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The Province of Jurisprudence Determined (John Austin)

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The Province of Jurisprudence Determined, Excerpts

By John Austin

1832

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LECTURE I

The purpose of the following attempt to determine the province of jurisprudence, stated or suggested

The matter of jurisprudence is positive law: law, simply and strictly so called, or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance* and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat, before I endeavour to analyse its numerous and complicated parts.

Law: what, in most comprehensive literal sense

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Under this definition are concluded, and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and intricacy has been infused into the science of jurisprudence by their being confounded or not clearly distinguished. In the comprehensive sense above indicated, or in the largest meaning which it has, without extension by metaphor or analogy, the term *law* embraces the following objects: laws set by God to his human creatures, and laws set by men to men.

Law of God

The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law, being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Human law. Two classes

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason, should be severed precisely, and opposed distinctly and conspicuously.

First class. Laws set by political superiors

Of the laws or rules set by men to men, some are established *by political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. But, as contradistinguished to *natural* law, or to the law of *nature* (meaning by those expressions the law of God), the aggregate of the rules, established by political superiors, is frequently styled *positive law*, or law existing *by position*. As contradistinguished to the rules which I style *positive morality*, and on which I shall touch immediately, the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of *positive law*. For the sake, then, of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules, or any portion of that aggregate, *positive law*: though rules, which are *not* established by political superiors, are also *positive*, or exist by *position* if they be rules or laws, in the proper signification of the term.

Second class. Laws set by men not political superiors

Though *some* of the laws or rules, which are set by men to men, are established by political superiors, *others* are *not* established by political superiors, or are not established by political superiors, in that capacity or character.

Objects improperly but by close analogy termed laws

Closely analogous to human laws of this second class, are a set of objects frequently but *improperly* termed laws, being rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term *law* are the expressions "The law of honour"; "The law set by fashion"; and rules of this species constitute much of what is usually termed 'International law'.

The two last placed in one class under the name positive morality

The aggregate of human laws properly so called belonging to the second of the classes above mentioned, with the aggregate of objects *improperly* but by *close analogy* termed laws, I place together in a common class, and denote them by the term *positive morality*. The name *morality* severs them from *positive law*, while the epithet *positive* disjoins them from the *law of God*. And to the end of obviating confusion, it is necessary or expedient that they *should* be disjoined from the latter by that distinguishing epithet. For the name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects: namely, positive morality *as it is*, or

without regard to its merits; and positive morality *as it would be*, if it conformed to the law of God, and were, therefore, deserving of *approbation*.

Objects metaphorically termed laws

Besides the various sorts of rules which are included in the literal acceptance of the term law, and those which are by a close and striking analogy, though improperly, termed laws, there are numerous applications of the term law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of *laws* observed by the lower animals; of *laws* regulating the growth or decay of vegetables; of *laws* determining the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason*, and, therefore, is too bounded to conceive the purpose of a law, there is not the *will* which law can work on, or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the field of jurisprudence and morals been deluged with muddy speculation.

Having suggested the *purpose* of my attempt to determine the province of jurisprudence: to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related, nearly or remotely; by a strong or slender analogy: I shall now state the essentials of a *law* or *rule* (taken with the largest signification which can be given to the term *properly*).

Laws or rules properly so called, are a species of commands

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.

Now, since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the *key* to the sciences of jurisprudence and morals, its meaning should be analysed with precision.

Accordingly, I shall endeavour, in the first instance, to analyse the meaning of "*command*:" an analysis which I fear will task the patience of my hearers, but which they will bear with cheerfulness, or, at least, with resignation, if they consider the difficulty of performing it. The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest, and, therefore, the simplest of a series are without equivalent expressions into which we can resolve them *concisely*. And when we endeavour to *define* them, or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

The meaning of the term command

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. "*Preces erant, sed quibus contradici non posset.*" ("They were prayers, but one could not contradict them.") Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.

A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from

the other, in case he comply not with the desire.

The meaning of the term duty

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

The terms command and duty are correlative

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.

Concisely expressed, the meaning of the correlative expressions is this. He who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: he who is liable to the evil in case he disregard the desire, is bound or obliged by the command.

The meaning of the term sanction

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a *punishment*. But, as punishments, strictly so called, are only a *class* of sanctions, the term is too narrow to express the meaning adequately.

To the existence of a command, a duty, and a sanction, a violent motive to compliance is not requisite

I observe that Dr Paley, in his analysis of the term *obligation*, lays much stress upon the *violence* of the motive to compliance. In so far as I can gather a meaning from his loose and inconsistent statement, his meaning appears to be this: that unless the motive to compliance be *violent* or *intense*, the expression or intimation of a wish is not a *command*, nor does the party to whom it is directed lie under a *duty* to regard it.

If he means, by a *violent* motive, a motive operating with certainty, his proposition is manifestly false. The greater the evil to be incurred in case the wish be disregarded, and the greater the chance of incurring it on that same event, the greater, no doubt, is the *chance* that the wish will not be disregarded. But no conceivable motive will *certainly* determine to compliance, or no conceivable motive will render obedience inevitable. If Paley's proposition be true, in the sense which I have now ascribed to it, commands and duties are simply impossible. Or, reducing his proposition to absurdity by a consequence as manifestly false, commands and duties are possible; but are never disobeyed or broken.

If he means by a *violent* motive, an evil which inspires fear, his meaning is simply this: that the party bound by a command is bound by the prospect of an evil. For that which is not feared is not apprehended as an evil: or (changing the shape of the expression) is not an evil in prospect.

The truth is that the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the

obligation: or (substituting expressions exactly equivalent), the greater is the *chance* that the command will be obeyed, and that the duty will not be broken. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there *is* a sanction, and, therefore, a duty and a command.

Rewards are not sanctions

By some celebrated writers (by Locke, Bentham, and, I think, Paley), the term *sanction*, or *enforcement of obedience*, is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for the names of Locke and Bentham, I think that this extension of the term is pregnant with confusion and perplexity. Rewards are, indisputably, motives to comply with the wishes of others. But to talk of commands and duties as *sanctioned* or *enforced* by rewards, or to talk of rewards as *obliging* or *constraining* to obedience, is surely a wide departure from the established meaning of the terms.

If *you* expressed a desire that *I* should render a service, and if *you* proffered a reward as the motive or inducement to render it, *you* would scarcely be said to *command* the service, nor should *I*, in ordinary language, be *obliged* to render it. In ordinary language, *you* would *promise* me a reward, on condition of my rendering the service, whilst *I* might be *incited* or *persuaded* to render it by the hope of obtaining the reward.

Again: if a law hold out a *reward* as an inducement to do some act, an eventual *right* is conferred, and not an *obligation* imposed, upon those who shall act accordingly, the *imperative* part of the law being addressed or directed to the party whom it requires to *render* the reward.

In short, I am determined or inclined to comply with the wish of another, by the fear of disadvantage or evil. I am also determined or inclined to comply with the wish of another, by the hope of advantage or good. But it is only by the chance of incurring *evil*, that I am *bound* or *obliged* to compliance. It is only by conditional *evil*, that duties are *sanctioned* or *enforced*. It is the power and the purpose of inflicting eventual *evil*, and *not* the power and the purpose of imparting eventual *good*, which gives to the expression of a wish the name of a *command*. If we put *reward* into the import of the term *sanction*, we must engage in a toilsome struggle with the current of ordinary speech; and shall often slide unconsciously, notwithstanding our efforts to the contrary, into the narrower and customary meaning.

The meaning of the term command, briefly restated

It appears, then, from what has been premised, that the ideas or notions comprehended by the term *command* are the following: 1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish by words or other signs.

The inseparable connection of the three terms, command, duty, and sanction

It also appears from what has been premised, that *command*, *duty*, and *sanction* are inseparably connected terms: that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series. A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded, are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion.

The manner of that connection

But when I am talking *directly* of the expression or intimation of the wish, I employ the term *command*: the expression or intimation of the wish being presented prominently to my hearer; whilst the evil to be incurred, with the chance of incurring it, are kept (if I may so express myself) in the background of my picture.

When I am talking *directly* of the chance of incurring the evil, or (changing the expression) of the liability or obnoxiousness to the evil, I employ the term *duty*, or the term *obligation*: the liability or obnoxiousness to the evil being put foremost, and the rest of the complex notion being signified implicitly.

