terms in common use don't accurately map kinds of objects, so they aren't good devices for reporting one's findings. But rectifying their meanings brings a •risk of not being understood, and inventing new general terms brings a •certainty of not being understood. He continues:] Complete success then is not yet attainable. But even an imperfect attempt may have its use, if only to accelerate the arrival of the perfect system that some maturer age will have the happiness to possess. Gross ignorance sees no difficulties; imperfect knowledge finds them and struggles with them: it must be perfect knowledge that overcomes them.

•END OF FOOTNOTE•

1. Let us first distinguish •acts that are or may be offences from •acts that ought to be offences. Any act may be an offence if those whom the community are in the habit of obeying are pleased to prohibit or to punish it. On the principle of utility, an act *ought to* be made an offence only if the good of the community requires this.
2. The good of the community can't require that an act be made an offence unless it is likely to be in some way detrimental to the community. . . . [The word 'detrimental' occurs on this page and the next, and nowhere else in the work.]
3. If any group of individuals is considered as constituting an imaginary compound body, a community or political state, then any act that is detrimental to any one or more of those members is to that extent detrimental to the state.
4. An act can't be detrimental to a state except by being detri-

mental to one or more of the individuals composing it. These individuals may either be identifiable<sup>1</sup> or unidentifiable.

5. When an offence is detrimental to an identifiable individual, the latter may be either •someone other than the offender or •the offender himself.

6. Offences that are detrimental in the first instance to identifiable persons other than the offender may be called **offences against individuals**—they constitute the first class of offences. . . . [Classified in **11** below.]

7. When it appears that there are persons to whom an act may be detrimental but they can't be individually identified, the circle within which it appears that they may be found is either •smaller than the whole community or •not smaller than the whole community. If it is smaller, then the persons within it may be regarded as composing a body of themselves, a part of the greater body of the whole community. What the members of this lesser body have in common may be either •their residence within a particular place or •some other less openly straightforward principle of union marking them off from the rest; so the offence that harms them may be called an offence against •a neighbourhood or against •a particular class of persons in the community. These **offences against a class or neighbourhood** or **semi-public offences** jointly constitute the second class of offences.<sup>2</sup> . . . . [Classified in **12–14** below.]

8. **Offences that are detrimental to the offender** himself and not directly to anyone else compose a third class, the offences in which might be called 'intransitive' (see **13** on page 45) or (better) 'self-regarding'. [Further discussed in **15** below.]

<sup>1</sup> That is, either by name or at least by an individuating description, e.g. 'the oldest occupant of 12 Brattle Road' or 'the captain of the HMS Victory'.

<sup>2</sup> [In a footnote Bentham remarks that his class can shade into offences against identifiable persons (when the class or neighbourhood is very small) or into offences against the community (when the class or neighbourhood is very big). Such shadings, he says, are common features of just about all classifications.]

9. The fourth class is composed of acts that ought to be made offences because of the distant mischief they threaten to bring on an unidentifiable indefinite multitude within the community, with no particular individual appearing more likely than any other to be a victim. These may be called **public offences** or **offences against the state**. [Classified in 16–19 below.]

10. A fifth class is composed of acts which can—depending on their circumstances or on the agent’s purposes—be detrimental in any of the ways in which one man’s act can be detrimental to another. These may to be called heterogeneous or **multiform offences**. These can be divided into two great sub-groups: •offences by falsehood and •offences against trust.<sup>1</sup> [Classified in 20–30 below.]

## 2. Divisions and sub-divisions of them

11. Let us see how these classes may be further subdivided, starting with **offences against individuals**.

A man’s pleasures and his immunity from pains all depend on his own person and on the exterior objects—things or persons—that surround him. So if an offence harms a man it must be either •absolutely, i.e. immediately in his own person or else •relatively, because of some material relation he has to something or someone else. . . .<sup>2</sup> Now, insofar as a man can derive either happiness or security from any *thing*,

that thing is said to be his property (or at least he is said to have an interest in it); so that an offence that tends to lessen his chances of getting happiness or security from it may be called an offence against his •property. As for other persons: suppose you are well placed to get services from some other person x because of some special connection that you have with him (•e.g. you are paying his wages-), that situation can be regarded as a kind of fictitious or incorporeal item of property that is called your •condition. So an offence that tends to lessen your chance of getting happiness from x’s services may be called an offence against your condition in life. Obviously conditions in life are as various as the relations that constitute them—e.g. those of husband, wife, parent, child, master, servant, citizen of Rome, natural-born subject of England.

Where your chance of services from x depends not on any special connection between you but just on his being well-disposed towards you, we express this fact by crediting you with having a fictitious object of property called your •reputation. So an offence that lessens your chance of getting happiness or security from the services of persons who are related to you only as x is may be called an offence against your reputation. It appears, therefore, that if an offence harms an individual, it must be in respect of his •person, his •property, his •condition in life, or his •reputation. [Bentham goes on to point out that a single act could be an

<sup>1</sup> [Bentham has here an enormous footnote in which he declares that ‘maturer views’ have shown him how he might get rid of ‘this anomalous excrescence’, the fifth class, which ‘appears all too plainly as a kind of botch’ in comparison with the other four classes. He sketches how this might be done, and seems to imply that he will stick with the fifth class because ordinary language demands it. ‘Such is the fate of science and more particularly of the moral branch’; classification ‘must be ruled by nomenclature, the work of popular caprice’. He consoles himself with the thought that all the material gathered into the fifth class can be variously slotted onto places in the other four.]

<sup>2</sup> [In another footnote, Bentham addresses those who are in difficulties here because of some kind of scruple about the word ‘relation’. He explains at length how it ‘may be got rid of—essentially be replacing the likes of ‘Person x has a material relation to object O’ by something like ‘Object O can cause pleasure (or pain) in x’.]



offence against someone's person *and* property, or against his person *and* reputation; he doesn't mention any other combinations. He adds a footnote, dated 1822, presenting two after-thoughts about this present classification. **(a)** It ought to have included offences against *power*, on a par with offences against *property*. **(b)** It would have been better to put 'condition in life' further down in the classification, treating it as 'a compound of property, reputation, power and right to services'.]

**12.** We come next to **semi-public offences**. These are ones whose victims are (at the time of speaking) not identifiable, which means that the offence's mischief still lies in the future. Our name for it is *danger*. When an act brings danger to a whole neighbourhood or other class of persons, either

- he didn't intend to do this, in which case the danger, when converted into actual mischief, is called a 'calamity'; or
- he did intend to create the danger, meaning this as harm that didn't require the occurrence of any calamity, his act may be said to come from mere 'delinquency';

so that's what offences of mere delinquency are: offences tending to produce danger that disturbs the security of some class of persons smaller than the whole community.

**13.** Offences through calamity can be classified according to the nature of the calamities that can befall a man, and the various things that are of use to him. These will be considered in another place [the long footnote to **33** below]. (Pestilence may serve as an example. Without intending to create such a calamity, a man may expose a neighbourhood to the danger of it by breaking quarantine. . . .)

**14.** Semi-public offences of mere delinquency can be further classified in a way that runs parallel to the classification of offences against individuals. . . .

**15.** We come next to **self-regarding offences**. . . . This class will not for the present give us much trouble, because it's obvious that a man can harm •himself in any way that he can be harmed by •someone else; so any basis for subdividing the latter class will also serve for subdividing the former. Two questions arise:

- (1)** What acts produce mischief of this sort?
- (2)** Among acts that *do*, which would it be worthwhile to treat as offences?

The answers to these—and especially to **(2)**—are too unsettled and too open to controversy for any classification to be based on them.

**16. Public offences** can be sorted into eleven sub-classes. There are offences against. . .

- . . . external security,
- . . . justice,
- . . . the preventive branch of the police,
- . . . the public force,
- . . . the positive increase of national happiness,
- . . . the public wealth,
- . . . population,
- . . . national wealth,
- . . . sovereignty,
- . . . religion,
- . . . the national interest in general.

How these sorts of offences connect with one another and with the interests of the public. . . . may be conceived as follows.

17. Mischief that affects the interests of the whole public must be produced either •by influence on the operations of government or •by other means.<sup>1</sup> [Bentham says that any harm that an individual can do, alone or with the help of people or things that are internal to his community—and without influencing the operations of government—is almost certain to be harm to identifiable individuals or sub-groups within the community, and thus won't count as harm to 'the public' in Bentham's present sense of that phrase. Any exceptions to this will be minor and fairly negligible. He continues:] The only non-negligible mischief that can be made to impend indiscriminately over all the members of the community is the complex kind that results from war, and is produced by external adversaries. Because they may have been provoked or invited or encouraged to invade a country by one of its own citizens, a man may bring down very heavy mischief on his whole community in general, without taking a part in any of the injuries that war brings to particular individuals.

Now for the mischief that an offence can bring on the public by its influence on the operations of the government. This may be done **(i)** by its immediate influence on those operations themselves, **(ii)** less immediately by influencing the instruments through which ·or through whom· those operations are performed, or **(iii)** in a still more remote way by influencing the sources from which such instruments

are derived. Let us start with **(i)** the operations of government. To the extent that they square with the principle of utility, their tendency ought always to be •to save the community from mischief or •to add to the sum of positive good.<sup>2</sup> Mischief must come either from external adversaries or internal adversaries or calamities. There's no need for further classification of mischief from external adversaries. As for mischief from internal adversaries: the procedures for averting this divide into

- those that can be followed before any particular harmful design has been discovered, this being the work of the police, and
- those that can be followed only in the light of the discovery of some such design, this being the province of justice.

·START OF FOOTNOTE·

The functions of justice and of the police often run into one another; and it would be a badly managed business if officers of the police didn't occasionally act as officers of justice. But the ideas of the two functions can be kept distinct, and I don't see where the line can be drawn other than where I have drawn it. [Bentham goes on to reflect on the word 'police' as being 'of Greek extraction but apparently of French growth'. He speaks of being forced by the lack of suitable words 'to reduce the two branches here specified into one';

<sup>1</sup> Note that I have introduced the idea of *government* without any preparation. That there are and have to be governments is obvious and incontestable. If you want to see reasons for the need for governments, read **17** on page 87 where they were presented for purposes of illustration.

<sup>2</sup> For examples, see the long note starting on page 133. This branch of the business of government. . . is of comparatively recent date in the calendar of political duty. It wasn't for *this* that the uneducated many could originally have submitted to the dominion of the few. What first cemented societies together was the dread of evil, not the hope of good; necessities always come before luxuries. The state of language marks the progress of ideas. •The military department has had a name time out of mind, and so has •the department of justice. The power whose role is to prevent mischief has only recently acquired a name, and a loose one at that—'the police'. No special name, however inadequate, seems yet to have been devised for the power whose role is to introduce positive good.

and it turns out that his topic is the dichotomy—which he seems to think (wrongly) he has already mentioned—between the crime-preventing and calamity-preventing branches of the police.]

·END OF FOOTNOTE·

The **(ii)** instruments that government has to work with, whether in averting evil or in producing positive good, must be either persons or things. Those whose special role is to guard against mischief from adversaries in general but especially from external adversaries can be marked off from the rest under the collective label ‘the public military force’ or ‘the military force’ for short.<sup>1</sup> The rest may be brought under the general label ‘the public wealth’. The **(iii)** sources or funds from which these instruments. . . .are derived divide into

**persons**, who are taken out the total population of the state,

so that the greater the population, the greater *cæteris paribus* may be this branch of the public wealth, and the less, the less; and

**things**, most of which are commonly taken out of the sum total of things that are the separate properties of the individual members of the community, the sum of

which properties may be called the **national wealth**, so that the greater the national wealth, the greater *cæteris paribus* may be this remaining branch of the public wealth, and the less, the less.<sup>2</sup> A further point: when an individual has a pernicious influence on the operations of the government, it must be by •impeding the operations of government or by misdirecting them; i.e. by •causing operations not to be performed that ought to be performed or by •causing operations to be performed that ought not to be performed. Final point: we use the word ‘government’ as a label for to the total assemblage of the persons who perform the various political operations I have mentioned. Usually some one of these or some sub-group of them have the role of assigning tasks to the others, determining how each should conduct himself in performing his duties, and sometimes even taking over from him.<sup>3</sup> Where there is any such person, or body of persons, he or it may be called ‘the sovereign’ or, where grammar demands it, ‘the sovereignty’.

·DEFINITIONS OF THE OFFENCES LISTED IN 16 ABOVE·

By offences against **external security** we may understand offences that tend to harm public through the hostilities of foreign adversaries. By offences against **justice** offences that tend to impede or misdirect the operations of the power

<sup>1</sup> Pernicious enterprises that come backed with more physical force than the officers of justice are likely to have at their command are most apt to originate from abroad. Mischief that is perpetrated by that much force may therefore be regarded in general as the work of external adversaries •even if in fact it is home-grown•. When the perpetrators are in such force as to defy the ordinary efforts of justice, they loosen themselves from their original nationality in proportion as they increase in force, till eventually they are regarded as being no longer members of the state but as tantamount to foreign enemies. Give enough force to robbery and it swells into rebellion; give enough permanence to rebellion and it settles into hostility [here = ‘war’].

<sup>2</sup> In common speech this distinction between •public wealth and •national wealth is not well settled; and that is not surprising because the two ideas are so often (but not always) interchangeable. But the language seems not to provide any two words that would express the distinction better. . . .

<sup>3</sup> I say ‘Usually’ this is the case; not ‘Always’. In the Netherlands, among the Swiss or even the Germans, where is that one assembly that has absolute power over the whole? Where was there in the commonwealth of ancient Rome? . . .

whose role is guard the public against the mischiefs resulting from the delinquency of internal adversaries, doing this in ways that don't come into play until after the discovery of some design of the sort they are supposed to prevent. By offences against **the preventive branch of the police**, offences that tend to impede or misdirect the operations of the power whose role is to guard against •mischiefs resulting from the delinquency of internal adversaries, by means that come into play beforehand; or against •mischiefs that might be caused by physical calamities. By offences against **the public force**, offences that tend to impede or misdirect the operations of the power whose role is to guard the public from mischiefs resulting from •the hostility of foreign adversaries and. . . .from •the delinquency of internal adversaries.

By offences against **the increase of national happiness** we may understand offences that tend to impede or misapply the operations of the powers that are employed in conducting various services that are meant to add to the stock of public happiness. By offences against **the public wealth**, offences that tend to lessen the amount—or misdirect the application—of the money and other articles of wealth that the government reserves for the purpose of supporting those services. By offences against **population**, offences that tend to lessen the sum total of the members of the community or numbers or impair their political value. By offences against **the national wealth**, offences that tend to lessen the quantity—or impair the value—of the things that compose the separate properties or estates of individual members of the community. Offences against **sovereignty** are offences that impede or misdirect the operations of the different departments of government.

18. I'll come to offences against religion shortly, ·but I need to give an explanation first·. For combating offences of the other kinds I have listed, the state has two great

engines—punishment and (much more rarely used) reward. But those to whom the management of these engines is entrusted can't always be sure •who should be punished or rewarded or •whether a man who deserves punishment will actually get it. This makes it seem useful. . . .to get the people to believe in the existence of a power applicable to the same purposes, and not liable to the same deficiencies; the power of a supreme invisible being who can be relied on to promote the ends of the government; and to keep up and strengthen this expectation among men, this power is spoken of as being the work of a kind of allegorical personage called 'religion'. So offences against **religion** are offences that tend to diminish or misapply the influence of religion, i.e. to diminish or misapply the state's effective power to combat any of the above-listed kinds of offences. [Bentham has a footnote here, saying •that he is talking about religion's influence on happiness in the present life, our beliefs about an after-life being no concern of the legislator; •that the topic is offences against (fictitious) religion, not offences against (real) God, because there's no way we can affect God; and •that he doesn't put offences against religion first (as is often done in a feeble attempt to show reverence) because the only way to understand the mischief that they tend to produce is *through* the mischiefs that result from the various other sorts of offences.]

19. Any act of which this is true:

It appears to be liable to affect the state in one or more of the above-listed ways, . . .but it's not clear in which of these ways it will affect the state or, if several, in which of them it will affect the state most,

can be called an offence against **the national interest in general**, that being the eleventh and last division of the class of offences against the state.

·END OF DEFINITIONS OF THE OFFENCES LISTED IN 16 ABOVE·

**20.** We now come to **multiform offences**, the fifth class. These, I repeat, are offences either •by falsehood or •concerning trust. Offences by falsehood include:

- simple falsehoods
- forgery
- impersonation
- perjury.<sup>1</sup>

Let us see what these four kinds of falsehood have in common and what differentiates them.

**21.** Offences by falsehood all consist in some abuse of the faculty of discourse (or rather—as we’ll see later—of the faculty of influencing the beliefs of other men, whether or not by discourse). The use of discourse is to influence belief, in such a way as to give other men to understand that things are as they are really. Falsehoods all give men to understand that things are otherwise than as in reality they are.