When I am talking *immediately* of the evil itself, I employ the term *sanction*, or a term of the like import, the evil to be incurred being signified directly; whilst the obnoxiousness to that evil, with the expression or intimation of the wish, are indicated indirectly or obliquely.

To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness, and precision), I can express my meaning accurately in a breath: each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connotes* the residue.

Laws or rules distinguished from commands which are occasional or particular

Commands are of two species. Some are *laws or rules*. The others, have not acquired an appropriate name, nor does language afford an expression which will mark them briefly and precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of "*occasional or particular commands*".

The term *laws or rules* being not infrequently applied to occasional, or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. But the distinction between laws and particular commands may, I think, be stated in the following manner. By every command, the party to whom it is directed is obliged to do or to forbear. Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically or individually*, a command is occasional or particular. In other words, a class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally. But where a command is occasional or particular, the act or acts, which the command enjoins or forbids, are assigned or determined by their specific or individual natures as well as by the class or description to which they belong.

. . .

To conclude with an example which best illustrates the distinction, and which shows the importance of the distinction most conspicuously, *judicial commands* are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

Now the lawgiver determines a class or description of acts; prohibits acts of the class generally and indefinitely; and commands, with the like generality, that punishment shall follow transgression. The command of the lawgiver is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment, as the consequence of a specific offence.

According to the line of separation which I have now attempted to describe, a law and a particular command are distinguished thus: acts or forbearances of a *class* are enjoined *generally* by the

former. Acts *determined specifically*, are enjoined or forbidden by the latter.

A different line of separation has been drawn by Blackstone and others. According to Blackstone and others, a law and a particular command are distinguished in the following manner: a law obliges *generally* the members of the given community, or, a law obliges *generally* persons of a given class. A particular command obliges a *single* person, or persons whom it determines *individually*.

That laws and particular commands are not to be distinguished thus, will appear on a moment's reflection.

For, *first*, commands which oblige generally the members of the given community, or commands which oblige generally persons of given classes, are not always laws or rules.

Thus, [for example] in a case . . . in which the sovereign commands that all corn actually shipped for exportation be stopped and detained, the command is obligatory upon the whole community, but as it obliges them only to a set of acts individually assigned, it is not a law. Again, suppose the sovereign to issue an order, enforced by penalties, for a general mourning, on occasion of a public calamity. Now, though it is addressed to the community at large, the order is scarcely a rule, in the usual acceptation of the term. For, though it obliges generally the members of the entire community, it obliges to acts which it assigns specifically, instead of obliging generally to acts or forbearances of a class. If the sovereign commanded that *black* should be the dress of his subjects, his command would amount to a law. But if he commanded them to wear it on a specified occasion, his command would be merely particular.

And, *secondly*, a command which obliges exclusively persons individually determined may amount, notwithstanding, to a law or a rule.

For example, a father may set a rule to his child or children; a guardian, to his ward; a master, to his slave or servant. And certain of God's laws were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins. Most, indeed, of the laws which are established by political superiors, or most of the laws which are simply and strictly so called, oblige generally, the members of the political community, or oblige generally persons of a class. To frame a system of duties for every individual of the community were simply impossible; and if it were possible, it were utterly useless: Most of the laws established by political superiors are, therefore, *general* in a twofold manner: as enjoining or forbidding generally acts of kinds or sorts; and as binding the whole community, or, at least, whole classes of its members.

But if we suppose that Parliament creates and grants an office, and that Parliament binds the grantee to services of a given description, we suppose a law established by political superiors, and yet exclusively, binding a specified or determinate person. Laws established by political superiors, and exclusively binding specified or determinate persons, are styled, in the language of the Roman jurists, *privilegia*. Though that, indeed, is a name which will hardly denote them distinctly: for, like most of the leading terms in actual systems of law, it is not the name of a definite class of objects, but of a heap of heterogeneous objects.

The definition of a law or rule, properly so called

It appears, from what has been premised, that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

The meaning of the correlative terms superior and inferior

Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. I will, therefore, analyse the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with *precedence* or *excellence*. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and meaning that the former precede or excel the latter in rank, in wealth or in virtue.

But, taken with the meaning wherein I here understand it, the term superiority signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's-wishes.

For example, God, is emphatically the *superior* of Man. For his power of affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the master, of the slave or servant: the father, of the child.

In short, whoever can *oblige* another to comply, with his wishes, is the *superior* of that other, so far as the ability reaches: the party who is obnoxious to the impending evil, being, to that same extent, the *inferior*.

The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. Or (changing the expression) the party who is the superior, as viewed from one aspect, is the inferior as viewed from another.

For example, to an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command.

"That *laws* emanate from *superiors*" is, therefore, an identical proposition. For the meaning which it affects to impart is contained in its subject.

If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally "that they flow from *superiors*," or to affirm of laws universally "that *inferiors* are bound to obey them," is the merest tautology and trifling.

Laws (improperly so called) which are not commands

Like most of the leading terms in the sciences of jurisprudence and morals, the term *laws* is extremely ambiguous. Taken with the largest signification which can be given to the term properly, *laws* are a species of *commands*. But the term is improperly applied to various objects which have nothing of the imperative character: to objects which are *not* commands; and which, therefore, are *not* laws, properly so called.

Accordingly, the proposition “that laws are commands” must be taken with limitations. Or, rather, we must distinguish the various meanings of the term *laws*; and must restrict the proposition to that class of objects which is embraced by the largest signification that can be given to the term properly.

I have already indicated, and shall hereafter more fully describe, the objects improperly termed laws, which are *not* within the province of jurisprudence (being either rules enforced by opinion and closely analogous to laws properly so called; or being laws so called by a metaphorical application of the term merely). There are other objects improperly termed laws (not being commands) which yet may properly be included within the province of jurisprudence, these I shall endeavour to particularise:

1. Acts on the part of legislatures to *explain* positive law, can scarcely be called laws, in the proper signification of the term. . . .
2. Laws to repeal laws, and to release from existing duties, must also be excepted from the proposition “that laws are a species of commands.” In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. . . .
3. Imperfect laws, or laws of imperfect obligation, must also be excepted from the proposition “that laws are a species of commands.”

An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example.

Though the author of an imperfect law signifies a desire, he manifests no purpose of enforcing compliance with the desire. But where there is not a purpose of enforcing compliance with the desire, the expression of a desire is not a command. Consequently, an imperfect law is not so properly a law, as counsel, or exhortation, addressed by a superior to inferiors.

. . .

The imperfect laws, of which I am now speaking, are laws which are imperfect, in the sense of the *Roman jurists*: that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions. Many of the writers on *morals*, and on the so-called *law of nature*, have annexed a different meaning to the term *imperfect*. Speaking of imperfect obligations, they commonly mean duties which are *not legal*: duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the Roman jurists, is exactly equivalent to no obligation at all. For the term *imperfect* denotes simply that the law wants the sanction appropriate to laws of the kind. An imperfect obligation, in the other meaning of the expression, is a religious or a moral obligation. The term *imperfect* does not denote that the law imposing the duty wants the appropriate sanction. It denotes that the law imposing the duty is *not* a law established by a political superior: that it wants that *perfect*, or that surer or more cogent sanction, which is imparted by the sovereign or state.

Laws (properly so called) which may seem not imperative

I believe that I have now reviewed all the classes of objects, to which the term laws is improperly applied. The laws (improperly so called) which I have here lastly enumerated, are (I think) the only laws which are not commands, and which yet may be properly included within the province of jurisprudence. But though these, with the so-called laws set by opinion and the objects metaphorically termed laws, are the only laws which *really* are not commands, there are certain laws (properly so called) which may *seem* not imperative. Accordingly, I will subjoin a few remarks upon laws of this dubious character.

1. There are laws, it may be said, which merely create *rights*: And seeing that every command imposes a *duty*, laws of this nature are not imperative.

But, as I have intimated already, and shall show completely hereafter, there are no laws *merely* creating *rights*. There are laws, it is true, which *merely* create *duties*: duties not correlating with correlating rights, and which, therefore may be styled *absolute*. But every law, really conferring a right, imposes expressly or tacitly a *relative* duty or a duty correlating with the right. If it specify the remedy to be given, in case the right shall be infringed, it imposes the relative duty expressly. If the remedy to be given be not specified, it refers tacitly to preexisting law, and clothes the right which it purports to create with a remedy provided by that law. Every law, really conferring a right, is, therefore, imperative: as imperative, as if its only purpose were the creation of a duty, or as if the relative duty, which it inevitably imposes, were merely absolute.

The meanings of the term *right*, are various and perplexed; taken with its proper meaning, it comprises ideas which are numerous and complicated; and the searching and extensive analysis, which the term, therefore, requires, would occupy more room than could be given to it in the present lecture. It is not, however, necessary, that the analysis should be performed here. I purpose, in my earlier lectures, to determine the province of jurisprudence; or to distinguish the laws established by political superiors; from the various laws, proper and improper, with which they are frequently confounded. And this I may accomplish exactly enough, without a nice inquiry into the import of the term *right*.

...

LECTURE V

Laws proper or properly so called, and laws improper or improperly so called

The term *law*, or the term *laws*, is applied to the following objects: to laws proper or properly so called, and to laws improper or improperly so called; to objects which have all the essentials of an imperative law or rule; and to objects which are wanting in some of those essentials, but to which the term is unduly extended either by reason of *analogy* or in the way of *metaphor*.

Strictly speaking, *all* improper laws are *analogous* to laws proper: and the term *law*, as applied to *any* of them, is a *metaphorical* or *figurative* expression.

For every metaphor springs from an analogy: and every analogical extension given to a term is a metaphor or figure of speech. The term is extended from the objects which it properly signifies to objects of another nature; to objects not of the class wherein the former are contained, although they are allied to the former by that more distant resemblance which is usually styled *analogy*. But, taking the expressions with the meanings which custom or usage has established, there is a difference between an employment of a term analogically and a metaphor.

Analogy and metaphor as used in common parlance, defined

Analogy is a species of *resemblance*. The word resemblance is here taken in that large sense in which all subjects which have any property in common, are said to resemble. But besides this more

extended acceptance according to which resemblance is a genus, and analogy one of the species included therein, there is another and a narrower sense, in which resemblance is opposed to analogy. Two resembling subjects are said to *resemble*, in the narrower meaning of the term, when they both belong to some determinate genus or species expressly or tacitly referred to: when they both have every property which belongs to all the subjects included in the class. Two resembling subjects are said on the contrary to be *analogous* when *one* of them belongs to some class expressly or tacitly referred to, and the *other* does *not*: when one possesses all the properties common to the class and the other only some of them. . . .

A metaphor is the transference of a term from its primitive signification to subjects to which it is applied not in that, but in a secondary sense. An analogy, real or supposed, is always the ground of the transference; hence every metaphor is an analogical application of a term, and every analogical application of a term is a metaphor. But a metaphorical or figurative application is scarcely, in common parlance, synonymous with an analogical application. By a metaphorical or figurative application, we usually mean one in which the analogy is faint, the alliance between the primitive and the derivative signification remote. When the analogy is clear, strong, and close; when the subjects to which the term is deflected lie on the confines of the class properly denoted by it, and have many of the properties common to the class, we hardly say that the name is employed figuratively or metaphorically.

. . .

Laws improper are of two kinds: 1. Laws closely analogous to laws proper; 2. Laws metaphorical or figurative

Now a broad distinction obtains between laws improperly so called. Some are *closely*, others are *remotely*, analogous to laws proper. The term *law* is extended to some by a decision of the reason or understanding. The term *law* is extended to others by a turn or caprice of the fancy.

In order that I may mark this distinction briefly and commodiously, I avail myself of the difference, established by custom or usage, between the meanings of the expressions *analogical* and *figurative*. I style laws of the first kind *laws closely analogous to laws proper*. I say that they are called *laws* by an *analogical* extension of the term. I style laws of the second kind *laws metaphorical or figurative*. I say that they are called *laws* by a *metaphor* or *figure of speech*.

Division of laws proper, and of such improper laws as are closely analogous to the proper

Now laws proper, with such improper laws as are closely analogous to the proper, are divisible thus. Of laws properly so called, some are set by God to his human creatures; others are set by men to men. Of the laws properly so called which are set by men to men, some are set by men as political superiors, or by men, as private persons, in pursuance of legal rights. Others may be described in the following negative manner: they are not set by men as political superiors, nor are they set by men, as private persons, in pursuance of legal rights.

The laws improperly so called, which are closely analogous to the proper, are merely opinions or sentiments held or felt by men in regard to human conduct. As I shall show hereafter, these opinions and sentiments are styled *laws* because they are *analogous* to laws properly so called: because they resemble laws properly so called in *some* of their properties or *some* of their effects or consequences.

Distribution of laws proper, and of such improper laws as are closely analogous to the proper, under three capital classes: 1. The law of God, or the laws of God; 2. Positive law, or positive laws; 3. Positive morality, rules of positive morality, or positive moral rules

Accordingly, I distribute laws proper, with such improper laws as are closely analogous to the proper, under three capital classes.

The first comprises the laws (properly so called) which are set by God to his human creatures. The second comprises the laws (properly so called) which are set by men as political superiors, or by men, as private persons, in pursuance of legal rights. The third comprises laws of the two following species:

1. The laws (properly so called) which are set by men to men, but not by men as political superiors, nor by men as private persons, in pursuance of legal rights;
2. The laws which are closely analogous to laws proper, but are merely opinions or sentiments held or felt by men in regard to human conduct.

I put laws of these species into a common class, and I mark them with the common name to which I shall advert immediately, for the following reason. No law of either species is a direct or circuitous command of a monarch or sovereign number in the character of political superior. . . .

Digression to explain the expressions positive law and positive morality

My reasons for using the two expressions "*positive law*" and "*positive morality*" are the following. There are two capital classes of human laws. The first comprises the laws (properly so called) which are set by men as political superiors, or by men as private persons, in pursuance of legal rights. The second comprises the laws (proper and improper) which belong to the two species mentioned on the preceding page.

As merely distinguished from the second, the first of those capital classes might be named simply law. As merely distinguished from the first, the second of those capital classes might be named simply *morality*. But both must be distinguished from the law of God: and, for the purpose of distinguishing both from the law of God, we must qualify the names *law* and *morality*. Accordingly, I style the first of those capital classes "*positive law*": and I style the second of those capital classes "*positive morality*." By the common epithet positive, I denote that both classes flow from human sources. By the distinctive names law and morality, I denote the difference between the human sources from which the two classes respectively emanate.

Strictly speaking, every law properly so called is *positive law*. For it is *put* or set by its individual or collective author, or it exists by position or institution of its individual or collective author.

But, as opposed to the law of nature (meaning the law of God), human law of the first of those capital classes is styled by writers on jurisprudence "*positive law*." This application of the expression "*positive law*" was manifestly made for the purpose of obviating confusion; confusion of human law of the first of those capital classes with that Divine law which is the measure or test of human.

And, in order to obviate similar confusion, I apply the expression "*positive morality*" to human law of the second capital class. For the name *morality*, when standing unqualified or alone, may signify the law set by God, or human law of that second capital class. If you say that an act or omission violates *morality*, you speak ambiguously. You may mean that it violates the law which I style "*positive morality*," or that it violates the Divine law which is the measure or test of the former.

Again: the human laws or rules which I style "*positive morality*," I mark with that expression for the following additional reason.

I have said that the name *morality*, when standing unqualified or alone, may signify positive morality or may signify the law of God. But the name *morality*, when standing unqualified or alone, is perplexed with a further ambiguity. It may import indifferently either of the two following senses:

1. The name *morality*, when standing unqualified or alone, may signify positive morality which is good or worthy of approbation, or positive morality as it would be if it were good or worthy of approbation. In other words, the name *morality*, when standing unqualified or alone, may signify positive morality which agrees with its measure or test, or positive morality as it would be if it agreed with its measure or test.
2. The name *morality*, when standing unqualified or alone, may signify the human laws, which I style positive morality, as considered without regard to their goodness or badness. For example, such laws of the class as are peculiar to a given age, or such laws of the class as are peculiar to a given nation, we style the *morality* of that given age or nation whether we think them good or deem them bad. Or, in case we mean to intimate that we approve or disapprove of them, we name them the *morality* of that given age or nation and we qualify that name with the epithet *good* or *bad*.