**22.** Impersonation, forgery, and perjury are each distinguished from other ways of uttering falsehood by certain special circumstances; and when a falsehood doesn’t have any of those circumstances it can be called ‘simple falsehood’. These circumstances are •the form in which the falsehood is uttered, •the circumstance of its relating or not to the identity of the person who utters it, and •the solemnity of the occasion on which it is uttered. . . .

**23.** We come now to the sub-divisions of offences by falsehood. These will bring me back into the regular track of analysis that I pursued without deviation through the four preceding classes. [That is the track that he admitted to leaving in the footnote to **20**.]

[If an offence by falsehood. Bentham says, harms identi-

fiable individuals or unidentifiable members of a sub-group of members of the state, the harm will be one or more of the four listed near the end of **11** above; if on the other hand it tends to the detriment of the whole state, it must belong in one of the pigeon-holes listed in **16** above, and he lists the first ten of them.]

**24.** [Bentham now devotes half a page to remarks about names that are commonly given to various sorts of offence by falsehood, emphasising that there are no firm rules at work in this nomenclature. Unadorned falsehood isn’t an offence at all. As for falsehood-in-circumstances, he concludes:] there is hardly any sort of pernicious effect that it can’t be instrumental in producing. So listing falsehoods under separate names as distinct offences is something we do in compliance with the laws of language rather than in consideration of the nature of the things themselves. . . .

**25.** We come now to offences against trust. A trust is •a state of affairs• where

one party is bound to perform some particular act for the benefit of another, in the exercise of some power or some right that is conferred on him.

•START OF FOOTNOTE•

[A vast footnote tackles powers and rights. They often go together, Bentham says, but not always:] You may have a right to the services of the magistrate: but as a private person you have no power over him; all the power is on his side. [It would take too long to deal thoroughly with ‘power’ and ‘right’, he says, but he presents ‘a general idea’ of how he understands those two words and ‘possession’ and ‘title’ and ‘the •names of• the whole tribe of fictitious entities

<sup>1</sup> [Bentham has a longish footnote admitting that this four-part list is opportunistic and ‘not regularly drawn out’, i.e. not based on basic principles about how classification should be done. He explains that there are ‘infinitely’ many kinds of falsehood, and it just happens that some of them have ‘engaged a peculiar share of attention on the part of the institutors of language’.]

of this sort'. He says that each of these fictitious entities is an upshot of 'the legislator's will regarding a given act', and •goes into the different ways in which a 'will' can be expressed—positive and negative commands, and so on. Out of all this he gets a conclusion about rights (powers drop out):] For every right that the law confers on one party it thereby imposes a duty or obligation on some other party; but the law can impose duties that have no corresponding rights, namely an agent's duties towards himself.

[The footnote mentions *property*, a concept that appears in 'the system of rights and powers'. A complete classification of forms of *property* would be needed, Bentham says, in a treatise on 'the civil branch of the art of legislation', but not in the present work regarding 'the penal branch'. He'll discuss the line between the two in chapter 17. Then:]

I might have cut this short by following the beaten track of definition, saying in the usual way that 'a power is a faculty which. . . ' and 'a right is a privilege which. . . ', and so on. But this kind of classification is inane, as I have already pointed out in another work. Powers and rights are not *things* that belong to some higher genus: they are •fictitious entities whose import can be brought out only showing how they relate to •real ones. The same holds for duty, obligation, and many others of the same sort.

•END OF FOOTNOTE•

Or more fully:

A party x is said to be invested with a trust when, being invested with a power or a right, there is a certain behaviour which, in the exercise of that power or that right, he is bound to maintain for the benefit

of some other party y.

In such a case, x is called a 'trustee'; no name has yet been found for y, but I shall fill the gap by giving a new and more extensive sense to the word 'beneficiary'.

The trustee is also said to have a trust 'conferred' or 'imposed' on him, to be 'invested' with a trust, to have had a trust given him to 'execute', to 'perform', to 'discharge', or to 'fulfil'. The beneficiary is said to have a trust 'established or created in his favour', and so on through a variety of other phrases.

**26.** Here are three things that are sometimes said:

- (a) A trust is a species of condition;<sup>1</sup>
- (b) A trust is a species of property;
- (c) A condition is a species of property.

[Bentham now devotes *four pages*—all within **26**—to explaining why he doesn't allow any of (a)–(c) to make a difference to his classification of offences. We can safely excuse ourselves from nearly all of this; but two things he says about *property* should be reported. This is one:]

•To speak of one human creature as being the property of another would shock the ear everywhere but where slavery is established. . . . Among the first Romans, the wife was the property of her husband, the child of his father, the servant of his master. In the civilised nations of modern times, the two first kinds of property are altogether at an end; and we must hope that the third is also moving towards extinction. The husband's property is now the company of his wife, the father's the guardianship and service of his child, the master's the service of his servant.

<sup>1</sup> Strictly speaking that is not worded correctly. The fictitious entities labelled by the two abstract terms 'trust' and 'condition' can't be related as genus and species. To speak with perfect precision, we should say that *he who is invested with a trust is on that account spoken of as being invested with a condition*, namely the condition of a trustee, this being analogous to the condition of a husband or a father.

[The other point about *property* implicitly criticises the last sentence of the passage just quoted. Bentham objects to counting among someone's 'property' such items as his *condition of being a trustee*, his *reputation*, his *liberty*; these are 'ideal beings', 'fictitious entities', sometimes called (by their friends) 'incorporeal beings'. Strictly speaking, he says, only physical things should count as property. He winds up:] These difficulties being cleared up, I now proceed to exhibit an analytical view of the various possible offences against trust.

27. [In the original, 27 is also more than four pages long. One sentence into it, Bentham has a footnote confessing that he will sometimes speak of a trust as something that a person might possess, as though the trust were one thing and the person another. He pleads necessity: 'Striving to cut a new road through the wilds of jurisprudence, I find myself continually distressed for lack of tools that are fit to work with. . . . All I can do is to make new ones in cases of absolute necessity, and for the rest to patch up the imperfections of the old.'] Offences against trust can first be divided into two:

- (i) offences regarding who has the trust; and (ii) offences regarding how the trust is exercised.

I shall discuss these in order.

(i) [Bentham says that any *offence* of this kind must bring harm to someone, and it must be the trustee or the beneficiary. He starts with the trustee, taking first the case where •being 'invested with' the trust (as Bentham puts it) is a benefit to the trustee because of the powers or rights that go with the trust, and •the trust ought by law to subsist, i.e. legislator meant that it should be established'. We are then presented with a number of scenarios reached by successive yes/no carving up of states of affairs; but all Bentham does with each of these is to say what the best label is for the offence in that case. Start from the present moment, and

let T be the trustee in question and O the offender. If T hasn't yet been invested with the trust, then O's offence will consist either in •blocking T's getting it or •not doing his job in enabling T to get it. If T has already been invested with the trust, O's offence will consist in wrongly divesting T of it. Each of these cases splits into three sub-cases, depending on whether O •leaves the trust empty or •gives it to someone other than T or •takes it himself. Bentham provides a label for the offence for each of these sub-cases.

He then turns to the case where the trust 'is not one that ought to exist'. In that case, he says, putting someone *into* it must be an offence, its label depending on whether O puts himself or someone else into it. Whether it is an offence to deprive a man of a trust that ought not to exist—that, Bentham says, depends on how you go about it.

[Bentham now turns to the case where the trust is a burden for the trustee because of the duties it involves. If it's a burden to the trustee and does no good for anyone else, then it ought not to exist, and there's no offence in depriving someone of it. If it is entitled to exist because its burden to the trustee is outweighed by its good to the beneficiary, then the various offences regarding who is invested with the trust are exactly parallel to those treated two paragraphs back. Finally:]

Lastly, with regard to harm that may come to the beneficiary, we find on examination that every sort of offence that wrongs the trustee can also wrong the beneficiary. The wrongs are very different in the two cases, but the same general labels will be applicable in both. If the beneficiary is liable sustain a harm resulting from the quality of the trustee, this must result either from the trust's •being held by someone who ought not to have it or •not being held by someone who ought to have it; and it makes no difference whether for the trustee the trust is a benefit or a burden. . . .

(ii) So much for offences that concern who has a trust; I now come to offences regarding how a trust is exercised. If you are in possession of a trust, the time for your acting in it must be either past or future (set the present moment aside, for simplicity's sake). If it is **past** and your exercise of it squared with the purposes for which the trust was instituted; in that case there has been no offence and thus nothing for me to talk about here; so let's consider the case where your past execution of the trust has not been in accordance with its purposes. [Bentham now rattles through some species of this state of affairs: the failure was yours alone or partly due to someone else; it consisted in wrongly doing something or in wrongly not doing something; the harm was suffered •by the trust's intended beneficiary or •by someone else. Bentham provides a label for each of these, and a longish footnote defending •the last of those distinctions. He continues:] If the time for your acting in the trust lies in the **future**, any act that tends to put your conduct at odds with the purposes of the trust must either •cause it to infringe the trust actually and in its outcome or •produce a chance of its doing so. In the former of these cases, the offence must fall into one of the categories I have listed with past offences. In the latter case, the blame must lie either with yourself alone or with some other person or with both together, as before. If another person is involved, the acts by which he tends to make you act contrary to the trust must act either on yourself or on other objects at large. If they exercised on yourself, they must operate immediately either •on your body or •on your mind. In the latter case, they must tend to deprive you the knowledge or the power or the inclination (see the long note starting on page 133) needed for you to act in accordance with the trust's purposes. If their target is your inclination to fulfill the trust, it must be by applying to your will the force of some seducing motive

(See chapter 11 § 29). Lastly, this motive must be either

- coercive, a threat of mischief, or
- alluring, an offer of advantage.

An offence in this last category is called *bribery*. None of those cases gets a label of its own except for the last, *bribery*. [And that, Bentham explains, doesn't really need a name of its own. For *any* offence O there is also a possible 'accessory offence' (see footnote to 31 below) that consists in inducing-x-to-commit-O; there are too many to be separately named; but inducing-x-to-abuse-a-trust has attracted enough attention to get a name of its own. [Bentham doesn't comment on how greatly this narrows the ordinary-language range of 'bribe(ry)'.] He concludes:] So we have thirteen sub-divisions of offences against trust:

- (1) Wrongful non-investment of trust.
- (2) Wrongful interception of trust.
- (3) Wrongful divestment of trust.
- (4) Usurpation of trust.
- (5) Wrongful investment or attribution of trust.
- (6) Wrongful abdication of trust.
- (7) Wrongful detraction of trust.
- (8) Wrongful imposition of trust.
- (9) Negative breach of trust.
- (10) Positive breach of trust.
- (11) Abuse of trust.
- (12) Disturbance of trust.
- (13) Bribery.

[The list is given here in case you are interested. It didn't seem worthwhile to add to the clutter of 27 by giving each of them when it first shows up. Item (7) is taken by Bentham from Latin; he means by it 'wrongful failure to take on the role of trustee'.]

28. That list covers all the ways in which a beneficiary can receive identifiable specific harm through the conduct of the trustee; but there's a kind of act by which a trustee can



be put in some danger of receiving harm, even if we can't identify the nature of the harm or the occasion where he is in danger of receiving it. I'm talking about acts—of any kind—that increase the trustee's disposition to accept and act upon a bribe. It seems that the only acts of this sort that can be described in a way that fits them in all places and at all times are *acts through which the trustee lives beyond his means*. . . . Considered as offences, then, they should be put into the class of self-regarding offences (see **32** on page 28).

[That ellipsis replaces the following sentence, here quoted verbatim: 'But in acts of this nature the prejudice to the beneficiary is contingent only and unliquidated; while the prejudice to the trustee himself is certain and liquidated.']

**29.** The subdivisions of offences against trust are perfectly analogous to those of offences by falsehood: the trust may be private, semi-public, or public; it may concern property, person, reputation, or condition; or any two or more of those at once. . . . And, as before, some of these special cases have their own names and some don't.

**30.** You may want to ask 'What is the relation between •falsehoods and •offences concerning trust?' The answer is that they are altogether disparate: neither is a special case of the other. But they do have a certain formal similarity. Falsehood can enter as a circumstance into the composition of any sort of offence, including ones concerning trust; and breach and abuse of trust are circumstances that can that can enter as accidental concomitants into the composition of any other offences, those involving falsehood included.

### 3. Further subdivision of Class 1: Offences Against Individuals

**31.** Returning now to the first class [last discussed in **11** above], let us take various subclasses of it that I have exhibited and split them into their respective genera, i.e. into even smaller classes that can be given labels most of which are already current among the people.<sup>1</sup> In this place the classificatory process must stop. To apply it in the same regular form to any of the other classes seems scarcely practicable:

- to semi-public and public offences [classes 2 and 4] because of the interference of local circumstances;
- to self-regarding offences [class 3] because that would require premature decisions on points that may appear open to controversy;
- to offences by falsehood and offences against trust [class 5] because this class depends so much on the three former.

What remains to be done in this way regarding these four classes will require discussion, so it will be better dealt with in the body of the work [see Glossary] than in a preliminary part that is only engaged in drawing outlines.

**32.** An act that disturbs the happiness of some individual has effects that are either

- simple, i.e. affecting him in only one of the respects: person, reputation, property, condition; or
- complex, i.e. affecting him in two or more of those respects at once.

I shall of course start with those that are simple in their effects.

<sup>1</sup> Through all this I shall omit offences of an accessory nature, except for the occasional one that has obtained a current name and seems too much in vogue to be omitted. An accessory offence is an act which •isn't the immediate cause of the mischief but •is causally connected to it.

**33.** . . . .A man's **person** is composed of two different parts, or reputed parts, his body and his mind. Acts that exert a pernicious influence on his person, whether on the corporeal or on the mental part of it, will operate on it either •immediately and without affecting his will, or •mediately through the intervention of his will, i.e. by means of the influence that they cause his will to exercise over his body. If with the intervention of his will, it must be by mental coercion, i.e. causing him •to will to act—and thus •to act—in a way that it is disagreeable or otherwise pernicious to him to act. The enforced way of acting may be positive or negative. [Bentham subdivides further, in terms of whether what is caused is •pain of body 'or only •pain of mind'; and whether the coercive act causes the disagreeable conduct D •directly or •by putting the victim in a place where he can't get out of performing D. The positive/negative distinction runs through all this, and Bentham says something interesting about it:] If he is prevented from being in one place, he is thereby confined to another. The earth's surface can be conceived to be divided into two parts; if the part he is confined to is smaller than the part he is excluded from, his condition may be called 'confinement'; if larger, 'banishment'. [He then bustles on through some more dichotomies: The harm done to a man by an act—whether or not through his will—will be either •mortal or •not mortal. If not mortal, it will be either •reparable (temporary) or irreparable (permanent). And any pain the victim suffers will be either •actual suffering or •a pain of apprehension. If a pain of apprehension, either the offender himself is represented as intending to bear a part in the production of it, or he is not. In all this, Bentham sprinkles the labels as he goes, but we can settle for his

final list of them:] And thus we have nine genera or kinds of personal injuries:

- (1) Simple corporal injuries.
- (2) Irreparable corporal injuries.
- (3) Simple injurious restraintment.
- (4) Simple injurious compulsion.<sup>1</sup>
- (5) Wrongful confinement.
- (6) Wrongful banishment.
- (7) Wrongful homicide.
- (8) Wrongful menacement.
- (9) Simple mental injuries.

·START OF LONG FOOTNOTE·

I explained in **31** why I am not going through •semi-public or •self-regarding offences here; but you might like to see some sort of list of them. . . . Such lists are seen to best advantage under the headings of the various genera of •private •extra-regarding offences to which the •semi-public and •self-regarding offences respectively correspond. In all this my topic is the kinds of harm that acts can cause; I'm not considering which of these *should* be punished. . . .

**A. Semi-public offences through calamity.** Calamities by which men's persons or properties can be affected are these: •Pestilence or contagion. •Famine and other kinds of scarcity. •Mischiefs caused by infants, idiots, or maniacs who haven't been properly taken care of. •Harm done by noxious animals, such as beasts of prey, locusts, etc. •The fall of large masses of solid matter, such as decayed buildings, or rocks, or masses of snow. •Inundation or submersion. •Tempest. •Blight. •Fire. •Explosion. A man may be guilty of an offence if any imprudent act of his causes any of those calamities, or if he could and should but doesn't act so as to prevent them.

<sup>1</sup> Injurious restraintment at large, and injurious compulsion at large, are here styled simple, in order to distinguish them from confinement, banishment, robbery, and extortion, which are often merely special cases of (1) or (2). . . .