Now, by the name "*positive morality*," I mean the human laws which I mark with that expression as considered without regard to their goodness or badness. Whether human laws be worthy of praise or blame, or whether they accord or not with their measure or test, they are "*rules of positive morality*," in the sense which I give to the expression, if they belong to either of the two species lastly mentioned. . . . But, in consequence of that ambiguity which I have now attempted to explain, I could hardly express my meaning with passable distinctness by the unqualified name *morality*.

Explanation of the following expressions: viz. science of jurisprudence and science of positive morality; science of ethics or deontology, science of legislation and science of morals

From the expression *positive law* and the expression *positive morality*, I pass to certain expressions with which they are closely connected.

The *science of jurisprudence* (or, simply and briefly, *jurisprudence*) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.

Positive morality, as considered without regard to its goodness or badness, *might* be the subject of a science closely analogous to jurisprudence. I say "*might be*" since it is only in one of its branches (namely, the law of nations or international law) that positive morality, as considered without regard to its goodness or badness, has been treated by writers in a scientific or systematic manner. For the science of positive morality, as considered without regard to its goodness, or badness, current or established language, will hardly afford us a name. The name *morals*, or *science of morals*, would denote it ambiguously: the name *morals*, or, *science of morals*, being commonly applied (as I shall show immediately) to a department of ethics or deontology. But, since the science of jurisprudence is not unfrequently styled "*the science of positive law*," the science in question might be styled analogically "*the science of positive morality*." The department of the science in question which relates to international law, has actually been styled by Von Martens . . . "*positive international law*" or "*practical international law*." Had he named that department of the science "*positive international morality*," the name would have hit its import with perfect precision.

The science of ethics (or, in the language of Mr. Bentham, the *science of deontology*) may be defined in the following manner: it affects to determine the test of positive law and morality, or it affects to determine the principles whereon they must be fashioned in order that they may merit approbation. In other words, it affects to expound them as they should be; or it affects to expound them as they ought to be; or it affects to expound them as they would be if they were good or worthy of praise; or it affects to expound them as they would be if they conformed to an assumed measure.

The science of ethics (or, simply and briefly, ethics) consists of two departments: one relating specially to positive law, the other relating specially to positive morality. The department which relates specially to positive law is commonly styled *the science of legislation*, or, simply and briefly,

legislation. The department which relates specially to positive morality is commonly styled *the science of morals*, or, simply and briefly, *morals*.

Meaning of the epithet good or bad as applied to a human law

The foregoing attempt to define the science of ethics naturally leads me to offer the following explanatory remark.

When we say that a human law is good or bad, or is worthy of praise or blame, or is what it should be or what it should not be, or is what it ought to be or what it ought not to be, we mean (unless we intimate our mere liking or aversion) this: namely, that the law agrees with or differs from a something to which we tacitly refer it as to a measure or test.

For example, according to either of the hypotheses which I stated in preceding lectures; a human law is good or bad as it agrees or does not agree with the law of God: that is to say, with the law of God as indicated by the principle of utility, or with the law of God as indicated by the moral sense. To the adherent of the theory of utility, a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For, in *his* opinion, it is consonant or not with the law of God inasmuch as it is consonant or not with the principle of general utility. To the adherent of the hypothesis of a moral sense, a human law is good if he likes it he knows not why, and a human law is bad if he hates it he knows not wherefore. For, in *his* opinion, that his inexplicable feeling of liking or aversion shows that the human law pleases or offends the Deity.

To the atheist, a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For the principle of general utility would serve as a measure or test, although it were not an index to an ulterior measure or test. But if he call the law a good one without believing it useful, or if he call a law a bad one without believing it pernicious, the atheist simply intimates his mere liking or aversion. For, unless it be thought an index to the law set by the Deity, an inexplicable feeling of approbation or disapprobation can hardly be considered a measure or test. And, in the opinion of the atheist, there is no law of God which his inexplicable feeling can point at.

To the believer in a supposed revelation, a human law is good or bad as it agrees with or differs from the terms wherein the revelation is expressed.

In short, the goodness or badness of a human law is a phrase of relative and varying import. A law which is good to one man is bad to another, in case they tacitly refer it to different and adverse tests.

Meaning of the epithet good as applied to the law of God

The Divine laws may be styled good, in the sense with which the atheist may apply the epithet to human. We may style them good, or worthy of praise, inasmuch as they agree with utility considered as an ultimate test. And this is the only meaning with which we can apply the epithet to the laws of God. Unless we refer them to utility considered as an ultimate test, we have no test by which we can try them. To say that they are good because they are set by the Deity is to say that they are good as measured or tried by themselves. But to say this is to talk absurdly: for every object which is measured, or every object which is brought to a test, is compared with a given object other than itself. If the laws set by the Deity were not generally useful, or if they did not promote the general happiness of his creatures, or if their great Author were not wise and benevolent, they would not be good or worthy of praise, but were devilish and worthy of execration.

Before I conclude the present digression I must submit this further remark to the attention of the reader.

The expression law of nature, or natural law, has two disparate meanings. It signifies the law of God or a portion of positive law and positive morality

I have intimated in the course of this digression that the phrase *law of nature*, or the phrase *natural law*, often signifies the law of God. Natural law as thus understood, and the *natural law* which I mentioned in my fourth lecture, are disparate expressions. The natural law which I there mentioned is a portion of positive law and positive morality. It consists of the human rules, legal and moral, which have obtained at all times and obtained at all places.

According to the compound hypothesis which I mentioned in my fourth lecture, these human rules, legal and moral, have been fashioned on the law of God as indicated by the *moral sense*. Or, adopting the language of the classical Roman jurists, these human rules, legal and moral, have been fashioned on the Divine law as known by *natural reason*.

But, besides the human rules which have obtained with all mankind, there are human rules, legal and moral, which have been limited to peculiar times or limited to peculiar places.

Now, according to the compound hypothesis which I mentioned in my fourth lecture, these last have not been fashioned on the law of God, or have been fashioned on the law of God as conjectured by the light of utility.

Being fashioned on the law of God as known by an infallible guide, human rules of the first class are styled the *law of nature*: for they are not of human position purely or simply, but are laws of God or Nature clothed with human sanctions. As obtaining at all times and obtaining at all places, they are styled by the classical jurists *jus gentium* ["the law of nations"], or *jus omnium gentium* ["the law of all nations"].

But human rules of the second class are styled *positive*. For, not being fashioned on the law of God, or being fashioned on the law of God as merely conjectured by utility, they, certainly or probably, are of purely human position. They are not laws of God or Nature clothed with human sanctions.

As I stated in my fourth lecture, and shall show completely hereafter, the distinction of human rules into natural and positive involves the compound hypothesis which I mentioned in that discourse.

...

The laws of God, and positive laws, are laws properly so called

Now it follows from these premises, that the laws of God, and positive laws, are laws proper, or laws properly so called.

The laws of God are laws proper, inasmuch as they are *commands* express or tacit, and therefore emanate from a *certain* source.

Positive laws, or laws strictly so called, are established directly or immediately by authors of three kinds: by monarchs or sovereign bodies as supreme political superiors; by men in a state of subjection as subordinate political superiors; by subjects, as private persons, in pursuance of legal rights. But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a *command* (and therefore flowing from a *determinate* source), every positive law is a law proper, or a law properly so called.

The generic character of positive moral rules

[OMITTED]

The law of God, positive law, and positive morality sometimes coincide, sometimes do not coincide, and sometimes conflict

The body or aggregate of laws which may be styled the law of God, the body or aggregate of laws which may be styled positive law, and the body or aggregate of laws which may be styled positive morality, sometimes *coincide*, sometimes do *not* coincide, and sometimes *conflict*.

One of these bodies of laws *coincides* with another when acts, which are enjoined or forbidden by the former, are also enjoined or are also forbidden by the latter. For example, the killing which is styled *murder* is forbidden by the positive law of every political society: it is also forbidden by a so called law which the general opinion of the society has set or imposed: it is also forbidden by the law of God as known through the principle of utility. The murderer commits a crime, or he violates a positive law: he commits a conventional immorality, or he violates a so called law which general opinion has established; he commits a sin, or he violates the law of God. He is obnoxious to punishment, or other evil, to be inflicted by sovereign authority: he is obnoxious to the hate and the spontaneous ill-offices of the generality or bulk of the society: he is obnoxious to evil or pain to be suffered here or hereafter by the immediate appointment of the Deity.