**B. Semi-public offences of mere delinquency.** A whole neighbourhood may be made to suffer. . .

- . . . simple corporal injuries,

i.e. to suffer in health by offensive or dangerous trades or manufactures, by selling or falsely praising unwholesome medicines or provisions, by poisoning or drying up springs, destroying aqueducts, destroying woods, walls, or other defences against wind and rain, by any kind of artificial scarcity, or by any other calamities intentionally produced.

- . . . simple injurious restraint and simple injurious compulsion,

e.g. using threatening hand-bills or threatening discourses, publicly delivered, to oblige a whole neighbourhood to join (or not to join) in illuminations, acclamations, outcries, invectives, subscriptions, undertakings, processions, or any other mode of expressing joy or grief, displeasure or approbation. . . .

- . . . confinement and banishment,

by spoiling roads, bridges, ferry-boats, by destroying or unwarrantably pre-occupying public carriages or houses of accommodation.

- . . . menacement,

e.g. by incendiary letters and tumultuous assemblies, by newspapers or hand-bills threatening vengeance against particular groups of persons, such as Jews, Catholics, Protestants, Scotchmen, Gascons, Catalonians, etc.

- . . . simple mental injuries,

such as distressful, terrifying, obscene, or irreligious exhibitions, exposure of sores by beggars, exposure of dead bodies, exhibitions or reports of counterfeit witchcrafts or apparitions, exhibition of obscene or blasphemous prints, obscene or blasphemous discourses held in public, spreading false news of public defeats in battle, or of other misfortunes.

**C. Self-regarding offences against person.** •Fasting. •Abstinence from sexual activity, self-flagellation, self-mutilation, and other self-denying and self-tormenting practices. •Gluttony, drunkenness, excessive sexual activity, and other species of intemperance. •Suicide.

·END OF LONG FOOTNOTE·

**34.** We come now to offences against **reputation** merely. •If someone gets others to think that you have been guilty of acts of the sort that cause a man to lose the good will of the community, this is *defamation*. •If someone shows his own lack of good will towards you, even if he does this unjustly and in an unlawful way that may in a manner force others to withdraw from you a part of their good will; that's just the constitution of human nature, and the force of prejudice. When he does this by words, or by actions whose only effect is one that words could have produced, the offence may be called *vilification*. . . . So we have two genera or kinds of offences against reputation, namely defamation and vilification. (Offences of vilification that go beyond the uttering of words or their equivalent are *compound* offences against person and reputation together.)

**35.** Of all the ways in which one man's **property** can suffer through the delinquency of someone else, we can set aside the special case in which this involves a breach of trust on the offender's part; and turn to all the others. Offences against property can be divided into those that concern •the legal possession of it, or right to it, and those that concern only •the enjoyment of it, i.e. the exercise of that right. The former of these includes wrongful non-investment, wrongful interception, wrongful divestment, usurpation, and wrongful attribution; and in each case if falsehood was at work the offence also counts as fraudulent. . . . [A short but complex and difficult passage about 'wrongful interception' can safely

be by-passed, except for an interesting footnote that it leads to, and that Bentham has already mentioned on page 3.]<sup>1</sup>

Now for offences against property that concern only the enjoyment of the object in question. This object must be either •a *service*. . . .that some person should have rendered, or •a *thing* of some kind. In the former case the offence may be called ‘wrongful withholding of services’, of which breach of contract is just one species. . . . The latter case, where

an act by someone else O leads to your losing most or all of your enjoyment or occupation of some physical thing x, *not* by affecting your own intrinsic physical condition,

divides into

- (i) the case where O does this by changing x’s intrinsic condition and
- (ii) the case where he does it by changing x’s exterior situation with respect to you, i.e. by putting x out of your reach.

In (i) he either destroys x or damages it. Moreover, if an act of O’s is seen as lessening x’s value to you, even if there has been no perceptible damage, his act is commonly regarded as an offence that may be called ‘wrongful using’ or ‘wrongful occupation’. In (ii) the offence can be called ‘wrongful detain-

ment’, and special cases of it have other names, depending on •whether the detainment is permanent or temporary and on •whether, if it is permanent, it is maintained in defiance of the law. If it is, it seems to fit the idea commonly annexed to the word ‘embezzlement’.<sup>2</sup> [Bentham now devotes more than a page to ‘wrongful occupation’. It has to do with whether the offender had help, and if he did how he got it, e.g. whether by threats, fraud, etc. Also, if by threats, whether they were positive or negative. And whether a breach of trust was involved, and if so how. In all this, he has been assigning labels along the way, and then he winds up with a list of them:] After these exceptions—[namely of offences that are better housed elsewhere in Bentham’s classification]—we have thirteen genera or principal kinds of offences against property:

- (1) Wrongful non-investment of property.
- (2) Wrongful interception of property.
- (3) Wrongful divestment of property.
- (4) Usurpation of property.
- (5) Wrongful investment of property.
- (6) Wrongful withholding of services.
- (7) Wrongful destruction or damaging.
- (8) Wrongful occupation.
- (9) Wrongful detainment.

<sup>1</sup> . . . .You might think that when a man owes you a sum of money, the right to the money is yours already, and that what he is withholding from you is not •the legal title to it, possession of it, or power over it, but only •the physical possession of it or power over it. But a more accurate examination shows that this is not so. What is meant by ‘payment’ is always. . . .an expression of an act of the will, and not a physical act. . . . A man who owes you ten pounds takes up a handful of silver to that amount and puts it on the table in front of you. If then by words or in some other way he conveys that he wants you to take up the money and do what you like with it, he is said to have *paid* you; but if he lays the money down intending to count and examine it and then take it up again, he has not *paid* you; yet what is physically done with the money is the same in both cases. Until he expresses a will to that effect, what you have is not the legal possession of the money or a right to the money, but only a right to have him. . . .compelled to do something that will count as his paying you. . . . [Then a paragraph on possible legal complications, followed by:] This matter would have appeared in a clearer light if it had been practicable for me to go into a full examination of the nature of property;. . . .but everything cannot be done at once.

<sup>2</sup> In trying to show the meaning of this and other common names of offences I am speaking with the utmost diffidence. In fact the meaning given to them is commonly neither determinate nor uniform, so that no definition by a private person can be perfectly exact. Fixing their sense is the role of the legislator.

(10) Embezzlement.

(11) Theft.

(12) Fraud.

(13) Extortion.<sup>1</sup>

I now turn to offences that are complex in their effects. Regularly, indeed, I should come here to offences against a man's **condition**; but I can do that better if I first deal with offences by which a man's interest is affected in two of the preceding ways at once. [The discussion of offences against a man's condition will occupy **38–55**.]

**36.** First, then, with regard to offences that affect *person and reputation* together. When a man affects someone else's person in a way that injures the victim's reputation, he is aiming at either •his own immediate pleasure or •the sort of reflected pleasure that can be gained from the suffering of another. The only significant immediate pleasure that can play this role is the pleasure of the sexual appetite. If this pleasure is gained, it must be gained

- against the consent of the victim (rape), or
- with the victim's consent, obtained freely and fairly (·no offence·), or
- ... obtained freely but not fairly (seduction), or
- ... obtained not even freely (forcible seduction).

If the offence has gone the length of consummation, it takes one or other of the names just given; if it hasn't gone that far, then in any of the above cases it can be labelled as 'simple lascivious injury' [approximately = 'sexual harassment']. Lastly, if

a man injures you in your reputation by actions that affect your person, doing this to get pleasure from contemplating your pain, either

- he actually harms your body ('corporal insult') or
- he doesn't get further than threats ('insulting menacement').

So we have six kinds of offences against person and reputation together:

- (1) Corporal insults.
- (2) Insulting menacement.
- (3) Seduction.
- (4) Rape.
- (5) Forcible seduction.
- (6) Simple lascivious injuries.<sup>2</sup>

**37.** Secondly, with respect to offences that affect *person and property* together. I have already said that a man's title to property may be unlawfully taken away or acquired through force against his person; so we have 'through-force' special cases of items in the 13-item list in **35**. [Bentham mentions some of these, and reports on the lack of special names for most of them, except for the original names with 'Forcible' put in front. He also notes some differences in nomenclature depending on whether the property in question is 'moveable' or 'immoveable'. He ends up with this:] And thus we can distinguish ten kinds of offences against person and property together [each ellipsis... replaces 'Forcible']:

<sup>1</sup> **Semi-public offences** ·that are analogous to these·: (1) Wrongful divestment, interception, usurpation, etc. of valuables that are the property of a corporate body or are available for common use throughout •a neighbourhood (parish churches, altars, relics, and other articles appropriated to the purposes of religion) or throughout •the nation (mile-stones, market-houses, exchanges, public gardens, and cathedrals). (2) Starting up so-called 'bubbles' or fraudulent partnership or gaming adventures; spreading false news to raise or sink the value of stocks or any other kind of property. **Self-regarding offences** ·analogous to these·: Idleness, gaming, other kinds of wanton extravagance.

<sup>2</sup> There are no semi-public analogues of these. Self-regarding offences ·analogous to these·: •Sacrifice of virginity. •Indecencies not public.

- (1) . . . interception of property.
- (2) . . . divestment of property.
- (3) . . . usurpation.
- (4) . . . investment.
- (5) . . . destruction or endamagement.
- (6) . . . occupation of moveables.
- (7) . . . entry.
- (8) . . . detainment of moveables.
- (9) . . . detainment of immoveables.
- (10) Robbery.<sup>1</sup>

**38.** We come now to offences against a man's **condition**. [This runs to **55**; 25 pages in the original.] A man's condition or station in life is constituted by his legal relation to certain other persons, i.e. by duties which, by being imposed on one side, give birth to rights or powers on the other (see the note to **25** above). These relations can be almost infinitely diversified, but we can find ways to bring them under control. First, we can divide them into

- those that can display themselves within the circle of a private family, and
- those that require a larger space.

We can call these 'domestic' and 'civil' respectively. I shall start with domestic relations, and will stay with them until the end of **54**.

**39.** The legal relations by which domestic conditions are constituted can be divided into

- those that are superadded to purely natural relations and

- those that exist purely by institution [= 'purely by being invented'], without any such natural basis.

I count a relation as 'purely natural' if it holds between two persons because of their concern—or that of certain other persons—in the process needed for the continuance of our species. These relations can be divided into •contiguous and •uncontiguous, with the latter existing through the intervention of the former. Contiguous relations may be divided into •connubial and •post-connubial; I'm using these terms with reference to the mere physical union between the two parties, apart from the associated ceremonies and legal engagements. There are just two connubial relations: the one the male has to the female, and the one the female has to the male.<sup>2</sup> The post-connubial relations divide into •productive and •derivative, the productive ones being those that the male and female have towards their children. [Bentham gives names to these, in each direction; and then goes on to sketch the great array of uncontiguous natural relations, e.g. between a woman and her paternal grandmother's brother. He then brushes these aside:] The only natural relations we need to attend to here are those which, when sanctioned by law, create the conditions of •husband and wife, the two relations of •parenthood, and the corresponding relations of •filiality [= 'offspringhood'].

What then are the relations of a legal kind that can be superinduced on the above-mentioned natural relations? [Bentham's discussion of this is a bit puzzling in its details, but its upshot is clear: in what follows, he will take up legal relations in the order that makes for the clearest exposition,

<sup>1</sup> Semi-public analogues of these: •Arson. •Criminal inundation. There are no self-regarding analogues.

<sup>2</sup> People commonly talk as though there were just one relation between x and y; but in the present context we have to speak of x's relation to y and y's different relation to x. That is because the relations in many instances have separate names—e.g. 'guardianship' and 'wardship', 'paternity and filiality', and have very different effects on a person's condition.

and won't give primacy to the difference between those that are and those that aren't superinduced on purely natural relations.]

40. I turn now to the domestic relations that are purely products of legislation. The two kinds of domestic conditions, considered as the work of law, arise from these. When the law starts to operate in a matter in which it hasn't operated before, it can only be by imposing obligations. Now, a legal obligation can be enforced

- by giving the power of enforcing it to the party in whose favour it is imposed, or
- by reserving that power to certain third persons who are called 'ministers of justice'.

In the first case, the party favoured has not only a right against the obliged party but also a power over him; in the second case he has a right only. In the first case, the party favoured may be called a domestic superior of the obliged party, who may be called his domestic inferior. Now domestic conditions *could* have been looked on as constituted by rights alone, without powers on either side. But that doesn't seem expedient from the point of view of utility, and it's probably because men always saw this that no domestic conditions seem ever to have been constituted by such feeble bands ·as rights without powers·. . . .

·START OF FOOTNOTE·

Two persons can never live together for long without one of them choosing that some act be done which the other chooses should not be done. How is such a competition to be decided? Setting aside generosity and good-breeding, which are the tardy and uncertain fruits of long-established laws, the only certain means of deciding it is, obviously, physical power; and that is the means by which family (and other) competitions must have been decided long before there were

any legislators. This, then, being the order of things that the legislator finds established by nature, how can he do better than to acquiesce in it?. . . . As between parent and child, the need for the parent to have power over the child—a need for the child's preservation—supersedes all further reasoning. As between man and wife there is no such need. The only reason that applies to this case is the need to put an end to competition. The man wants the meat roasted, the woman wants it boiled: shall they both fast till the judge comes in to cook it for them?. . . . This provides a reason for giving a power to one or other of the parties, but it provides no reason for giving the power to the one rather than to the other. How then shall the legislator decide?. . . . Looking around him he finds that in almost every couple the male •is the stronger of the two and therefore •already has by purely physical means the power the legislator is thinking of bestowing on one of them by means of law. How then can he do so well as by placing the legal power in the hands that are vastly more likely to hold the physical power already? In this way, few transgressions and few calls for punishment: in the other way, perpetual transgressions and perpetual calls for punishment. . . . And in addition to these reasons there have also been motives: legislators seem all to have been of the male sex, down to the days of Catherine. (I'm speaking of those who make laws, not those who ·merely· touch them with a sceptre.)

·END OF FOOTNOTE·

. . . Thus, of the legal relationships that can be made to hold within a family, there remain only those in which the obligation is enforced by power. When any such power is conferred, the aim must be to produce a benefit for somebody; and the person for whose sake it is conferred must be •one of the two parties just mentioned or •a third party; and if it's one of these two, it must be either the superior or the inferior. If

it's the superior, he is commonly called a 'master' and the inferior is called his 'servant'; and the power may be called a beneficial one. If the power is established for the sake of the inferior, the superior is called a 'guardian' and the inferior his 'ward'; and the power, being thereby coupled with a trust, may be called a fiduciary [see Glossary] one. [Bentham next takes the case where the power is conferred not for the sake of either of 'the two parties just mentioned' but for the sake of a third party. This produces a machine-gun rattle of special cases and technical terms, with the upshot that the only offences that could come in here are ones we are about to meet in relation to master/servant.]

**41.** Offences to which the condition of a **master** is exposed divide into •those that concern the existence of the condition itself and •those that concern the performance of its functions. First then, with regard to offences that affect its existence. The condition of a master may be beneficial to the man who has it; so it is exposed to the offences of wrongful non-investment, interception, usurpation, investment, and divestment. What about wrongful abdication, detraction, and imposition? Those would require the condition of master to be a burden, which it can't be. The law may attach to it some obligation, e.g. to pay the servant, and that might become a burden; but then we are talking about a kind of complex object made up of •the beneficial condition of a master and •the burdensome obligation that is annexed to it.<sup>1</sup> [Bentham then allows that in certain marginal cases it could be said that the mastership was itself burdened, and that in those cases it is open to the offences **(6)–(8)** in the numbered list below.] As for the behaviour of those who do have the condition of mastership: because it is a

benefit, it is exposed to disturbance. This could be the offence of a stranger who takes the person of the servant in circumstances where if the servant were a *thing* we would call it 'theft'; as things are we can call it 'servant-stealing'. Where it is the offence of the servant himself, it is called 'breach of duty'; the most flagrant form of this is called 'elopement', meaning that the servant simply goes away. Also, because of the power that goes with it, mastership is open to abuse on the part of the master. . . . So there are thirteen sorts of offences to which the condition of a master is exposed:

- (1) Wrongful non-investment of mastership.
- (2) Wrongful interception of mastership.
- (3) Wrongful divestment of mastership.
- (4) Usurpation of mastership.
- (5) Wrongful investment of mastership.
- (6) Wrongful abdication of mastership.
- (7) Wrongful detraction of mastership.
- (8) Wrongful imposition of mastership.
- (9) Abuse of mastership.
- (10) Disturbance of mastership.
- (11) Breach of duty in servants.
- (12) Elopement of servants.
- (13) Servant-stealing.

**42.** The power by which the condition of a master is constituted may be either limited or unlimited. When it is altogether unlimited, the condition of the servant is called 'pure slavery'. But. . . 'slavery' is often used when the limits prescribed for the master's power are regarded as inconsiderable. Whenever any such limit is prescribed, the servant is said to 'possess' a kind of fictitious entity—an incorporeal object of possession—that is called a 'right' or

<sup>1</sup> In most civilised nations there is a sort of domestic condition, in which the superior is always called a 'master' while the inferior is best described as an 'apprentice'. Despite the label 'master', the relationship is in fact a mixed one, compounded of that of master and that of guardian.



'liberty' or 'privilege' or 'immunity' or 'exemption'. These limits and the corresponding 'liberties' create countless possible special cases of mastership (i.e. of servitude), and different ones of these are found in different countries which have correspondingly different views about what constitutes an abuse of mastership. If any place on the earth is so wretched as to contain pure and absolutely unlimited slavery, there will be no abuse of mastership *there*—by which I mean that no abuse of mastership will be treated there as an offence. Ought *any* forms of servitude to be established or maintained? and if so, what? The answer to this belongs to the civil branch of the art of legislation.

**43.** Next, with regard to the offences that may concern the condition of a **servant**. It might be thought that this condition couldn't have a spark of benefit—that it must be pure burden. But a burden can be a benefit in comparison to a greater burden. For someone who can't escape from pure slavery it may matter to him greatly who is to be his master, so that slavery under one master may be for him a beneficial state compared to slavery under another. So the condition of a servant is exposed to all the offences to which any beneficial condition is exposed just because it is a beneficial one.<sup>1</sup> [Bentham goes on to say that with enough limits on one side and liberties on the other, someone's servitude may be positively desirable—so much so that he may have chosen to enter into this condition. (Remember that limits/liberties can involve such things as wages and food and accommodation.) He continues:] It may help to clarify natures of the two conditions to show how the offences that affect the existence of one correspond to those that affect the existence of the other. Obviously, this correspondence must be very intimate; but it's *not* the case that each offence on one side coincides

with the offence with the same name on the other side; rather, an offence with name  $N_1$  on one side coincides with an offence with name  $N_2$  on the other; and we'll see that even this match-up is not constant, but varies according to circumstances. [Bentham's case-by-case demonstration of this is heavy going, and you can work it out for yourself. Here is just one example:] Wrongful •interception of the condition of a servant, if it's the offence of him who should have been master, coincides with wrongful •detractation of mastership; if it's the offence of a third person, and the mastership is beneficial, it involves wrongful •interception of mastership. [And so it goes, with the result that systematically replacing 'mastership' by 'servantship' turns the items **(1)–(8)** in the list in **41** into names of offences against the condition of servitude. Items **(9)–(13)** name offences against servantship just as they stand, as Bentham says:] As to •abuse of mastership, •disturbance of mastership, •breach of duty in servants, •elopement of servants, and •servant-stealing, these are offences that relate equally to both conditions without any change of name. . . .

**44.** Now I turn to the offences to which the condition of a **guardian** is exposed. A guardian is invested with power over someone else who lives in the same family and is called a 'ward', the power being meant to be exercised for the ward's benefit. Now, what are the cases in which it benefits one person to have power exercised over him by someone else living in the same family? If the parties are on a par in respect of understanding, it seems evident enough that no such cases can ever exist. For a person to produce happiness (or indeed to produce *anything*) he needs three things working together: knowledge, inclination, and physical power. Now, no-one else is as certain as you are to be always inclined to

<sup>1</sup> [A footnote here says a little about ways in which a slave might change from master x to master y, perhaps with illicit help from y.]

promote your happiness; and no-one else can have had as good opportunities as you have had to know what is most conducive to that purpose—who could know as well as you do what gives you pain or pleasure? As for power: clearly no superiority in this respect, on the part of a stranger, could make up for his relevant lack of knowledge and inclination. So if it is ever for one man's advantage to be under the power of another, it must be because the former has some palpable and very considerable intellectual deficiency, i.e. a deficiency in respect of knowledge or understanding. There are two cases where this is found: •infancy, where a man's intellect hasn't yet reached the state in which it can direct his own inclination in the pursuit of happiness; and •insanity, where for some reason his intellect has never arrived at that state or else has arrived at it and then fallen from it.

Then how is it to be ascertained whether a man's intellect is in that state? We don't have any intellect-measuring instrument like a thermometer; so obviously the line between •intelligence that *is* sufficient for self-government from •intelligence that *isn't* must be quite arbitrary. Where the insufficiency comes from lack of age, the desired quantity of intelligence doesn't come to everyone at the same age. So legislators have to cut the Gordian knot and fix on a particular age as the point—the first point—at which each person is to be regarded as having, as far as it depends on age, this sufficient quantity of intellect.<sup>1</sup> This draws a line that is the same for everyone, and we can be perfectly precise about *where* it is. With intellectual insufficiency due to insanity we don't have even this resource; so that here the

legislator's only resource is to appoint individuals to settle the question in every instance where it comes up, according to his or their particular choice. This choice must be pretty arbitrary, because it has to be based on the decider's own loose and indeterminate idea about what share of intelligence is sufficient for self-government.

**45.** Once the line has been drawn, it is expedient for someone who can't with safety to himself be left in his own power should be placed in the power of someone else. For how long should he remain so? For an infant: a considerable length of time. For an insane person: possibly for ever.

**46.** The next question is: what can the extent be of the guardian's power over the ward? Well, there are no limits to what it *can* be. . . . Start with the thought that it goes the whole way: the condition of the ward is exactly that of pure slavery. Now vary that by giving the guardian the obligation that turns his power into a trust; it is the obligation to act in the way that is most likely to bring to the ward the greatest quantity of happiness that his faculties and circumstances will allow (subject only to the guardian's being •permitted to care about his own happiness and •obliged to care about the happiness of other men). . . . In short, the business of the guardian is to govern the ward precisely as the ward ought to govern himself. . . . The details of how this is to be done don't belong here, because they couldn't be embodied in rules that it would be useful for the legislator to provide. Some general outlines might be drawn by his authority, and some in fact *are* in every civilised state. But such

<sup>1</sup> In certain nations, all women have been placed in a state of perpetual wardship, obviously based on the notion of a decided intellectual inferiority in the female sex, analogous to that which comes from infancy or insanity in the male. This is not the only instance in which tyranny has taken advantage of its own wrong, justifying the domination it exercises on the grounds of an incompetence which, as far as it has been real, has been produced by the abuse of the very power it is supposed to justify. Aristotle, enslaved by the prejudice of the times, divides mankind into two distinct species—freemen and slaves. Certain men were born to be slaves, and ought to be slaves. Why? Because they are so.

regulations are liable to vary greatly, •because of the infinite diversity of civil conditions that a man may be invested with in any given state, and •because of the diversity of local circumstances that can affect the nature of the conditions that are established in different states. . . . So there is no place here for a systematic classification of the possible offences against them.

**47.** We are now better prepared to look into the offences to which guardianship is exposed. Because guardianship is a private trust, it is exposed to all and only the offences by which a private trust is liable to be affected; but the special nature of this kind of trust allows some further detail of description. [In what follows, items will be numbered to match the list at the end of this paragraph.] **(9)** Breach of this species of trust may be called ‘mismanagement of guardianship’. **(10)** It must often happen the guardian’s duties require him to be at a certain particular place; when he isn’t there on the occasion in question, this is mismanagement that may be called ‘desertion of guardianship’. **(11)** The guardian’s duty with respect to the ward’s happiness require him to have a certain power over objects—things or persons—on the use of which that happiness depends. . . . If he fails in this, that offence can be called ‘dissipation in breach of trust’; and **(12)** if the failure brings profit to the trustee, it may be called ‘peculation’. **(13)** For x to exercise power over y, it is necessary that y should act in certain ways or allow x to act in certain ways towards him. Someone who interferes with this is guilty of disturbance of the guardianship, and if the offender is the ward himself this is **(14)** a breach of duty in his part, which he may bring about by **(15)** elopement.

There does not seem to be any offence concerning guardianship that corresponds to abuse of trust. . . . The reason is that guardianship, being a trust of a private nature, doesn’t confer on the trustee any

power over the persons or property of anyone but the beneficiary himself. If by accident it confers on the trustee a power over any persons whose services constitute a part of the property of the beneficiary, the trustee thereby becomes in certain respects the master of such servants.

**(17)** Bribery also is a sort of offence to which there is not commonly much temptation in guardianship situations. Still, it is a possible offence in such contexts, so it should be added to the list of offences to which the condition of a guardian is exposed. So we have seventeen of these offences. [The first eight are the same as the first eight in the list on page 118, with ‘trust’ replaced by ‘guardianship’. Here are the others]:

**(9)** Mismanagement of guardianship.

**(10)** Desertion of guardianship.

**(11)** Dissipation in prejudice of wardship.

**(12)** Peculation in prejudice of wardship.

**(13)** Disturbance of guardianship.

**(14)** Breach of duty to guardians.

**(15)** Elopement from guardians.

**(16)** Ward-stealing.

**(17)** Bribery in prejudice of wardship.

[The indented passage above occurs at the place where Bentham should be laying the ground for item **(16)**, but it seems not to do so. The term ‘ward-stealing’ occurs only twice in the whole work—in the above list and in the list at the end of the next paragraph (suppressed in the present version).]

**48.** Next, with regard to offences to which the condition of **wardship** is exposed. Those that affect the existence of the condition itself are as follows. . . . [The first eight are the same as the first eight in the list on page 118, with ‘trust’ replaced by ‘wardship’. Bentham’s brief accounts of them are not *very* interesting. They are followed by nine that are exactly the same as **(9)–(17)** in the list just above. All

Bentham says about them is that they are ‘offences relative to the consequences of the condition of wardship’, as distinct from offences that affect the existence of the condition itself.]

**49.** We come now to the offences to which the condition of a **parent** is exposed, starting with those that affect the very existence of the condition. The parent-child relation is twofold: there is the •natural relationship and the •legal one that is (as it were) superinduced on it. The natural one is constituted by a particular past event that is out of the law’s reach and can’t be the subject of an offence. . . . No offence of mine could possibly make you not be the father of your actual son or the son of your actual father. But an offence of mine might be able to manage matters so that your son doesn’t legally count as your son: as a witness I could cause the judges to •believe that he isn’t your son and to •decree accordingly; or as a judge I could make that decree myself. And the *legal* parent condition is obviously exposed to exactly the same offences as any other condition that can be either beneficial or burdensome. Next, with regard to the exercise of the functions of this condition: insofar as it is the work of law, the condition of a parent is a complex one, compounded of the conditions of a guardian and of a master. (I shall take it both the father and the mother are in this condition; it doesn’t matter here how they share out between them its benefits and obligations.) So the parent as guardian has a set of duties that involve also having certain powers; the child as a ward has rights corresponding to the parent’s duties, and duties corresponding to the parent’s powers. And the parent as master has a set of beneficiary powers that don’t have to be limited except by the parent’s duties as guardian; and the child as servant has, corresponding to

the parent’s beneficiary powers, a set of duties that don’t have to be limited except by the child’s rights as a ward. Thus the condition of a parent will be exposed to all the offences to which either that of a guardian or that of a master is exposed. . . . Taking them then all together, the •eighteen• offences to which the condition of a parent is exposed are these. [Then follows a list whose first eight items are the same as the first eight in the list on page 118, with ‘trust’ replaced by ‘parenthood’. Nine of the remaining ten are the same as those listed at the end of **47** above, with •‘guardianship’ expanded to ‘parental guardianship’, •‘wardship’ expanded to ‘filial wardship’, •some other tiny adjustments, and •the insertion of ‘**(13)** Abuse of parental powers.’ The first item in the list—‘Wrongful non-investment of parenthood’—has this footnote attached:] Can the condition of parenthood be one that a man needs to be invested with? Well, it is at least perfectly conceivable that some ceremony should be required for a given man to be regarded by the law as the father of a given child. And it actually happens: in Roman law, adopted by many modern nations, an illegitimate child is made legitimate by the subsequent marriage of his parents. So if a priest or other relevant official refuses to join a man and woman in matrimony, this may be a wrongful non-investment of parenthood and filiation, to the prejudice of any children who would have been legitimated.

**50.** Next, with regard to the offences to which the filial condition, **condition of a son or daughter**, is exposed.<sup>1</sup> The principles to be followed in investigating offences of this sort have already been sufficiently developed, so I need only to enumerate them without further discussion. [Bentham does offer some discussion, but it all follows smoothly from what

<sup>1</sup> No English word properly stands for the person who bears the relation opposed to that of parent. The word ‘child’ is ambiguous, and is used more often in the child/adult than in the child/parent contrast. . . .

he said earlier about the conditions of guardian and ward. And his resultant list of offences is a routine counterpart of the 18-member list of offences against parenthood. All this is prefaced by two comments:] •Differences between these offences and the previously listed ones all come from the fact that everyone must have had a father and a mother, whereas not everyone must have had a master, a servant, a guardian, or a ward. •If a person

from whom, if he were alive, the offence would take a benefit or impose a burden

dies, some of the mischief dies with him. But there still remains whatever mischief depends on the advantage or disadvantage that might accrue to persons related to the person who has died.

**51.** We are now well placed to examine the various offences to which the condition of a **husband** is exposed. Between a husband and a certain woman, his wife, there is a legal obligation for •the purpose of their living together and in particular •for the purpose of sexual intercourse to be carried on between them. This obligation will be considered in respect of

- what starts it,
- who has it,
- its nature, and
- how long it lasts.

There's no limit to the kinds of event that *could* serve to mark the start of the obligation; but the usual way—and utility says it should be the only way—is through a contract between the parties, a legally endorsed a set of signs expressing their mutual consent to take on them this condition. As for who is to have the obligations, if they are all on one side the condition indistinguishable from pure slavery: the wife the slave of the husband, or the husband the slave of the wife. The latter of these suppositions has perhaps never been

exemplified;. . . the former seems to have been exemplified all too often. . . . As for the nature of the obligations: any obligation on one side is matched by a right on the other; so if there are obligations on both sides then there must be rights on both sides also. But these rights can't all have powers associated with them, because these are two persons who live together, and I have shown in the long note on page 125) that •there have to be powers there and that •they must be all on one side. Which side? I have shown that on the principle of utility they ought to be lodged in the husband. And it is obvious that, according to the principle of utility, he ought in his exercise of the powers to consult the interests of both of them. . . . So the legal relation the husband bears to the wife will clearly be a complex one, compounded of that of master and that of guardian.

**52.** The offences to which the condition of a husband of will be exposed, therefore, will be the sum of the offences to which the conditions of master and of guardian are exposed; putting it in its general outlines on a par with the condition of a parent. But certain reciprocal services are the main subject of the matrimonial contract and constitute the essence of the two matrimonial relations; they are services that neither a master nor a guardian has usually been permitted—in the role of master or guardian—to receive, and that a parent has not been permitted to receive in any role. . . . The offences relative to the two matrimonial conditions—I mean the ones that concern these peculiar [see Glossary] services—have been given their own names. **Firstly:** [A marriage contract *could*, Bentham writes, include allowance for polygamy on the part of the husband or the wife, with or without specifications about how many spouses either could have. He continues:] Which of all these arrangements would be best from the point of view of utility? Answering that would take me too far afield, and anyway it belongs to the •civil rather than the •penal

branch of legislation. In Christian countries, a marriage contract is made to exclude any subsequent contract during the continuance of the former one; and the solemnisation of any such subsequent contract is accordingly treated as an offence, called ‘polygamy’. [Bentham distinguishes and labels various versions of this, depending on whether the husband’s second wife was already married, on whether she knew that he was already married, etc. He adds:] And the converse of all this holds with regard to polygamy on the part of the woman. **Secondly**: Another condition on which the law lends its sanction to the marriage contract is its including an undertaking not to render to, or accept from, any other person the services that form the characteristic object of marriage; giving or accepting any such services is treated as an offence, under the name of ‘adultery’, which also covers the offence of the stranger who is the necessary accomplice in the commission of that offence. **Thirdly**: Disturbing either of the parties to this engagement in the possession of these characteristic services may—as distinct from disturbing them in the enjoyment of the miscellaneous advantages of the marital condition—may be called ‘wrongful withholding of connubial services’. [In a puzzling clause, Bentham says that this may be the offence of ‘a third person’. He continues:] And thus we have 21 sorts of offences to which, as the law stands at present in Christian countries, the condition of a husband is exposed:

- (1) Wrongful non-investment of the condition of a husband.
- (2) Wrongful interception of the condition of a husband.
- (3) Wrongful divestment of the condition of a husband.

- (4) Usurpation of the condition of a husband.
- (5) Polygamy
- (6) Wrongful investment or attribution of the condition of a husband.
- (7) Wrongful abdication of the condition of a husband.
- (8) Wrongful detraction of the condition of a husband.
- (9) Wrongful imposition of the condition of a husband.
- (10) Mismanagement of marital guardianship.
- (11) Desertion of marital guardianship.
- (12) Dissipation in prejudice of marital wardship.
- (13) Peculation in prejudice of marital wardship.
- (14) Abuse of marital power.
- (15) Disturbance of marital guardianship.
- (16) Wrongful withholding of connubial services.
- (17) Adultery.
- (18) Breach of duty to husbands.
- (19) Elopement from husbands.
- (20) Wife-stealing.
- (21) Bribery in prejudice of marital guardianship.<sup>1</sup>

[The discussion leading up to that list has been abbreviated somewhat in this version, but not much. The jump from discussion to list is larger here than with any of the previous offence-against-condition items.]