One of these bodies of laws does *not* coincide with another when acts, which are enjoined or forbidden by the former, are not enjoined or are not forbidden by the latter. For example, though smuggling is forbidden by positive law, and (speaking generally) is not less pernicious than theft, it is not forbidden by the opinions or sentiments of the ignorant or unreflecting. Where the impost or tax is itself of pernicious tendency, smuggling is hardly forbidden by the opinions or sentiments of any: and it is therefore practised by any without the slightest shame, or without the slightest fear of incurring general censure. Such, for instance, is the case where the impost or tax is laid upon the foreign commodity, not for the useful purpose of raising a public revenue, but for the absurd and mischievous purpose of protecting a domestic manufacture. Offences against the game laws are also in point: for they are not offences against positive morality, although they are forbidden by positive law. A gentleman is not dishonoured, or generally shunned by gentlemen, though he shoots without a qualification. A peasant who wires a hare escapes the censure of peasants, though the squires, as doing justiceship, send him to the prison and the treadmill.

One of these bodies of laws *conflicts* with another when acts, which are enjoined or forbidden by the former, are forbidden or enjoined by the latter. For example, in most of the nations of modern Europe the practice of duelling is forbidden by positive law. It is also at variance with the law which is received in most of those nations as having been set by the Deity in the way of express revelation. But in spite of positive law, and in spite of his religious convictions, a man of the class of gentlemen may be forced by the law of honour to give or to take a challenge. If he forebore from giving, or if he declined a challenge, he might incur the general contempt of gentlemen or men of honour; and might meet with slights and insults sufficient to embitter his existence. The negative *legal* duty which certainly, is incumbent upon him, and the negative *religious* duty to which he believes himself subject, are therefore mastered and controlled by that positive *moral* duty which arises from the so called law set by the opinion of his class.

The simple and obvious considerations to which I have now adverted are often overlooked by legislators. If they fancy a practice pernicious, or hate it they know not why, they proceed, without further thought, to forbid it by positive law. They forget that positive law may be superfluous or impotent, and therefore may lead to nothing but purely gratuitous vexation. They forget that the moral or the religious sentiments of the community may already suppress the practice as completely as it can be suppressed, or that, if the practice is favoured by those moral or religious sentiments, the strongest possible fear which legal pains can inspire may be mastered by a stronger, fear of other and conflicting sanctions.

In consequence of the frequent coincidence of positive law and morality, and of positive law and the law of God, the true nature and fountain of positive law is often absurdly mistaken by writers upon jurisprudence. Where positive law has been fashioned on positive morality, or where positive law has been fashioned on the law of God, they forget that the copy is the creature of the sovereign, and impute it to the author of the model.

For example: customary laws are positive laws fashioned by judicial legislation upon pre-existing customs. Now, till they become the grounds of judicial decisions upon cases and are clothed with legal sanctions by the sovereign one or number, the customs are merely rules set by opinions of the governed, and sanctioned or enforced morally. Though, when they become the reasons of judicial decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are rules of positive law as well as of positive morality. But, because the customs were observed by the governed before they were clothed with sanctions by the sovereign one or number, it is fancied that customary laws exist as *positive laws* by the institution of the private persons with whom the customs originated. Admitting the conceit, and reasoning by analogy, we ought to consider the sovereign the author of the positive morality which is often a consequence of positive law. Where a positive law, not fashioned on a custom, is favourably received by the governed, and enforced by their opinions or sentiments, we must deem the so called law, set by those opinions or sentiments, a law imperative and proper of the supreme political superior.

Again: the portion of positive law which is parcel of the *law of nature* (or, in the language of the classical jurists, which is parcel of the *jus gentium* ["law of nations"]) is often supposed to emanate, even as positive law from a Divine or Natural source. But (admitting the distinction of positive law into law natural and law positive) it is manifest that law natural, considered as a portion of positive, is the creature of human sovereigns, and not of the Divine monarch. To say that it emanates, as positive law, from a Divine or Natural source is to confound positive law with law whereon it is fashioned, or with law whereunto it conforms.

The foregoing distribution of laws proper, and of such improper laws as are closely analogous to the proper, tallies, in the main, with a division of laws which is given incidentally by Locke in his Essay on Human Understanding.

The foregoing distribution of laws proper, and of such improper laws as are closely analogous to the proper, tallies, in the main, with a division of laws which is given incidentally by Locke in his *Essay on Human Understanding*. And since this division of laws, or of the sources of duties or obligations, is recommended by the great authority which the writer has justly acquired, I gladly append it to my own division or analysis. The passage of his essay in which the division occurs is part of an inquiry into the nature of *relation*, and is therefore concerned indirectly with the nature and kinds of *law*. With the exclusion of all that is foreign to the nature and kinds of law, with the exclusion of a few expressions which are obviously redundant, and with the correction of a few expressions which are somewhat obscure, the passage containing the divisions may be rendered in the words following:

The conformity or disagreement men's voluntary actions have to a rule to which they are referred, and by which they are judged of, is a sort of relation which may be called *moral relation*.

Human actions, when with their various ends, objects, manners, and circumstances, they are framed into distinct complex ideas, are, as has been shown, so many *mixed modes*, a great part whereof have names annexed to them. Thus, supposing gratitude to be a readiness to acknowledge and return kindness received; or *polygamy* to be the having more wives than one at once, when we frame those notions thus in our minds, we have there so many determined ideas of mixed modes.

But this is not all that concerns our actions. It is not enough to have determined ideas of them, and to know what names belong to such and such combinations of ideas. We have a

further and greater concernment. And that is to know whether such actions are morally good or bad.

Good or evil is nothing but pleasure or pain, or that which occasions or procures pleasure or pain to us. *Moral good or evil*, then, is only the conformity or disagreement of our, voluntary actions to some law, whereby good or evil is drawn on us by the will and power of the law-maker: which good or evil, pleasure or pain, attending our observance or breach of the law, by the decree of the law-maker, is that we call reward or punishment.

Of these moral rules or laws, to which men generally refer, and by which they judge of the rectitude or depravity of their actions, there seem to me to be three sorts, with their three different enforcements, of rewards and punishments. For since it would be utterly in vain to suppose a rule set to the free actions of man, without annexing to it some enforcement of good and evil to determine his will, we must, wherever we suppose a law, suppose also some reward or punishment annexed to that law. It would be in vain for one intelligent being to set a rule to the actions of another, if he had it not in his power to reward the compliance with, and punish deviation from his rule; by some good and evil that is not the natural product and consequence, of the action itself: for that being a natural convenience or inconvenience, would operate of itself without a law. This, if I mistake not, is the true nature of all *law* properly so called.

The laws that men generally refer their actions to, to judge of their rectitude or obliquity, seem to me to be these three:

1. The *Divine* law.
2. The *civil* law.
3. The law of *opinion* or *reputation*, if I may so call it.

By the relation they bear to the first of these, men judge whether their actions are sins or duties: by the second, whether they be criminal or innocent: and by the third, whether they, be virtues or vices.

By the *Divine* law, I mean that law which God hath set to the actions of men, whether promulgated to them by the light of nature; or the voice of revelation. This is the only true touchstone of *moral rectitude*. And by comparing them to this law it is that men judge of the most considerable *moral good* or *evil* of their actions: that is, whether as *duties* or *sins*, they are like to procure them happiness or misery from the hands of the Almighty.

The *civil* law, the rule set by the commonwealth, to the actions of those who belong to it, is a rule to which men refer their actions, to judge whether they be *criminal* or no. This law nobody overlooks, the rewards and punishments that enforce it being ready at hand; and suitable to the power that makes it: which is the force of the commonwealth engaged to protect the lives, liberties, and possessions of those who live according to its law, and has power to take away life, liberty or goods from him who disobeys.

The law of *opinion* or *reputation* is another law that men generally refer their actions to, to judge of their rectitude or obliquity.

Virtue and *vice* are names pretended, and supposed everywhere to stand for actions in their own nature right or wrong: and as far as they really are so applied, they so far are coincident with the *Divine* law above mentioned. But yet, whatever is pretended, this is visible, that these names *virtue* and *vice*, in the particular instances of their application through the several nations and societies of men in the world, are constantly attributed to such actions

only as in each country and society are in reputation or discredit. Nor is it to be thought strange, that men everywhere should give the name of *virtue* to those actions which amongst them are judged praiseworthy, and call that *vice* which they account blameable; since they would condemn themselves, if they should think anything *right*, to which they allowed not commendation, or anything *wrong*, which they let pass without blame.