**53.** With regard to the offences to which the condition of a **wife** is exposed: they are the same, *mutatis mutandis*, as the offences against the condition of a husband.

**54.** In my discussion of offences relative to the various sorts of domestic conditions, the natural relations I have attended to are the contiguous ones; so you’ll expect me to say something about the unctiguous ones. These, however, don’t have what it takes to constitute a *condition*; indeed, no

<sup>1</sup> Semi-public offences ‘against the marital condition’: •Falsehoods contesting, or offences against justice destroying, the validity of the marriages of people of certain descriptions—e.g. Jews, Quakers, Catholics, etc. Huguenots, etc. etc. •Self-regarding offence: Improvident marriage on the part of minors.

power seems ever to be annexed to any of them. If the law requires a grandfather to take on the guardianship of his orphan grandson, this gives him a power not as grandfather but as guardian. Power *could* be annexed to these relations, but no new sort of domestic condition would result from that. . . . However, non-contiguous relations, like contiguous ones, can bring either benefit or burden; so they are exposed to the same offences as the contiguous relations are—I mean offences having to do with whether x has relation R to y. These offences are not a new set; they are already included in the lists I have given, because the only way to affect an unctiguous relation is by affecting some contiguous relation. Furthermore, any offence affecting the existence of a contiguous relation will also affect the existence of countless unctiguous ones. If a false witness causes it to be believed that you are the son of a woman who isn't in fact your mother. What follows? An endless tribe of other false beliefs about sons and brothers-in-law etc., about who cohabited with whom, and so on. . . .

Any advantages and disadvantages that happen to be annexed to any of those unctiguous relationships. . . .are merely the result of •local and accidental institutions or of •some spontaneous bias that has been taken by the moral sanction. So there would be no point in trying to trace them out *a priori* by any exhaustive process; all I can do is to select some of the principal articles in each category by way of specimen. The advantages that a given relationship is apt to impart seem chiefly to fall into the following groups:

- Chance of succession to all or some of the property of the correlative person.
- Chance of pecuniary support from the correlative person, either by appointment of law or by spontaneous donation.

- Acquisition of legal rank and any privileges that are annexed to it by law—capacity of holding such-and-such beneficial offices, exemption from burdensome obligations such as paying taxes, from serving burdensome offices, etc.
- Acquisition of rank by courtesy, including the sort of reputation that usually goes with distinguished birth and family alliance.

The last of these—e.g. being the untitled brother of an Earl—can bring advantages in the chance of making an advantageous marriage and in a thousand other less obvious ways. The disadvantages that a given relation is liable to impart seem mainly to be these:

- Chance of being obliged by law or the moral sanction to give pecuniary support to the correlative party.
- Loss of legal rank, including the legal disabilities and burdensome obligations that the law is apt to annex, sometimes unjustly, to the lower ranks.
- Loss of rank by courtesy, including the loss of the advantages annexed by custom to such rank.
- Inability to marry the correlative person, where the supposed natural relation lies within the prohibited degrees.

•START OF VERY LONG FOOTNOTE• [ending on page 136]

Following the plan for •semi-public and •self-regarding offences [see the footnote starting on page 120], I now offer some account of the various genera of •public offences.

**A. Against the external security of the state.** •Treason in favour of foreign enemies. It may be positive or negative (e.g. not opposing the commission of positive). •Espionage in favour of foreign rivals who aren't yet enemies. •Injuries to foreigners at large (including piracy). •Injuries to privileged foreigners such as ambassadors.

**B. Against justice.** [This begins with a 12-item list like the various lists we have already met. Then:] Breach and abuse of judicial trust, if intentional, are always culpable. If they are unintentional, they are still culpable if the mistake came from heedlessness or rashness; otherwise blameless. . . .

If a man fails in fulfilling the duties of this trust, and thereby comes to break or to abuse it, he must be lacking in at least one of: knowledge, inclination, and power. If this lack is his fault, he is guilty of breach or abuse of trust; if it's the fault of other persons who should act with or under him, they are guilty of disturbance of trust.

The bad effects of any breach, abuse, or disturbance of judicial trust are mischiefs that it ought to be the purpose of judicial procedure •to remedy or avert or •to avoid producing. Of these, the **primary** ones are those that bring actual pain to identifiable persons and are therefore mischievous in themselves: •continuance of the individual offence itself, thus continuing and increasing the mischief of it; •continuance of all or part of the mischief of the individual offence; •total or partial lack of compensation for persons injured by the offence; •superfluous punishment of delinquents; •unjust punishment of accused persons; •unnecessary labour, expense, or other suffering or danger [Bentham's phrase] on the part of superior or subordinate judicial officers or others who are professionally involved in the judicial system or yet others who are employees of any of the above.

Then there are the **secondary** bad effects, which are mischievous because they tend to produce primary ones. In the purely civil branch of procedure, there are •errors of interpretation or adjudication. In the executive (including the penal) branch: •total or partial impunity of delinquents (favouring the occurrence of other similar offences); •application of punishment improper in kind though perhaps not in degree (lessening the beneficial efficacy of the quantity employed);

•uneconomical application of punishment. . . .; •unnecessary expense on the part of the state. Inconveniences of the **tertiary** order, i.e. ones that tend to produce ones of the secondary order, are •unnecessary delay; •unnecessary intricacy. [Then Bentham distinguishes the fourth and fifth orders of inconveniences, purely in terms of the number of inconvenience-links in the chain connecting them to the primary ones.]

**C. Against the preventive branch of the police.** [Bentham divides this into two, involving the prevention of offences and the prevention of calamities.]

**D. Against the public force.** •Offences against military trust, corresponding to those against judicial trust; military desertion is a breach of military trust, and favouring desertion is a disturbance of it. •Offences against the branch of the public trust that concerns the management of arsenals, fortifications, dockyards, ships of war, artillery, ammunition, military magazines, and so forth. [Bentham offers the label 'polemo-tamieutic' for this part of the public trust, and adds in a footnote:] I have brought into view a number of branches of public trust that don't yet have names. What would be best—to coin new names for them out of the Greek, or instead of a word to use a whole sentence? Those are the only alternatives for English, French, or any of the other southern languages. You decide.

**E. Against the positive increase of national happiness.** [Bentham lists seven public trusts to which he gives bizarre Greek-derived names. Their roles are: •promotion of knowledge, •education, •treatment of diseases, •care of the insane, •care for the poor, •reparation of losses, •presiding over pleasures. He continues:] Those are examples of the principal systems that might be established for the purpose of increasing the stock of national happiness. There could be many others, but this is not the place to try to list them all.



The offences to which they are exposed will all be offences against trust, and that settles the names they will have. All these trusts might be comprised under some such general name as that of 'agatho-poieutic' trust, from Greek meaning 'to do good to anyone'.

**F. Against the public wealth.** [Bentham lists various kinds of offences relating to taxes, fines, and other means the state has for getting money. And also;] Offences against the trust whose purpose is manage articles of the public wealth that are meant for the convenience of anyone and everyone, such as public roads and waters, public harbours, post-offices, and packet boats; market-places, and other public buildings; race-grounds, public walks, and so forth. These offences will be apt to coincide with offences in **E** or the last ones in **H**, depending on whether the benefit in question is considered •in itself or as •resulting from the application of some portion of the public wealth.

**G. Against population.** •Emigration. •Suicide.  
•Procurement of impotence or barrenness. •Abortion.  
•Unprolific sexual intercourse. •Celibacy.

**H. Against the national wealth.** •Idleness. •Breach of the regulations that are meant to steer industry in more profitable directions. •Offences against the trust whose role is to enrich the nation at large.

**I. Against the sovereignty.** [The preparer of this version was defeated by this item, and now offers it with almost no alterations.] Offences against sovereign trust: corresponding to those against judicial, preventive, military, and fiscal trusts. Offensive rebellion includes wrongful interception, wrongful divestment, usurpation, and wrongful investment, of sovereign trust, with the offences accessory thereto. Where the trust is in a single person, wrongful interception, wrongful divestment, usurpation, and wrongful investment cannot, any of them, be committed without rebellion: abdication

and detraction can never be deemed wrongful: breach and abuse of sovereign trust can scarce be punished: no more can bribe-taking: wrongful imposition of it is scarcely practicable. When the sovereignty is shared among a number, wrongful interception, wrongful divestment, usurpation, and wrongful investment, may be committed without rebellion: none of the offences against this trust are impracticable: nor is there any of them but might be punished. Defensive rebellion is disturbance of this trust. Political tumults, political defamation, and political vilification, are offences accessory to such disturbance.

Sovereign power (which, upon the principle of utility, can never be other than fiduciary) is exercised either by rule or without rule: in the latter case it may be called autocratic: in the former case it is divided into two branches, the legislative and the executive. In either case, where the designation of the person by whom the power is to be possessed, depends not solely upon mere physical events, such as that of natural succession but in any sort upon the will of another person, the latter possesses an investitive power, or right of investiture, with regard to the power in question: in like manner may any person also possess a divestitive power. The powers above enumerated, such as judicial power, military power, and so forth, may therefore be exercised by a man either •directly or •through the agency of someone else. . . . Of sovereign power, whether autocratic, legislative, or executive, the several public trusts above mentioned form so many subordinate branches. Any of these powers may be placed, either, 1. in an individual; or, 2. in a body politic: who may be either supreme or subordinate. Subordination on the part of a magistrate may be established, 1. By the person's being punishable: 2. By his being removable: 3. By the orders being reversible.

**J. Against religion.** •Offences tending to weaken the force of the religious sanction, including blasphemy and profaneness. •Offences tending to misapply the force of the religious sanction, including false prophecies etc., also heresy, when this is pernicious to the worldly interests of the community. •Offences against any religious trust that has been established.

**K. Against the national interest in general.** •Immoral publications. •Offences against the trust of an ambassador. •Offences against the trust of a privy-counsellor. •In pure or mixed monarchies, extravagance by courtiers who don't have any specific jobs. •Excessive gambling by those the same persons. •Taking presents from rival powers without permission.

•END OF LONG FOOTNOTE• [started on page 133]

55. I began my discussion of offences against domestic conditions in 39, and that has been my topic ever since, except for the long footnote just completed. I now turn to civil conditions. [Bentham devotes a page to talking about items that could come in here but that are already covered by what he has said about offences against trusts or against domestic conditions. All that are left to be considered separately, he writes, are:] conditions constituted by

- beneficial powers over things;
- beneficial rights to things (i.e. rights to powers over things) or by rights to those rights, etc.,
- rights to services, and
- duties corresponding to those respective rights.

I set aside the ones whose materials are the ingredients of the various forms of property, the various conditions of ownership. Most of the latter don't have specific names of their own, and aren't usually thought of as *conditions*; so that acts that could be considered as offences against them

are usually seen as offences against *property*.

[There is no clear line, Bentham says, between the facts that would lead to someone's being said to have a certain *civil condition* and those that would be described in terms of his *property*; and he adds:] This is probably true for all languages. . . . It is one reason why it is not practicable to try for a systematic and comprehensive list of civil conditions, leaving us with no option but to search the language for them and take them as they come. I shall illustrate this by analysing two or three of the principal sorts of *civil conditions*, comparing them with two or three articles of *property* that seem to be of nearly the same kind. My aim is to make clearer •the nature of these two kinds of ideal objects—*conditions* and *property*—and •how they come into existence.

Most of the civil conditions that aren't connected with trusts come under the headings of *rank* or *profession*. Among ranks (as well as professions) I'll choose examples that are most clearly free of any mixture of either fiduciary [see Glossary] or beneficial power. How is the rank of knight-hood constituted? By prohibiting all other persons from performing certain acts that are symbols of the order, while the knight and his companions are permitted to perform them—e.g. wearing a ribbon of a certain colour, calling himself by a certain title, using an armorial seal with a certain mark on it. By prohibiting everyone else from doing these things, the law gives them a set of negative duties; their fulfilling these duties brings the knight a benefit, namely an enhancement of his reputation; and in this way they are rendering him a service—because of its negative nature it may be called a 'service of forbearance'. To create this condition *of rank*, we see, two sorts of service are needed: the negative service rendered by the community at large, and the positive service rendered by the law.

The condition of a professional man stands on a narrower footing. (I'm using 'profession' in its broadest sense, including not only what are called the liberal professions but also those that are exercised by the various sorts of traders, artists, manufacturers, and other persons who make a profit by their labour. For a man to have this condition all that is needed is for the legislator to permit him to perform the acts that are the exercise of his profession: giving or selling legal or medical advice or help, giving or selling his services in executing or overseeing some kind of manufacture; selling a commodity of a certain sort. All that is needed here is a single kind of service—a negative one rendered by the law—namely allowing him to exercise his profession, which ordinarily means simply not prohibiting him.

When a rank or profession is conferred on a man, what he gets is not an article of property but a condition. And if the law deprives him of it, what he loses is not his property but his •rank or dignity or •his trade or profession—in both cases, his condition.

Other cases that are formally like those two are ordinarily counted as involving property. If the law permits a man to sell books of a certain kind and prohibits all other persons from doing so, that confers on him a sort of exclusive privilege or monopoly known as a copyright. This is described not as his acquiring any new sort of condition but as his acquiring an article of property, so-called 'incorporeal property' (probably because its chief value comes from its ability to generate *property* in the more ordinary meanings of that word, e.g. money). This isn't confined to books; a man could have a copyright relating to an engraving, a mechanical engine, a medicine, or any sort of saleable article.

[Bentham now has •a paragraph on the privileges/services/etc. involved in the condition of *natural-born subject* as distinct from *alien*; and •another making the point

that our language for the relations that go into the making of civil conditions is unlike our language for the relations that go into the making of domestic conditions. Specifically, we bracket 'master' with 'servant', 'husband' with wife', and so on; but we have nothing to bracket in the corresponding way with 'knight' or 'trader' or 'farmer' and so on.]

It is not hard now to see what offences the various sorts of civil conditions are exposed to, Each of these conditions is of a beneficial nature, and therefore exposed to all the offences to which the possession of a benefit is exposed. But it may happen also to be a burden—because •the man is obliged to persevere in it, or •other obligations are annexed to it, or •the moral sanction puts it into comparative disrepute—and in that case it is exposed to the offences to which everything burdensome is exposed. . . .

#### 4. Advantages of this method

56. It may be useful for me to say a little about the method of classification I have followed, and about its advantages. The whole system of offences starts with five classes. In the first three the subdivisions are based on differences in *how* the interests of an individual suffer from them. This uniformity seems to throw much light on the whole system, especially on the offences in the third class, which have never before been brought into any sort of order. With regard to subdivisions of the fourth class, it seemed best to start with offences whose connection •with the welfare of individuals seemed most obvious and immediate, then—one link further off in the chain of causes and effects—•with offences that tend to weaken the force that is provided to combat offences at the first level, and then •with offences that lessen the particular fund from which that force is to be extracted. The bad effects of those third-level offences, though indisputable, are still

more distant and out of sight; and that holds also for offences that harmfully affect the universal fund. Offences against the sovereignty in general are harmful only because offences of the sorts I have just mentioned are harmful. And offences against religion are harmful only because they remove or weaken or misapply one of the three great incentives to virtue and checks to vice, thereby opening the door to the various mischiefs that those other offences produce. (In saying this, I am thinking only about the effects of offences against religion in *this* world.) As for the fifth class, I have remarked that this has a *prima facie* irregularity that seems to be unavoidable; but this is corrected when the analysis returns, after a step or two, into the path from which it had been forced deviate by the tyranny of language.

The classification had two purposes:

- driven by nature: to present a fairly detailed list of the various possible kinds of delinquency, and
- driven by custom: to find places in that list for currently used names of offences.

If the nature of the offences had been the only guide, it would have been necessary to invent a new language that would have been uncouth and unintelligible; and there would have been no explanation for the currently used names of offences. Staying exclusively with the current language would have been as bad on the other side: the list of offences it would generate, when compared to the list of mischiefs that *can* be produced, would have been broken and incomplete .

To reconcile these two aims as far as possible I proceeded as follows. I bisected the sum total of possible offences in as many directions as were necessary, carrying the process (in each direction) down to level where the particular classes that I arrived at had names in current use. At that point I stopped, leaving any still smaller subgroups to be listed in the body of the work [see Glossary] as 'species of the genus

[name]', without being given names of their own. [When he seriously needed to, Bentham says, he invented a name for a kind of offence, usually a *phrase*, because English, unlike German and Greek, doesn't allow 'two or three words. . . .to be melted into one'.]

In selecting names in current use I avoided ones that are based on local distinctions. . . .and aren't applicable to the circumstances of other countries.

The analysis is as applicable to the legal concerns of one country as of another; I have always been careful to stop before getting down to a level where that would no longer be the case. That is why offences against individuals have been classified in a more fine-grained way than offences in any of the other classes. So one use that this classification might have if it is properly done is to indicate •what the legal interests of all countries agree in and •what they are liable to differ in; how far a rule that is proper for one country will or won't serve for another. . . .

**57.** A natural method [see Glossary] such as I have tried to exhibit seems to have four main advantages (along with other lesser ones). **In the first place**, it gives to the understanding and the memory help that they couldn't get from any technical arrangement [Bentham's phrase]. A classification in any science counts as *natural* if it is based on properties that men in general are accustomed to attend to because •of the common constitution of man's nature and not •of any impressions they happen to have picked up from local or other particular causes. . . . Now, how can an object engage a man's attention other than by interesting [see Glossary] him? and how can the object interest him more than by the influence it promises to have on his happiness and that of his immediate circle?. . . .

**58. In the next place**, along with a general idea of each class of offences that is marked off by one characteristic property, it provides for true general propositions to be formed concerning the particular offences within that class.<sup>1</sup>

**59. In the third place**, the classification is devised in such a way that the reason for putting offence O in place x in it is indicated by x itself; it not only says which acts *are* offences but also says why they *ought to be*. By this means. . . it •explains and in some measure •vindicates the punishment it is thought proper to assign for each obnoxious act. To people in general it is a kind of perpetual defence of the legal system, showing the need for every restriction of each individual's liberty for the security and prosperity of everyone else. To the legislator it is a kind of perpetual lesson, correcting his prejudices and checking his passions. If some mischief has escaped him, he cannot fail to find it in a classification that is natural and exhaustive. If he is ever tempted to force innocence into the domain of guilt, the difficulty of finding a place for it warns him of his error. Such are the uses of a map of universal delinquency based on the principle of utility. . . .

**60. In the fourth place**, a natural arrangement governed by a principle that is recognised by all men will serve for the jurisprudence of all nations. In a system of proposed law constructed along these lines the •language will serve as a glossary by which all systems of positive law could be explained, while the •matter serves as a standard by which they might be tested. So the practice of every nation could

be a lesson to every other; and mankind could carry on a mutual interchange of experiences and improvements as easily in this as in every other branch of science. . . .

## 5. Characters of the five classes

**61.** . . . For each class of offences, it may be worthwhile to exhibit the characteristics shared by all its members. The more of these we can find, the more clearly and fully we will understand the nature of the classes and of the offences they are composed of.

**62.** Class 1, **private offences**, or offences against identifiable individuals.

(1) When they reach the stage of consummation (see chapter 7 **14**) they all produce a primary mischief as well as a secondary (see chapter 12 **3**).

(2) The individuals whom they affect by their primary mischief are identifiable throughout—during preparations and attempts as well as in the consummation. (See footnote to **31** above.)

(3) So they admit of compensation (see chapter 13 **2** note) unlike the offences in all the other classes, as such.

(4) They also admit of retaliation (see chapter 15 **8**), in which also they differ from the offences in all the other classes. (I don't mean retaliation is possible in every case, or that it ought always to be employed.)

(5) There is always someone who has a natural and peculiar [see Glossary] interest in prosecuting them. In this

<sup>1</sup> Imagine the condition of a science that can't provide any true general propositions! What state would botany be in there were no common characteristics for any of its classes? Yet that is the state of every system of penal law that has ever yet appeared. . . . This lack of method is not surprising. A science [see Glossary] as new as that of penal legislation could hardly have been in any better state: objects can't be classified until they have been distinguished; so truth and order go hand in hand. . . . The discovery of truth leads to the establishment of order, and the establishment of order fixes and propagates the discovery of truth.

they differ from self-regarding offences; and also from semi-public and public ones except when they happen to involve a private mischief.

(6) The mischief they produce is more obvious than the mischief from semi-public or self-regarding or even public offences.

(7) They always do and always must fall under the censure of the world; more so than semi-public offences as such, and even more so than public ones.

(8) They are more constantly censured by the world than self-regarding offences; and they would be so universally if it weren't for the influence of the two false principles—of asceticism and of antipathy (chapter 2).

(9) They are less apt than semi-public and public offences to require different descriptions in different states and countries; in which respect they are much on a par with self-regarding offences.

(10) When circumstances make them worse in certain ways, they are liable to be transformed into semi-public offences, or in other ways into public offences.

(11) There can be no ground for punishing them until they are proved to have caused—or to be about to cause—some particular mischief to some particular individual. In this they differ from semi-public and public offences.

(12) In slight cases, compensation given to the affected individual may be a sufficient ground for remitting punishment; for if the primary mischief doesn't rise to the level of producing any alarm, the whole mischief may be cured by compensation. In this also they differ from semi-public and public offences.

**63. Class 2, semi-public offences**, or offences affecting a whole subordinate class of persons.

(1) As such, they produce no primary mischief. The mischief they produce consists of one or both branches

of the *secondary* mischief produced by offences against individuals.

(2) The persons affected in the first instance by these offences are not individually identifiable; if they were, the offences wouldn't belong to this class.

(3) But they are apt to involve or terminate in some primary mischief of the first order; and when they do, that puts them into the first class as private offences.

(4) They don't admit, as such, of compensation.

(5) Or of retaliation.

(6) There's never any one individual whose exclusive interest it is to prosecute them; but it's always possible to mark out a circle of persons some of whom have a greater interest in prosecuting than does anyone outside the circle.

(7) The mischief they produce is, though less obvious than that of private offences, usually more obvious than the mischief of self-regarding and public offences.

(8) They are not censured by the world as strongly as private offences; but more strongly than public offences are. They would also be more strongly censured than self-regarding offences if it weren't for the influence of the two false principles—•sympathy and antipathy, and •asceticism.

(9) They are more apt than private and self-regarding offences to require different descriptions in different countries; but less so than public ones.

(10) There may be ground for punishing them before they have been proved to have caused—or to be about to cause—mischief to any particular individual; which is not the case with private offences.

(11) Satisfaction given to any particular individual affected by such an offence cures only a part of the mischief and is therefore never a sufficient ground for remitting punishment. In this they differ from private offences; but are like public ones.

**64.** Class 3, **self-regarding offences**, offences against oneself.

(1) In many instances it will be questionable whether they produce any primary mischief at all (because the person who is most likely to suffer the mischief if there is any shows by his conduct that he is not aware of it); and they produce no secondary mischief.

(2) They don't affect any other individuals, identifiable or not, except by affecting the offender himself; unless in particular cases they affect—in a very slight and distant manner—the whole state.

(3) So they don't admit of compensation.

(4) Or of retaliation.

(5) No person naturally has any peculiar interest in prosecuting them, except for someone who suffers a mischief of the derivative kind (see chapter 12 4) because of some connection—either of sympathy or of interest (see chapter 6 25–26)—that he has with the offender. (Some self-regarding offences, in certain countries, are often prosecuted without any artificial inducement, merely because of the antipathy that such acts are apt to arouse.)

(6) The mischief they produce is apt to be unobvious and in general more questionable than that of any of the other classes.

(7) Yet many of them are apt to be censured by the world more strongly than public offences because of the influence of the false principles of asceticism and the antipathy. Some of them are censured more strongly even than semi-public or private offences.

(8) They are less apt than offences of any other class to require different descriptions in different states and countries. (Accordingly, most of them are apt to be counted as offences against the law of nature.)

(9) Among the considerations that induce the legislator to treat them as offences and to punish them, antipathy against

the offender is apt to have a greater share than sympathy for the public.

(10) The best case for punishing them is based on a faint probability of their producing a mischief that will qualify them as public offences, mainly against population or against the national wealth.

**65.** Class 4, **public offences**, offences against the state in general.

(1) They can't produce any primary mischief; and the secondary mischief they produce, which often consists of danger without alarm, is very great but indeterminate as to its kind.

(2) The individuals whom they initially affect are unidentifiable throughout, except when they happen to involve or terminate in some specific offence against individuals.

(3) Consequently they don't admit of compensation.

(4) Or of retaliation.

(5) No-one naturally has a particular interest in prosecuting them except where they appear to affect the private interest—e.g. the power—of some person in authority.

(6) The mischief they produce is comparatively unobvious; much more so than that of private or of semi-public offences.

(7) They are much less heavily censured by the world than are private, semi-public or self-regarding offences, except in particular cases through sympathy for persons in authority whose private interests they appear to affect.

(8) They are more apt than any of the other classes to admit of different descriptions in different states and countries.

(9) In many cases they are constituted by some circumstances that worsen a private offence, and thus involve the mischief and exhibit the other characteristics of both classes. But even then it is right to put them in class 4, because the mischief they produce in virtue of their class-4 properties

eclipses and swallows up the mischief they produce in virtue of their class-1 properties.

(10) There may be sufficient ground for punishing them without proof that they have caused, or are about to cause, any particular mischief to any particular individual. In this they are unlike private offences, but like semi-public ones. Here, as with semi-public offences, the •extent of the mischief makes up for the •uncertainty of it.

(11) In no case can satisfaction given to any individual victim be a sufficient ground for remitting punishment. In this they are unlike private offences but like semi-public ones.

66. Class 5, multiform or anomalous offences, containing offences by **falsehood** and offences concerning **trust** .

(1) Taken collectively, in the groups marked out by their

popular labels, they can't be subjected to any systematic classification based on the mischief of the offence.

(2) But they can be put into sub-groups that *can* be further classified in that way.

(3) These sub-groups will naturally and easily rank under the groups of the various preceding classes of this system.

(4) Each of the two great divisions of this class spreads itself in that way over all the preceding classes.

(5) In some kinds of class-5 offence the defining characteristic of the kind is a circumstance of the act, so that if the act occurred without this circumstance it would not have been an offence (e.g. offences by falsehood in the case of defraudment [Bentham's phrase].) In others that same circumstance comes in only as something making the offence worse; the offence would still be an offence without it (e.g. offences by falsehood in the case of simple corporeal injuries).

## Chapter 17: The Boundary around Penal Jurisprudence

### 1. Borderline between private ethics and the art of legislation

1. So much for the classification of offences in general. Now an offence is an act that is prohibited (or an act whose contrary is commanded) by the law; and what role can the law have except prohibiting and commanding? That

might seem to imply that if we settled what it's proper to do regarding offences, we would thereby have settled everything that it's proper to do in the law. But everyone knows that the art of legislation has two branches: •the criminal or penal branch that concerns the method of dealing with offences, and •the civil branch.<sup>1</sup> Between these two branches there has to be a very intimate connection—so intimate that the

<sup>1</sup> What about the constitutional branch? you'll want to ask. I might reply that its content could without much violence be distributed under the two other headings. But my memory tells me that when I wrote this work the constitutional branch—despite its importance and its capacity to stand alone—had scarcely presented itself to my view as a distinct branch; the thread of my inquiries had not yet reached it. This omission is to some extent made good in the supplementary material starting on page 152.



line between them is not easy to draw. The same thing holds, in some degree, for the line marking off the whole business of •legislation (civil and penal branches together) and that of •private ethics. I have to give some idea of these two borderlines, so as to avoid •neglecting topics that I should treat and •treating topics that don't belong in my area.

In the course of enquiring into the boundary between the civil and penal branches of law, I'll have to settle a number of points that might at first sight seem not be connected with the main question:

- What sort of thing is a law?
- What parts does it have?
- What has to be in it for it to be complete?
- How do the laws of procedure connect with the rest of the law?

All these must be answered before any satisfactory answer can be given to the main question of this section.

Nor is this the questions' only use. Obviously, the notion of a complete law must be fixed before the legislator can know what he has to do and when his work is done.

2. Ethics at large may be defined as *the art of directing men's actions to the production of the greatest possible quantity of happiness for those whose interests are in view.*
3. What actions can a man have the power to direct? They must be either his own actions or those of other agents. Ethics, considered as the art of directing a man's own actions, may be called *the art of self-government* or *private ethics.*
4. What other agents are there that •can be affected by man's actions and •are capable of happiness? They are of two sorts:
  - Other human beings, 'persons'.
  - Other animals, which—because their interests were neglected by the insensibility of the ancient jurists—are downgraded into the class of *things.*

·START OF FOOTNOTE·

The interests of the non-human part of the animal creation seem to have met with some attention in the Hindu and Mahometan religions. Why **haven't** they been attended to as fully as the interests of human creatures (allowance made for differences of sensibility)? Because existing laws have been the work of mutual fear, a feeling which the less rational animals haven't had the same means as man has for turning to account. Why **oughtn't** they? No reason can be given. There is very good reason why we should be allowed to **eat** such non-human animals as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery that we have; and the death they suffer at our hands usually is and always could be speedier and thus less painful than what would await them in the inevitable course of nature. There is also very good reason why we should be allowed to **kill** ones that attack us: we would be the worse for their living, and they are not the worse of being dead.

But is there any reason why we should be allowed to **torment** them? None that I can see. Are there any reasons why we should *not* be allowed to torment them? Yes, several. Calling people 'slaves' and giving them the legal status that the lower animals are given in England, for example—there was a time when that was the situation of a majority of the human species, and I grieve to say in many places that time is still with us. The day may come when the non-human part of the animal creation will acquire the rights that never could have been withheld from them except by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the whims of a tormentor. Perhaps it will some day be recognised that the number of legs, the hairiness of the skin, or the possession of a tail,

are equally insufficient reasons for abandoning to the same fate a creature that can *feel*? What else could be used to draw the line? Is it the faculty of reason or the possession of language? But a full-grown horse or dog is incomparably more rational and conversable than an infant of a day, or a week, or even a month old. Even if that were not so, what difference would that make? The question is not *Can they reason?* or *Can they talk?* but *Can they suffer?*

·END OF FOOTNOTE·

As for other human beings, the art of directing their actions to the above end is what we mean by ‘the art of government’, or by the principle of utility that’s what we *ought to* mean. The measures taken by government divide into

- legislation—permanent measures, and
- administration—temporary measures determined by the occurrences of the day.

5. . . . The art of government in directing the actions of persons who aren’t yet adult may be called the art of *education*. When this is entrusted to those who are the most willing and best able to take it on, because of some private relationship, it can be called the art of *private education*; when done by those whose role it is to superintend the conduct of the whole community, it can be called the art of *public education*.

6. As for ethics in general, a man’s happiness will depend •first on the parts of his behaviour that affect the interests of himself alone, and •next on the parts of it that may affect the happiness of people around him. Insofar as his happiness depends on that first part, it is said to depend on ‘his duty to himself’; the relevant part of ethics may be called ‘the art of discharging one’s duty to oneself’; and the quality that shows up in the discharge of this branch of duty (if ‘duty’ is the right word) is *prudence*. Insofar as his happiness (and that of anyone else whose interests are considered) depends

on the parts of his behaviour that can affect the happiness of people around him, it can be said to depend on ‘his duty to others’ or—in a now somewhat antiquated phrase—‘his duty to his neighbour’; and the relevant part of ethics may be called ‘the art of discharging one’s duty to one’s neighbour’. This duty is

- partly negative: to avoid lessening one’s neighbour’s happiness, and
- partly positive: to increase one’s neighbour’s happiness.

Discharging the negative duty is *probity*; discharging the positive duty is *beneficence*.

7. You may want to ask:

‘. . . What motives (other than those provided by legislation and religion) can one man have to care about the happiness of another? By what motives—i.e. by what obligations—can he be bound to obey the dictates of probity and beneficence?’

It has to be admitted that the only interests that a man always has •adequate motives for caring about are his own. But he always has •some motives for caring about the happiness of other men. •He has on all occasions the purely social motive of sympathy or benevolence, which will act on him with more or less effect depending on the bias of his sensibility (see chapter 6 3). •He also has on most occasions the semi-social motives of desire for friendship and love of reputation, whose power over him depends on a variety of circumstances—mainly •the strength of his intellectual powers, •the firmness and steadiness of his mind, •the strength of his moral sensibility, and •the characters of the people he has to deal with (see chapter 10 39).

8. Private ethics has happiness for its goal, and legislation can have no other. Private ethics concerns the happiness

and the actions of every member of any community that can be proposed, and legislation can concern no more. Thus far, then, private ethics and the art of legislation go hand in hand: they do or should aim at the same goal, the happiness of the very same persons, doing this by directing the conduct of those same persons; and even the acts they ought to be attending to are **to a large extent** the same. Then where is the difference? It lies in the fact that the acts that they ought to be attending to are not **perfectly and throughout** the same. There is no case in which a private man ought not to aim to produce his own happiness and of that of his fellow-creatures; but there are cases in which the legislator ought not to try (at least in a direct way, by punishing particular individual acts) to direct the conduct of the other members of the community. Every act that promises to be beneficial on the whole to the community (himself included) each individual ought to perform of himself; but it is not every such act that the legislator ought to compel him to perform. Every act that promises to be pernicious on the whole to the community (himself included) each individual ought to abstain from; but it is not every such act that the legislator ought to compel him to abstain from.