Thus the measure of what is everywhere called and esteemed *virtue* and *vice*, is this approbation or dislike, praise or blame, which by a secret and tacit consent establishes itself in the several societies, tribes, and clubs of men in the world whereby several actions come to find credit or disgrace amongst them, according to the judgment, maxims, or fashions of that place. For though men uniting into politick societies have resigned up to the publick the disposing of all their force, so that they cannot employ it against any fellow citizens any further than the law of the country directs, yet they retain still the power of thinking well or ill, approving or disapproving of the actions of those whom they live amongst and converse with and by this approbation and dislike, they establish amongst themselves what they will call *virtue* and *vice*.

That this is the common *measure of virtue and vice* will appear to any one who considers, that, though that passes for vice in one country, which is counted *virtue* (or, at least, not *vice*) in another, yet everywhere *virtue* and praise, *vice* and blame go together. *Virtue* is everywhere that which is thought praiseworthy and nothing but that which has the allowance of public esteem is called *virtue*. *Virtue* and praise are so united, that they are often called by the same name. "*Sunt sua praemia laudi*," ["Praise has its own rewards"] says Virgil. And, says Cicero, "*nihil habet natura praestantius, quam honestatem, quam laudem, quam dignitatem, quam decus*," ["Nature has nothing more excellent than nobility, than praise, than dignity, than honor"] all which, he tells you, are names for the same thing. Such is the language of the heathen philosophers, who well understood wherein the notions of *virtue* and *vice* consisted.

But though, by the different temper, education, fashion, maxims, or interest of different sorts of men, it fell out that what was thought praiseworthy in one place, escaped not censure in another, and so in different societies *virtues* and *vices* were changed, yet, as to the main, they for the most part kept the same everywhere. For since nothing can be more natural than to encourage with esteem and reputation that wherein everyone finds his advantage, and to blame and discountenance the contrary, it is no wonder that esteem and discredit, virtue and vice, should in a great measure everywhere correspond with the unchangeable rule of right and wrong which the law of God hath established, there being nothing that so directly and visibly secures and advances the general good of mankind in this world as obedience, to the law He has set them, and nothing that breeds such mischiefs and confusion as the neglect of it. And therefore men, without renouncing all sense and reason, and their own interest, could not generally mistake in placing their commendation or blame on that side which really deserved it not. Nay, even those men, whose practice was otherwise, failed not to give their approbation right: few being depraved to that degree, as not to condemn, at least in others, the faults they themselves were guilty of. Whereby, even in the corruption of manners, the law of God, which ought to be the rule of virtue and vice, was pretty well observed.

If any one shall imagine that I have forgotten my own notion of a law, when I make the law, whereby men judge of *virtue* and *vice*, to be nothing but the consent of private men who have not authority to make a law; especially wanting that which is so necessary and essential to a law, a power to enforce it: I think, I may say, that he who imagines commendation and disgrace not to be strong motives on men to accommodate themselves to the opinions and rules of those with whom they converse, seems little skilled in the nature or history of mankind, the greatest part whereof he shall find to govern themselves chiefly, if not solely, by this law of fashion, and so : they do that which keeps them in reputation with their company,

little regard the law of God or the magistrate. The penalties that attend the breach of God's law, some, nay, perhaps most men seldom seriously reflect on; and amongst those that do, many, whilst they break the law, entertain thoughts of future reconciliation, and making their peace for such breaches. And as to the punishments due from the law of the commonwealth, they frequently flatter themselves with the hope of impunity. But no man escapes the punishment of their censure and dislike, who offends against the fashion and opinion of the company he keeps, and would recommend himself to. Nor is there one often thousand, who is stiff and insensible enough to bear up under the constant dislike and condemnation of his own club. He must be of a strange and unusual constitution, who can content himself to live in constant disgrace and disrepute with his own particular society. Solitude many men have sought and been reconciled to: but nobody that has the least thought or sense of a man about him, can live in society under the constant dislike and ill opinion of his familiars, and those he converses with. This is a burthen too heavy for human sufferance: and he must be made up of irreconcilable contradictions, who can take pleasure in company, and yet be insensible of contempt and disgrace from his companions.

The law of God; the law of politick societies, and the law of fashion or private censure, are, then, the three rules to which men variously compare their actions. And it is from their conformity or disagreement to one of these rules, that they judge of their rectitude or obliquity, and name them good or bad.

Whether we take the rule, to which, as to a touchstone, we bring our voluntary actions, from the fashion of the country, or from the will of a law-maker, the mind is easily able to observe the relation any action hath to it, and to judge whether the action agrees or disagrees with the rule. And thus the mind hath a notion of *moral goodness or evil* which is either conformity or not conformity of any action to that rule. If I find an action to agree or disagree with the esteem of the country I have been bred in, and to be held by most men there worthy of praise or blame, I call the action virtuous or vicious. If I have the will of a supreme invisible law-maker for my rule, then, as I suppose the action commanded or forbidden by God, I call it good or evil, duty or sin. And if I compare it to the civil law, the rule made by the legislative power of the country, I call it lawful or unlawful, no crime or a crime. So that whencesoever we take the rule of actions, or by what standard soever we frame in our minds the ideas of virtues or vices, their rectitude or obliquity consists in their agreement or disagreement with the patterns prescribed by some law.

Before I quit this argument, I would observe that, in the relations which I call *moral relations*, I have a true notion of relation, by comparing the action with the rule, whether the rule be true or false. For if I measure any thing by a supposed yard, I know whether the thing I measure be longer or shorter than that supposed yard, though the yard I measure by be not exactly the standard. Measuring an action by a wrong rule, I shall judge amiss of its moral rectitude: but I shall not mistake the relation which the action bears to the rule whereunto I compare it.

(John Locke. *Essay Concerning Human Understanding*. Book 2, Chapter 28)

Laws metaphorical or figurative. The common and negative nature of laws of the class

The analogy borne to a law proper by a law which opinion imposes, lies mainly in the following point of resemblance. In the case of a law set by opinion, as well as in the case of a law properly so called, a rational being or beings are obnoxious "to contingent evil, in the event of their not complying with a known or presumed desire of another being or beings of a like nature. If, in either, of the two cases, the contingent evil is suffered, it is suffered by a rational being, through a rational being: and it is suffered by a rational being, through a rational being, in consequence of the suffering party having disregarded a desire of a rational being or beings. The analogy, therefore, by which the laws are related mainly lies in the resemblance of the improper sanction and duty to the sanction and duty properly so called. The contingent evil in prospect which enforces the law

improper, and the present obnoxiousness to that contingent evil, may be likened to the genuine sanction which enforces the law proper, and the genuine duty or obligation which the law proper imposes. The analogy between a law in the proper acceptation of the term, and a law improperly so called which opinion sets or imposes, is, therefore, strong or close. The defect which excludes the latter from the rank of a law proper merely consists in this: that the wish or desire of its authors has not been duly *signified*, and that they have no formed intention of inflicting evil or pain upon those who may break or transgress it.

But, beside the laws improper which are set or imposed by opinion, there are laws improperly so called which are related to laws proper by slender or remote analogies. And, since they have gotten the name of *laws* from their slender or remote analogies to laws properly so called, I style them laws metaphorical, or laws merely metaphorical.

The metaphorical applications of the term *law* are numerous and different. The analogies by which they are suggested, or by which metaphorical laws are related to laws proper, will, therefore, hardly admit of a common and positive description. But laws metaphorical, though numerous and different, have the following common and negative nature. No property or character of any metaphorical law can be likened to a sanction or a duty. Consequently, every metaphorical law wants that point of resemblance which mainly constitutes the analogy between a law proper and a law set by opinion.

The common and negative nature of laws metaphorical or figurative, shown by examples

To show that figurative laws want that point of resemblance, and are therefore remotely analogous to laws properly so called, I will touch slightly and briefly upon a few of the numberless cases in which the term *law* is extended and applied by a metaphor.

The most frequent and remarkable of those metaphorical applications is suggested by that uniformity, or that stability of conduct, which is one of the ordinary consequences of a law proper. By reason of the sanction working on their wills or desires, the parties obliged by a law proper commonly adjust their conduct to the pattern which the law prescribes. Consequently, wherever we observe a uniform order of events, or a uniform order of coexisting phenomena, we are prone to impute that order to a *law* set by its author, though the case presents us with nothing that can be likened to a sanction or a duty.