9. Then where is the line to be drawn? We shan't have far to seek for it. We are looking for cases where ethics ought to interfere and legislation ought not (at least directly). If legislation interferes in a direct manner it must be by punishment.<sup>1</sup> Now, I have already said in chapter 15 what the cases are where punishment—meaning the punishment of the political sanction—ought not to be inflicted. If in any of *these* cases private ethics ought to interfere, these cases will help to point out the borderline between the two arts or

branches of science. These cases, you may remember, are of four sorts:

- (1) Where punishment would be groundless.
- (2) Where it would be ineffective.
- (3) Where it would be unprofitable.
- (4) Where it would be needless.

Let us look over these and see whether in any of them there's room for the interference of private ethics yet none for the direct interference of legislation. [You'll see that Bentham discusses the first three, but not the fourth, which one might have thought was prime territory for ethics to be appropriate and legislation not (see page 95).]

10. (1) First then, the cases where punishment would be groundless. In these cases, obviously, the restrictive interference of ethics would be groundless too. It is because there is over-all no evil in the act that legislation ought not to try to prevent it; and private ethics oughtn't to either, for the same reason.

11. (2) The cases where punishment would be ineffective fall into two classes. (a) The first depend not on the nature of the act but only on a defect in the timing of the punishment. The punishment in question is appropriate for the act in question, except that it ought not to have been inflicted until after it had been properly announced. These are the cases of •retroactive law, •a judicial sentence beyond the law, and •a law that wasn't adequately promulgated. So these acts can appropriately be brought under the scope of coercive legislation, so of course they fall within the scope of private ethics. (b) The other set of cases where punishment would be ineffective also don't depend on the nature of the act; they depend on extraneous circumstances that might happen to

<sup>1</sup> I say nothing here about reward. It's only in a few extraordinary cases that it can be applied, and even there it's not clear that this is an act of legislation.

accompany an act of any sort. But these are of such a nature that they leave little room for the influence of private ethics either: they are cases where the will couldn't be deterred from any act even by the extraordinary force of legal punishment, as in extreme infancy, insanity, and total intoxication; so of course it couldn't be deterred by such slender and precarious force as private ethics could apply. The same thing holds when the person didn't intend the act to have the result that it did, didn't know all the relevant circumstances, or was prey to mis-supposal with regard to the existence of circumstances that actually didn't exist; as also when the threat even of extraordinary punishment is overcome by the superior force of physical danger or threatened mischief. In these cases, clearly, if the thunders of the law prove impotent the whispers of simple morality can't have much influence.

**12. (3)** The cases where punishment would be unprofitable provide the great field for the exclusive interference of private ethics. When a punishment is unprofitable, or in other words too expensive [see Glossary], it is because the evil of the punishment exceeds that of the offence. Now the evil of the punishment, you may remember from chapter 13 **14**, can be divided into four branches: •the evil of coercion, including constraint or restraint, depending on whether the commanded act is positive or negative; •the evil of fear; •the evil of sufferance; and •the derivative evils that come to persons who are connected with sufferers of non-derivative evils in the other three classes. Now, those ·three· non-derivative evils are a threat to two sets of persons: those who have committed or been prompted to commit acts that really are prohibited, and those persons who have performed or been prompted to perform acts that they wrongly think are punishable. Because acts in the latter group are not harmful, it is no more the business of ethics than it is of legislation to try to prevent them. The acts in the former group are the

only ones that are pernicious, and thus the only ones that private ethics should try to prevent. It remains to show how it can happen that there are really pernicious acts that can properly come under the censure of private ethics but aren't fit objects for the legislator to control.

**13.** Punishment then, as applied to delinquency, may be unprofitable in either of two ways:

- (i)** By the expense it would amount to, even if it applied only to delinquency; and
- (ii)** by the danger of its involving the innocent in the fate intended only for the guilty.

**(i)** These cases clearly depend on a certain proportion between the evil of the punishment and the evil of the offence. . . . There are many cases where a punishment has no chance of being effective unless its severity is raised far above the level where it merely outweighs the profit (to the offender) of the offence. That's the situation when the danger of detection is—i.e. is likely to appear to be—so small that the punishment appears to be highly uncertain. In this case if punishment is to be used its severity must be increased as its certainty falls (see chapter 14 **18** ). But obviously all this can only be guess-work. The effect of such a proportion—i.e. such a raising of severity to compensate for lack of certainty—will be made precarious by a variety of circumstances:

- the law's not being sufficiently promulgated;
- the particular circumstances of the temptation;
- the circumstances influencing the sensibility of the various individuals who are exposed to it.

If the seducing motives are strong, the offence *will* be frequently committed. Now and then indeed, through some coincidence of circumstances, it will be detected and thus punished. But the principal purpose of punishment is to set an example, and a single act of punishment is of no use

for that; its usefulness depends entirely on the expectation it raises of similar punishment in future cases of similar delinquency. But this future punishment must always depend on detection. If the chance of detection appears (especially to eyes fascinated by the force of the seducing motives) too low to be reckoned on, the punishment won't be of any use even if it is inflicted. Here then will be two opposite evils running on at the same time, neither reducing the amount of the other—the evil of the disease and the evil of the painful and ineffective remedy. It seems to be partly owing to some such considerations that fornication—illicit commerce between the sexes—has commonly gone altogether unpunished or been punished much less severely than legislators might have been disposed to punish it.

**14. (ii)** What is the source of the danger of punishment's involving the innocent in the fate intended only for the guilty? It is the difficulty there may be of fixing the idea of the guilty action, i.e. defining it clearly and precisely enough to guard effectively against misapplication. This difficulty may arise from •the nature of the actions themselves or from •the qualities of the men who draft the laws. [The latter source of difficulty, Bentham writes, may come partly from •the legislators' worries about whether and how judges will understand the laws they are writing, and partly from •the language's shortage of appropriate words or the legislators' incompetence with the words the language does contain. These difficulties, he suggests, may explain the fact that most legislators have not passed laws condemning actions involving rudeness, treachery, or ingratitude. He continues:] Any attempt to bring acts of such a vague and questionable

nature under the control of law would be evidence for either •a very immature age, in which men haven't yet noticed the difficulties that create the danger of punishing the innocent, or •a very enlightened age in which the difficulties are overcome.<sup>1</sup>

**15.** So as to get a clearer idea of the boundary between the art of legislation and private ethics, I invite you to recall the distinctions I drew regarding ethics in general. How badly private ethics needs the help of legislation is different in the three branches of duty that I distinguished in **6** above. The rules of **prudence** seem to have least need for help from legislation. If a man ever fails in his duty to himself, that can only be because of some inadvertence or some mis-supposal (see chapter 9 **6**) regarding the circumstances on which his happiness depends. 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? Clearly, the legislator can't know anything about the particular circumstances of each individual, so he can't do anything useful about the points of conduct that depend on them. If he has any claim to interfere, it is only with respect to broad lines of conduct that everyone—or a large and permanent subset of everyone—is at risk of engaging in; and even here the propriety of his interference will in most cases be disputable. At any rate, he mustn't expect to produce a perfect compliance by the mere force of the sanction that he has instituted. All he can hope to do is to increase the efficacy of private ethics by giving strength and direction to the influence of the moral sanction. What chance would a legislator have of wiping out drunkenness and fornication by means of legal punishment?

<sup>1</sup> In certain countries where the voice of the people has a special control over the hand of the legislator, there is intense fear of laws that would punish *defamation*, especially *political defamation*. This fear seems to come partly from doubts about the ability or integrity of the legislator and partly from doubts about the integrity of the judge.

Not all the tortures that ingenuity could invent would be enough to do it; and before he had made any significant progress, the punishment would involve evil a thousand times worse than the utmost possible mischief of the offence. The great difficulty would be in getting evidence: an attempt at this that had any chance of success would spread dismay through every family, ripping up the bonds of sympathy and rooting out the influence of all the social motives. All he can do by direct legislation against offences of this nature is to subject them in cases of notoriety to a slight censure, thus covering them with a slight shade of artificial disrepute.

**16.** With regard to the duty of prudence, legislators have generally been disposed to interfere at least as much as is expedient. The great difficulty is to get 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 where the punishment either does no good at all or at least none that will make up for the expense [see Glossary].

**17.** The mischief of this sort of interference is especially conspicuous in matters of religion. The reasoning about this goes along the following lines:

There are certain errors in matters of belief to which all mankind are prone; and a Being of infinite benevolence has decided to punish these errors in judgment with an infinity of torments. The legislator himself is necessarily free from these errors, because the men who happen to be available for him to consult with—being perfectly enlightened, unfettered, and unbiased—have such advantages over all the rest of the world that when they sit down to look for the truth

regarding matters as plain and familiar as those in question, they can't fail to find it. This being the case, when the sovereign sees his people ready to plunge headlong into an abyss of fire won't he stretch out a hand to save them?

That seems to have been the train of reasoning and the motives that led Louis XIV into the coercive measures that he took for the conversion of heretics and the confirmation of true believers.

- The ground-work: pure sympathy and loving kindness.
- The superstructure: all the miseries that the most determined malevolence could have devised. . . .

**18.** The rules of **probity** are the ones that most need help from the legislator, and the ones in which his interference has in fact been most extensive. It would hardly ever be expedient to punish a man for hurting himself, but it is nearly always expedient to punish a man for injuring his neighbour. With regard to the part of probity that opposes offences against property: before the general rules of ethics about this can apply to anything in particular, legislation must first settle what things are to be regarded as each man's property. Similarly with offences against the state: without legislation there wouldn't *be* any state, any particular persons invested with powers to be exercised for the benefit of the rest. In this branch, therefore, it's clear that legislator's interference can't be dispensed with: we can't know what private ethics dictates until we know what legislation dictates.<sup>1</sup>

**19.** As for the rules of **beneficence**: the details of these must be left in great measure to the jurisdiction of private ethics. In many cases the beneficial quality of the act depends on the

<sup>1</sup> There's an interesting question about what the dictates of private ethics ought to be if the dictates of legislation are not what they ought to be; but it doesn't concern the present subject.

disposition of the agent, i.e. on the motives that prompted him to perform it—on their belonging in the category of

- sympathy, desire for friendship, or love of reputation and not in the category of

- self-regarding motives, brought into play by the force of political constraint;

in short, on their qualifying his conduct as *free* and *voluntary* in one of the many senses given to those ambiguous expressions. The limits of the law about beneficence seem, however, to be extendable further than they seem ever to have been extended hitherto. In particular, when a person is in danger, why shouldn't it be made the duty of everyone to save him if he can do this without prejudicing himself?<sup>1</sup>

**20.** To conclude this section, let me repeat and sharpen the difference between •private ethics considered as an art or science and •the branch of jurisprudence that contains the art or science of legislation. Private ethics teaches how each man may behave to pursue the course most conducive to his own happiness, by means of such motives as offer of themselves; the art of legislation (which can be seen as one branch of the science of jurisprudence) teaches how a multitude of men who compose a community may behave to pursue the course most conducive to the happiness of the whole community, by means of motives to be supplied by the legislator.

Before discussing the boundary between penal and civil jurisprudence, I shall give a distinct though summary

view of the principal branches into which jurisprudence is customarily divided.

## 2. Branches of jurisprudence

**21.** Jurisprudence is a •fictitious entity: the only way to find any meaning for 'jurisprudence' is to place it in company with some word that signifies a a •real entity. To know what 'jurisprudence' means we must know what is meant by (for example) 'book of jurisprudence'. The aim of a book of jurisprudence must be either •to ascertain what the law is, in which case it may be called a book of expository jurisprudence, or •to ascertain what it ought to be, in which case it is a book of censorial jurisprudence, i.e. a book on the art of legislation.

**22.** A book of expository jurisprudence is •authoritative if it is composed by someone who by saying that the law is thus-and-so causes it to be thus-and-so; it is unauthoritative when it is the work of anyone else.

**23.** Now, 'law'—or 'the law' understood indefinitely—is an **abstract** and collective term which, when it means anything, can only mean the sum total of a number of individual •**concrete**• laws taken together.<sup>2</sup> It follows that the basis for any divisions in the subject of a book of jurisprudence must be circumstances of which individual laws—or the groups of laws into which they can be sorted—are susceptible.

<sup>1</sup> A woman's head-dress catches fire; water is at hand; a man stands by and laughs. A drunken man, falling with his face in a puddle, is in danger of drowning though lifting his head a little on one side would save him; another man sees this and leaves him there. There is gunpowder scattered around a room, and a man is going into it with a lighted candle; another man, knowing this, lets him go in without warning. Would *anyone* think that punishment is inappropriate in these cases?

<sup>2</sup> Most European languages have different words for the **abstract** and the **concrete** senses of 'law'—words that are so far apart that they don't even have any etymological affinity. Latin has *lex* for the concrete sense and *jus* for the abstract; Italian has *legge* and *diritto*; French *loi* and *droit*; Spanish *ley* and *derecho*; German *Gesetz* and *Recht*. English today lacks this advantage. It did exist in Anglo-Saxon, but has since been lost.

The circumstances that have generated the branches of jurisprudence that are commonly spoken of seem to be these:

- (1) The territory across which the laws in question are valid.
- (2) The political quality of the persons whose conduct they undertake to regulate.
- (3) When they are in force.
- (4) How they are expressed.
- (5) Whether they are concerned with punishment.

24. (1) What the book says about the laws in question may refer either to •the laws of such-and-such a nation (local jurisprudence) or to •the laws of all nations whatsoever (universal jurisprudence).

Of the infinite variety of nations there are on the earth, no two agree exactly in their laws; certainly not over-all and perhaps not even in any single article; and if they did agree today they would disagree tomorrow. This is evident enough with regard to the laws' content; it would be even more extraordinary if they agreed in their form, i.e. if they were expressed in precisely the same strings of words. Strictly speaking, of course, the languages of two nations are likely not to have a single word in common; but for some legal terms there are pretty exact synonyms in all languages, e.g. the words meaning the same as 'power', 'right', 'obligation', 'liberty'; and my remark about 'the same string of words' is to be understood in terms of those.

It follows that if there are any books that can properly speaking be called books of 'universal jurisprudence', they must be looked for within very narrow limits. There can't be

any that are **expository** and authoritative; and as far as the content of the laws is concerned there can't even be any that are unauthoritative. For a book of the expository kind to be capable of universal application it must restrict itself to the meanings of words; so the definitions that I have scattered through the present work, and especially the definition of 'law' that I am going to give, can be regarded as belonging in the category of universal jurisprudence. . . .

It is in the **ensorial** line that there's most room for disquisitions that apply to the circumstances of all nations alike; and in this line what is said about the •content of the laws in question is as capable of universal application as what is said about the •form, the words. It's impossible that the laws of all nations, or even of any two nations, should coincide in all points, and anyway it's not desirable that they should. But there seem to be some leading points in respect of which the laws of all civilised nations might satisfactorily be the same. To mark out some of these points will, as far as it goes, be the business of the body of this work.

25. (2) With regard to the political quality of the persons whose conduct is the object of the law. These may, on any given occasion, be considered either as members of the same state, or as members of different states; in the first case, the law may be referred to the head of internal, in the second case, to that of international jurisprudence.<sup>1</sup>

Transactions between individuals who are subjects of different states are regulated by the internal laws, and decided on by the internal tribunals, of one or other of those states. The same holds when the sovereign of one state

<sup>1</sup> The word 'international' is admittedly a new one, but I hope it will be understood well enough. It is meant as a better name for the so-called 'law of nations'. If the latter name weren't held in place by custom, it would seem to refer to the internal jurisprudence •of the different nations•. A French lawyer recently said the same thing: what is commonly called *droit des gens* ought rather to be called *droit entre les gens*—law *between* peoples rather than *of* peoples.



has any immediate transactions with a private member of another state; whenever the sovereign submits his cause to either tribunal, whether claiming a benefit or defending himself against a burden, he reduces himself *pro re nata* [= 'on this occasion for this purpose'] to the condition of a private person. Then there are transactions between sovereigns; those are the subject of the branch—the only branch—of jurisprudence that can be properly called 'international'. . . .

It is evident enough that international jurisprudence, as well as internal, can be censorial as well as expository, unauthoritative as well as authoritative.