For example: we say that the movements of lifeless bodies are determined by certain *laws*: though, since the bodies are lifeless and have no desires or aversions, they cannot be touched by aught which in the least resembles a sanction, and cannot be subject to aught which in the least resembles an obligation. We mean that they move in certain uniform modes, and that they move in those uniform modes through the pleasure and appointment of God: just as parties obliged behave in a uniform manner through the pleasure and appointment of the party who imposes the law and the duty. Again: we say that certain actions of the lower and irrational animals are determined by certain *laws*: though, since they cannot understand the purpose and provisions of a law, it is impossible that sanctions should effectually move them to obedience, or that their conduct should be guided by a regard to duties or obligations. We mean that they act in certain uniform modes, either in consequence of instincts (or causes which we cannot explain), or else in consequence of hints which they catch from experience and observation: and that, since their uniformity of action is an effect of the Divine pleasure, it closely resembles the uniformity of conduct which is wrought by the authors of laws in those who are obnoxious to the sanctions. In short, whenever we talk of *laws* governing the irrational world, the metaphorical application of the term *law* is suggested by this double analogy:

1. The successive and synchronous phenomena composing the irrational world, happen and exist, for the most part, in uniform series: which uniformity of succession and coexistence resembles the uniformity of conduct produced by an imperative law.

2. That uniformity of succession and coexistence, like the uniformity of conduct produced by an imperative law, springs from the will and intention of an intelligent and rational author.

When an atheist speaks of *laws* governing the irrational world, the metaphorical application suggested by an analogy still more slender and remote than that which I have now analysed. He means that the uniformity of succession and coexistence resembles the uniformity of conduct produced by an imperative rule. If, to draw the analogy closer, he ascribes those laws to an author, he personifies a verbal abstraction, and makes it play the legislator. He attributes the uniformity of succession and coexistence to *laws* set by *nature*: meaning, by *nature*, the world itself; or, perhaps, that very uniformity which he imputes to nature's commands.

Many metaphorical applications of the term *law* or *rule* are suggested by the analogy following. An imperative law or rule guides the conduct of the obliged, or is a *norma* ["norm"], model, or pattern, to which their conduct conforms. A proposed guide of human conduct, or a model or pattern offered to human imitation, is, therefore, frequently styled a *law* or *rule* of conduct, although there be not in the case a shadow of a sanction or a duty.

For example: to every law properly so called there are two distinct parties: a party by whom it is established, and a party to whom it is set. But, this notwithstanding, we often speak of a law set by a man to himself: meaning that he intends to pursue some given course of conduct as exactly as he would pursue it if he were bound to pursue it by a law. An intention of pursuing exactly some given course of conduct is the only law or rule which a man can set to himself. The binding virtue of a law lies in the sanction annexed to it. But in the case of a so called law set by a man to himself, he is not constrained to observe it by aught that resembles a sanction. For though he may fairly purpose to inflict a pain on himself, if his conduct shall depart from the guide which he intends it shall follow, the infliction of the conditional pain depends upon his own will. Again: when we talk of *rules* of art, the metaphorical application of the term *rules* is suggested by the analogy in question. By a *rule* of art, we mean a prescription or pattern which is offered to practitioners of an art, and which they are advised to observe when performing some given process. There is not the semblance of a sanction, nor is there the shadow of a duty. But the offered prescription or pattern may guide the conduct of practitioners, as a rule imperative and proper guides the conduct of the obliged.

Laws metaphorical or figurative are often blended and confounded with laws imperative and proper

The preceding disquisition on figurative laws is not so superfluous as some of my hearers may deem it. Figurative laws are not unfrequently mistaken for laws imperative and proper. Nay, attempts have actually been made, and by writers of the highest celebrity, to explain and illustrate the nature of laws imperative and proper by allusions to so called laws which are merely such through a metaphor. Of these most gross and scarcely credible errors, various cases will be mentioned in future stages of my Course. For the present, the following examples will amply demonstrate that the errors are not impossible.

In an excerpt torn Ulpian placed at the beginning of the Pandects, and also inserted by Justinian in the second title of his Institutes, a fancied *ius naturale* ["natural law"], common to all animals, is thus distinguished from the *jus naturale* or *gentium* ["law of nature" or "of nations"] to which I have adverted above:

Jus naturale est, quod natura omnia animalia docuit: nam jus istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit malis atque feminae conjunctio, quam nos matrimonium appellamus; hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam, istius juris peritia censer. Jus gentium est, quo gentes humanae utuntur. Quod a naturali recedere, inde facile intelligere licet; quia illud omnibus animalibus, hoc solis hominibus inter se commune est. ["The natural law is that which nature has taught

all animals: for this law does not belong to the human race, but to all animals which are born on land or in the sea; it is also common to the birds. From this comes the joining of male and female, which we call matrimony; from this come the procreation of children; from this comes the rearing [of children]: for indeed we see that also the rest of the animals, even in the wild, are thought to experience this law. The law of nations is what the human race uses. However it is easy to understand that it is a distinct part of [literally “recedes from”] the natural [law]; for the natural law is common to all animals, [but] [the law of nations] is common to men alone, among themselves.” –*Site Editor*]

The *jus naturale* which Ulpian here describes, and which he here distinguishes from the *jus naturale* [“the natural law”] or *gentium* [“the law of nations”], is a name for the instincts of animals. More especially, it denotes that instinctive appetite which leads them to propagate their kinds, with that instinctive sympathy which inclines parent animals to nourish and educate their young. Now the instincts of animals are related to laws by the slender or remote analogy which I have already endeavoured to explain. They incline the animals to act in certain uniform modes, and they are given to the animals for that purpose by an intelligent and rational Author. But these metaphorical laws which govern the lower animals, and which govern (though less despotically) the human species itself, should not have been blended and confounded, by a grave writer upon jurisprudence, with laws properly so called. It is true that the instincts of the animal man, like many of his affections which are not instinctive, are amongst the causes of laws in the proper acceptance of the term. More especially, the laws regarding the relation of husband and wife, and the laws regarding the relation of parent and child, are mainly caused by the instincts which Ulpian particularly points at. And that, it is likely, was the reason which determined this legal oracle to class the instincts of animals with laws imperative and proper. But nothing can be more absurd than the ranking with laws themselves the causes which lead to their existence. And if human instincts are laws because they are causes of laws, there is scarcely a faculty or affection belonging to the human mind, and scarcely a class of objects presented by the outward world, that must not be esteemed a law and an appropriate subject of jurisprudence. I must, however, remark, that the *jus quod natura omnia animalia docuit* [“the law that nature has taught all the animals”] is a conceit peculiar to Ulpian: and that this most foolish conceit, though inserted in Justinian’s compilations, has no perceptible influence on the detail of the Roman law. The *jus naturale* of the classical jurists generally, and the *ius naturale* occurring generally in the Pandects, is equivalent to the *natural law* of modern writers upon jurisprudence, and is synonymous with the *jus gentium*, or the *jus naturale et gentium*, which I have tried to explain concisely at the end of a preceding note. It means those positive laws and those rules of positive morality which are not peculiar or appropriate to any nation or age; but obtain, or are thought to obtain, in all nations and ages; and which, by reason of their obtaining in all nations and ages, are supposed to be formed or fashioned on the law of God or Nature as known by the moral sense.