**26.** Internal jurisprudence can concern either •all the members of a state indiscriminately or •only the ones that are connected—as residents or otherwise—with a particular district. So jurisprudence is sometimes divided into national and provincial. But 'provincial' is hardly applicable to districts as small as many of those that have laws of their own, such as towns, parishes, and manors; so 'local' or 'particular' might be better adjectives for this purpose.<sup>1</sup>

**27. (3)** With respect to time: If a work of the expository kind deals with laws that are still in force at the time when the book is written, we could call it 'present jurisprudence' or 'living jurisprudence'; if it deals with laws that have ceased to be in force, we could call it 'ancient jurisprudence'—if we *must* use that noun and some adjective! But a book of the latter kind is really a book of history, not jurisprudence. . . .

If a book deals with laws that were in force when it was written but are so no longer, it is no longer a book of living jurisprudence and it isn't—and never was—a book on the history of jurisprudence. Obviously any expository book of jurisprudence must after a few years come to be in this situation.<sup>2</sup>

The most common and most useful thing for a history of jurisprudence to do is to exhibit the circumstances that have attended the establishment of laws actually in force. But the exposition of the dead laws that have been superseded is inseparably interwoven with that of the living ones that have superseded them. The great use of both these branches of science is to furnish examples for the art of legislation.

**28. (4)** As regards how they are expressed: the laws in question may exist in the form either of statutes or of customary law.

As for how mode-of-expression relates to the penal and civil branches of law, that can't be properly shown until some progress has been made in the definition of *law*.

**29. (5)** The most intricate distinction of all, and the one that is most often under discussion, is that between the civil branch of jurisprudence and the penal (sometimes called the 'criminal'). . . .

What is a penal code of laws? What is a civil code? What do they contain? Is it that there are two sorts of laws, penal and civil, so that the laws in a penal code are all penal while

<sup>1</sup> The term 'municipal' seemed to answer the purpose very well until an eminent English author used it to cover •internal law in general, as against •international law and the imaginary •law of nature.

<sup>2</sup> What sort of thing are the works of Grotius, Pufendorf, and Burlamaqui? Are they political or ethical, historical or juridical, expository or censorial? Sometimes one thing, sometimes another: they seem hardly to have settled the matter with themselves. A book is almost certain to have this defect if it takes for its subject the supposed 'law of nature'—an obscure phantom which, in the imaginations of those who chase after it, points sometimes to manners, sometimes to laws; sometimes to what law is, sometimes to what it ought to be. Montesquieu sets out on the censorial plan; but long before the conclusion he seems to forget his first design and shift from censor to antiquarian. . . .

the laws in a civil code are all civil? Or is it that every law has some content of a penal nature, thus belonging to the penal code; and other content of a civil nature, belonging to the civil code? Or is it that some laws belong to one code or the other exclusively, while others are divided between the two? To answer these questions in a reasonably satisfactory

way we would have to ascertain what *a law* is—meaning one single complete law—and what are the parts that a law can be divided into. . . . This will be the business of the **third** and **fourth** sections; the meaning of ‘criminal’ in the phrase ‘criminal law’ will be discussed separately in the **fifth**.

### Material added nine years later

Here ends the original work, in the state into which it was brought in November 1780. What follows is now added in January 1789. The **third**, **fourth** and **fifth** sections that were to have been added to this chapter will not be given here, because to give them in a reasonably complete and satisfactory way might require a considerable volume. This volume will form a work of itself, closing the series of works mentioned in the preface [see page 1].

What follows may give a slight indication of the nature of the task that such a work will have to achieve. It won’t give anything like satisfactory answers to the questions raised in the text, but it will provide a slight and general indication of the course to be taken for answering them properly.

What is a law? What are the parts of a law? The subject of these questions is the logical, the ideal, the intellectual whole and not the physical one; it is *the law*, not *the statute*. The questions when asked about statutes are easy to answer but not interesting. In this sense of ‘law’, whatever is given as law by someone recognised as having the power to make laws is law. The *Metamorphoses* of Ovid, if thus given, would be law. As much as was embraced by a single act of authentication, as much as received the touch of the sceptre at one stroke,

is one law, a whole law. . . . A statute of George II made to replace an ‘and’ by an ‘or’ in a former statute is a complete law—a statute containing an entire body of laws, perfect in all its parts, would not be more so. By the word ‘law’, then, when it occurs in the succeeding pages, is meant •the ideal object of which the part, the whole, or the multiple, or an assemblage of parts, wholes, and multiples mixed together is exhibited by a statute, and not •the statute that exhibits them.

Every law, when complete, is either coercive or uncoercive. A coercive law is a command.

An uncoercive—or rather a *discoercive*—law is the revocation of a part or the whole of a coercive law.

A so-called ‘declaratory law’, not being either coercive or discoercive, is not properly speaking a law at all. It is not the expression of an act of the will exercised at that time; it is a mere notification of the existence some coercive or discoercive law that already exists. . . . If it does anything more than give information of this fact, . . . that makes it either coercive or discoercive and thus stops it from being what is meant by a ‘declaratory law’.

Every coercive law creates an offence, i.e. converts an act of some kind into an offence. It is only by doing this that it can impose obligation, produce coercion.

•A law that merely creates an offence and •a law commanding punishment for the commission of such an offence are two distinct laws, and not—as they seem to have been generally regarded until now—parts of a single law. The acts they command are altogether different; the persons they are addressed to are altogether different. For example:

•To everyone: do not steal.

•To judges: When someone is convicted of stealing, have him hanged.

They might be called ‘simply imperative’ and ‘punitive’ respectively; but the punitive law is as truly imperative as the other, and differs from it only in *also* being punitive.

A discoercive law can’t in itself have a punitive law belonging to it; to get the support of a punitive law it must have the support of a simply imperative or coercive law; and the punitive law will attach itself to the latter. For example:

•discoercive law: The sheriff has power to hang everyone whom the judge, proceeding in due course of law, orders him to hang.

•coercive law in support of that: No man is to hinder the sheriff from hanging everyone whom the judge [etc.] orders him to hang.

•punitive law in support of that: The judge is to cause to be imprisoned ever man who tries to hinder the sheriff from hanging everyone whom the judge [etc.] orders him to hang.

But though the simply imperative law is totally distinct from the punitive law attached to it—the former contains nothing of the latter, and the latter doesn’t explicitly contain anything of the former—the punitive law does implicitly involve and include the content of the associated simply

imperative law. To say to the judge ‘Cause to be hanged whoever in due form of law is convicted of stealing’ is •as intelligible a way (though an implicit one) of telling men in general that they must not steal as saying to them explicitly ‘Do not steal’, and •much more likely to be effective!

You might think that when a simply imperative law is to have a punitive one appended to it, the former could be dropped, so that the whole body of the law would have no need for any laws except punitive—i.e. penal—ones. (Unless some laws could do their work without any punitive appendage, and there aren’t likely to be many of those.) This might indeed be the case if it weren’t for the need for a large quantity of *expository* content, which I shall now discuss.

It happens with many, probably most, possibly *all* commands with the force of a public law that they need to be expressed with the use of terms whose meanings are too complex to exhibit the requisite ideas without help from a quantity of expository material. Such terms, like the symbols used in algebraical notation, are not •the real and immediate representatives of those ideas but •substitutes for—pointers to—terms that do of themselves exhibit the ideas in question.

Take for instance the law *Thou shalt not steal*. That command, just as it stands, could never do the work of a law. The only way something so vague and inexplicit could do that work is by giving a general indication of a variety of propositions each of which would make itself intelligible by using many more words, and more specific ones at that. According to a definition that is accurate enough for my present purpose. *stealing* is taking something that belongs to someone else when you don’t have any *title* to it and know that you don’t. Even after this explanation, and supposing it to be correct, can the law be regarded as completely expressed? Certainly not! What does it mean to say that a man has a *title* to take a thing? To be complete, the law

must present—among much else—two lists: of •events to which the law has given the quality of conferring title in such a case, and of •events to which it has given the quality of taking title away. What follows is that for a man to have stolen—for a man to have no title to what he took—it must be the case that either •no event in the first list has happened in his favour or •an event in the second has happened in his disfavour.

Such is the nature of a general law: the imperative part of it—the living core of this artificial body—needn't take up more than two or three words, but the expository appendage without which that imperative part couldn't rightly do its work may occupy a considerable volume.

This can equally be the case with a private order given in a family or small business. A bookseller says to his foreman: 'Remove from this shop to my new one my whole stock according to this printed catalogue.' The imperative content of this order is 'Remove from this shop to my new one my whole stock', and the catalogue referred to contains the expository appendage.

The same expository content may serve for many commands, many masses of imperative content. For example, the two lists of events mentioned above will belong to all or most of the laws constitutive of the various offences against property; as in mathematical diagrams, where a single base can serve for a whole cluster of triangles.

Because such expository material is so different from the imperative, it wouldn't be surprising if the connection between the two were not noticed; and perhaps it pretty generally *isn't* noticed. And as long as any mass of legislative material presents itself that isn't itself imperative or the contrary, and isn't understood to be connected with material that *is* imperative or the contrary, two things will be the case: •the truth of the proposition *That every law is a command or*

*its opposite* will remain unsuspected or appear questionable; and •the incompleteness of most of the masses of legislative material that look superficially like complete laws will remain undiscovered, as will the method to be taken for making them really complete.

The difficulty of making this discovery is increased by the great variety of ways in which the operation of a law can be conveyed—the great variety of forms that the imperative part of a law can have—differing in how directly they express the imperative quality. 'Thou shalt not steal.' 'Let no man steal.' 'Whoever steals shall be punished thus and so.' 'If any man steals, he shall be punished thus and so.' 'Stealing is where a man does thus and so.' 'The punishment for stealing is so and so'. . . . These are only a few of the multitude of forms of words that can express the command by which stealing is prohibited; and it's easy to see how greatly, in some of them, the imperative quality is clouded and concealed from ordinary understanding.

After this explanation, a few general propositions may help to provide insight into the structure and contents of a complete body of laws:

- So many different sorts of offences created—so many different laws of the coercive kind;
- so many exceptions to the descriptions of those offences—so many laws of the discoercive kind.

Thus, to classify offences, as I tried to do in chapter 16, is to classify laws; and to exhibit a complete list of all the offences created by law, including all the expository material needed to fix and exhibit the meanings of the terms used in the various laws by which those offences are created, would be to exhibit a complete collection of the laws in force—i.e. a complete body of law.

[The difficulties of line-drawing that he has discussed, Bentham now says, create an obscurity concerning the line

between 'a civil and a penal code'. He insists that no state has ever had a complete civil code and a complete penal one, so he approaches the line-drawing question thus:] If two masses of legislative material are drawn up by a state today, one called a 'civil' code and the other a 'penal' code and each meant to be complete in its kind, how should we expect the different sorts of material to be distributed between them?

The civil code would not consist of a collection of civil laws, each complete in itself, and no penal ones; and the penal code would not (because we have seen that it *could* not) consist of a collection of punitive laws, each complete in itself, and no civil ones. Rather

The civil code would consist chiefly of mere masses of expository material. The imperative material to which that expository material pertained would be found in the penal code woven into the corresponding punitive laws in the way I have explained.

The penal code then would consist principally of punitive laws, involving the imperative content of all the civil laws; along with which there would probably be various masses of expository material pertaining to the punitive laws. The body of penal law enacted by the Empress-Queen Maria Theresa fits this account pretty well.

The mass of legislative material published in French as well as in German under the auspices of Frederic II of Prussia, . . . but never established with force of law, appears to be almost wholly composed of masses of expository material whose relation to anything imperative appears to have been very imperfectly grasped.

In the ancient Roman law—that enormous mass of confusion and inconsistency—the imperative material and even all traces of the imperative character seem eventually to have been smothered in the expository. [In what follows, *esto* is Latin for the imperative 'make it the case' or 'let it be the case'; and *videtur*

seems here to mean something like 'it is decided'.] *Esto* had been the language of primeval simplicity; *esto* had been the language of the twelve tables [of Moses]. By the time of Justinian (so thick was the darkness raised by clouds of commentators) the penal law had been crammed into an odd corner of the civil law; the whole list of offences and even of crimes lay buried under a heap of obligations; will was hidden in opinion; and the original *esto* had transformed itself into *videtur* in the mouths of even the most despotic sovereigns.

Among the barbarous nations that grew up out of the ruins of the Roman empire, •Law emerged from under the mountain of expository rubbish and reassumed for a while the language of command; and then •she at least had simplicity to recommend her, if nothing else.

Besides the civil and the penal, every complete body of law must contain a third branch, the constitutional.

The main role of the constitutional branch is •to confer powers on particular classes of persons—powers to be exercised for the good of the whole society or of large parts of it—and •to prescribe duties to the persons who have been given those powers.

The powers are principally constituted, in the first instance, by discoercive or permissive laws operating as exceptions to certain laws of the coercive or imperative kind. For example, a tax-gatherer as such may on such-and-such an occasion take such-and-such things without any other title.

The duties are created by imperative laws addressed to the persons to whom the powers are given. For example, on such-and-such an occasion, such-and-such a tax-gatherer shall take such-and-such things. Such-and-such a judge shall in such-and-such a case cause persons offending thus-and-so to be hanged.

The parts that say who the individuals are who shall be considered as belonging to those classes are neither permis-

sive nor imperative. They are so many masses of expository material that relate equally to all the laws that mention those classes of persons. For example, there are imperative laws telling judges what to do in certain situations; and expository material saying who is to count as a judge. . . .

Thus it is that a single law—one and the same command—will have its material divided among *three* main branches of the whole body of the laws, the civil, the penal and the constitutional.

In countries where much of the law exists only in the form of what in England is called ‘common law’ but might be more accurately called ‘judiciary law’, there must be many laws whose meaning can’t be sufficiently pinned down without referring to this ‘common law’ for some of the expository material belonging to them. Thus in England the exposition of the word ‘title’—that basis of the of whole fabric of the laws of property—can’t be found anywhere else. [The rest of this paragraph is verbatim from Bentham.] And, as uncertainty is of the very essence of every particle of law so denominated (for the instant it is clothed in a certain authoritative form of words it changes its nature, and passes over to the other denomination) hence it is that a great part of the laws in being in such countries remain uncertain and incomplete. What are those countries? To this hour, every one on the surface of the globe.

If the science of architecture had no fixed terminology—no settled names for marking off distinguishing different sorts of buildings or parts of buildings, what would it be? It would be what the science of legislation, considered with respect to its form, remains at present.

If no architect could distinguish a dwelling-house from a barn, or a side-wall from a ceiling, what would architects be? They would be what all legislators are at present.

From this slight and imperfect sketch you may get not

•an answer to the questions I have raised but •an imperfect indication of how to go about finding such an answer; and also •some idea of how hard this task is as well as of how greatly it is needed.

If you want empirical evidence of the difficulty and the need, consider all the well-meant attempts by popular bodies, and well-meant recommendations in ingenious books, to restrain supreme representative assemblies from making laws in such-and-such cases or to such-and-such an effect. For such attempts to succeed they would require •perfect mastery of the formal aspects of the science of law (spoken of in the preface to this work); but even a •moderate insight into that science would prevent the use of the loose and inadequate terms that are so often used here; and a perfect acquaintance with the dictates of utility would in many—if not in most—cases say ‘Don’t even try’. If you keep to the letter, your attempt to prevent the making of bad laws will end up prohibiting the making of the most necessary laws, perhaps even of all laws. If you don’t keep to the letter, what you come up with will be tantamount to saying ‘When any of your laws contain anything that I don’t agree with, it *ipso facto* becomes void’.

Examples of such unhappy attempts can be met with in the legislation of many nations; but in none more frequently than in that newly-created nation, one of the most enlightened—if not *the* most enlightened—on the planet today.

Take for instance the Declaration of Rights enacted by the state of North Carolina in a convention in September 1788, and said to be copied (with a small exception) from one similarly enacted by the state of Virginia. Here is the first and fundamental article:

'There are certain natural rights of which men cannot, in forming a social compact, deprive or divest their posterity. Among these are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.'

Not to dwell on the oversight of confining to posterity the benefit of the rights thus declared, what follows? That every coercive law is void!

For example, every order to pay money as taxation, or as payment of individual debt, is void; because if someone obeys it it will 'deprive and divest him' to that extent of the enjoyment of liberty, namely the liberty of paying or

not paying as he thinks proper; and will take some of his property, which is itself a 'means of acquiring, possessing and protecting property, and of pursuing and obtaining happiness and safety'. Similarly with any law requiring imprisonment for a certain offence.

Every order to attack an armed enemy in time of war is also void, because the inevitable effect of such an order is to 'deprive [some people] of the enjoyment of life'.

Those consequences may suffice for examples, among an endless train of similar ones.<sup>1</sup>

THE END

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<sup>1</sup> [Bentham has a footnote discussing the attribution to Virginia, and then continues:] Who can help lamenting that such a rational cause should be based on reasons that are more fit to create objections than to remove them? With men who are unanimous and heart-felt about measures, nothing is so weak that it can't be accepted as a reason. This isn't the first time that a conclusion has supported its premises instead of vice versa.