Omnes populi [says Gaius] qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est, vocaturque jus civile; quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur, vocaturque jus gentium; quasi quo jure omnes gentes utuntur. [“All peoples who are ruled by laws and customs use law: partly their own, and partly that which is common to all men. For that which each people has itself established as law for itself is proper to itself, and it is called civil law, as a law proper to its own state (*civitas*). But that which natural reason has established among all men is kept among all peoples uniformly; and it is called the law of nations, as the law which all nations use.” –*Site Editor*]

The universal *leges et mores* [“laws and customs”] here described by Gaius, and distinguished from the *leges et mores* peculiar to a particular nation, are styled indifferently, by most of the classical jurists, *ius gentium* [“law of nations”], *jus naturale* [“natural law”], or *jus naturale et gentium* [“the law of nature and of nations”]. And the law of nature, as thus understood, is not intrinsically absurd. For

as some of the dictates of utility are always and everywhere the same, and are also so plain and glaring that they hardly admit of mistake, there are legal and moral rules which are nearly or quite *universal*, and the expediency of which must be seen by merely *natural* reason, or by reason without the lights of extensive experience and observation. The distinction of law and morality into natural and positive is a needless and futile subtlety; but still the distinction is founded on a real and manifest difference. The *ius naturale* or *gentium* would be liable to little objection if it were not supposed to be the offspring of a moral instinct or sense, or of innate practical principles. But, since it is closely allied (as I shall show hereafter) to that misleading and pernicious jargon, it ought to be expelled, with the *natural law* of the moderns, from the sciences of jurisprudence and morality. The following passage is the first sentence in Montesquieu's *Spirit of Laws*:

Les lois, dans la signification la plus etendue, sont les rapports necessaires qui derivent de la nature des choses: et dans ce sens tous les etres ont leurs lois: la Divinite a ses lois; le monde materiel a ses lois; les intelligences super-ieures a l'homme ont leurs lois; les betes ont leurs lois; l'homme a ses lois. ["The laws, in the most extended meaning, are the necessary relationships that derive from the nature of things; and in this sense, all beings have their laws: the Divinity has his laws, the material world has its laws, the intelligences superior to man have their laws, the beasts have their laws, man has his laws." –*Site Editor*]

Now objects widely different, though bearing a common name, are here blended and confounded. Of the laws which govern the conduct of intelligent and rational creatures, some are laws imperative and proper, and others are closely analogous to laws of that description. But the so called laws which govern the material world, with the so called laws which govern the lower animals, are merely laws by a metaphor. And the so called laws which govern or determine the Deity are clearly in the same predicament. If his actions were governed or determined by laws imperative and proper, he would be in a state of dependence on another arid superior being. When we say that the actions of the Deity are governed or determined by laws, we mean that they conform to intentions which the Deity himself, has conceived, and which he pursues or observes with inflexible steadiness or constancy. To mix these figurative laws with laws imperative and proper is to obscure, and not to elucidate, the nature or essence of the latter. The beginning of the passage is worthy of the sequel. We are told that laws are the necessary relations which flow from the nature of things. But what, I would crave, are relations? What, I would also crave, is the nature of things? And how do the necessary relations which flow from the nature of things differ from those relations which originate in other sources? The terms of the definition are incomparably more obscure than the term which it affects to expound.

If you read the disquisition in Blackstone on the nature of laws in general, or the fustian description of law in Hooker's *Ecclesiastical Polity*, you will find the same confusion of laws imperative and proper with laws which are merely such by a glaring perversion of the term. The cases of this confusion are, indeed, so numerous that they would fill a considerable volume.

Physical or natural sanctions

From the confusion of laws metaphorical with laws imperative and proper, I turn to a mistake, somewhat similar, which, I presume to think, has been committed by Mr. Bentham.

Sanctions proper and improper are of three capital classes: the sanctions properly so called which are annexed to the laws of God; the sanctions properly so called which are annexed to positive laws; the sanctions properly so called; and the sanctions closely analogous to sanctions properly so called, which respectively enforce compliance with positive moral rules. But to sanctions religious, legal, and moral, this great philosopher and jurist adds a class of sanctions which he styles *physical* or *natural*.

When he styles these sanctions *physical*, he does not intend to intimate that they are distinguished from other sanctions by the mode wherein they operate: he does not intend to intimate that these

are the only sanctions which affect the suffering parties through physical or material means. Any sanction of any class may reach the suffering party through means of that description. If a man were smitten with blindness by the immediate appointment of the Deity, and in consequence of a sin he had committed against the Divine law, he would suffer a religious sanction through his physical or bodily organs. The thief who is hanged or imprisoned by virtue of a judicial command suffers a legal sanction through physical or material means. If a man of the class of gentlemen violates the law of honour, and happens to be shot in a duel arising from his moral delinquency, he suffers a moral sanction in a physical or material form.

The meaning annexed by Mr. Bentham to the expression physical sanction may, I believe, be rendered in the following manner: a physical sanction is an evil brought upon the suffering party by an act or omission of his own. But, though it is brought upon the sufferer by an act or omission of his own, it is not brought upon the sufferer through any Divine law, or through any positive law, or rule of positive morality. For example: if your house be destroyed by fire through your neglecting to put out a light, you bring upon yourself, by your negligent omission, a *physical* or *natural* sanction: supposing, I mean, that your omission is not to be deemed a sin, and that the consequent destruction of your house is not to be deemed a punishment inflicted by the hand of the Deity. In short, though a physical sanction is an evil falling on a rational being, and brought on a rational being by an act or omission of his own, it is neither brought on the sufferer through a law imperative and proper, nor through an analogous law set or imposed by opinion. In case I borrowed the just, though tautological, language of Locke, I should describe a physical sanction in such some terms as the following: "It is an evil *naturally* produced by the conduct whereon it is consequent: and, being *naturally* produced by the-conduct whereon it is consequent, it reaches the suffering party *without the intervention of a law.*"

Such physical or natural evils are related by the following analogy to sanctions properly so called:

1. When they are actually suffered, they are suffered by rational beings through acts or omissions of their own.
2. Before they are actually suffered, or whilst they exist in prospect, they affect the wills or desires of the parties obnoxious to them as sanctions properly so called affect the wills of the obliged. The parties are urged to the acts which may avert the evils from their heads, or the parties are deterred from the acts which may bring the evils upon them.

But in spite of the specious analogy at which I have now pointed, I dislike, for various reasons, the application of the term *sanction* to these physical or natural evils. Of those reasons I will briefly mention the following:

1. Although these evils are suffered by intelligent rational beings, and by intelligent rational beings through acts or omissions of their own, they are not suffered as consequences of their not complying with desires of intelligent rational beings. The acts or omissions whereon these evils are consequent can hardly be likened to breaches of duties, or to violations of imperative laws. The analogy borne by these evils to sanctions properly so called is nearly as remote as the analogy borne by laws metaphorical to laws imperative and proper.
2. By the term *sanction*, as it is now restricted, the evils enforcing compliance with laws imperative and proper, or with the closely analogous laws which opinion sets or imposes, are distinguished from other evils briefly and commodiously: If the term were commonly extended to these physical or natural evils, this advantage would be lost. The term would then comprehend every possible evil which a man may bring upon himself by his own voluntary conduct. The term would then comprehend every contingent evil which can work on the will or desires as a motive to action or forbearance.

In strictness, declaratory law, laws repealing laws, and laws of imperfect obligation (in the sense of the Roman jurists), ought to be classed respectively with laws, metaphorical or figurative, and rules of positive morality.

. . .

Note: on the prevailing tendency to confound what is with what ought to be law or morality, that is, first, to confound positive law with the science of legislation, and positive morality with deontology; and secondly, to confound positive law with positive morality, and both with legislation and deontology:

First: tendency to confound positive law with the science of legislation, and positive morality with deontology. Example from Blackstone.

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

Sir William Blackstone; for example, says in his *Commentaries* that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original.

Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. The evils which we are exposed to suffer from the hands of God as a consequence of disobeying His commands are the greatest evils to which we are obnoxious; the obligations which they impose are consequently paramount to those imposed by any other laws, and if human commands conflict with the Divine law, we ought to disobey the command which is enforced by the less powerful sanction; this is implied in the term *ought*: the proposition is identical, and therefore perfectly indisputable—it is in our interest to choose the smaller and more uncertain evil, in preference to the greater and surer. If this be Blackstone's meaning, I assent to his proposition, and have only to object to it that it tells us just nothing. Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent: for if the index to the law of God be the principle of utility, that law embraces the whole of our voluntary actions in so far as motives applied from without are required to give them a direction conformable to the general happiness.

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law*, for a law without an obligation is a contradiction in terms. I suppose this to be his meaning, because when we say of any transaction that it is invalid or void, we mean that it is not binding: as, for example, if it be a contract, we mean that the political law will not lend its sanction to enforce the contract.

Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which

have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment. But this abuse of language is not merely puerile, it is mischievous. When it is said that a law ought to be disobeyed, what is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned. If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are paramount to all others. But the laws of God are not always certain. All divines, at least all reasonable divines, admit that no scheme of duties perfectly complete and unambiguous was ever imparted to us by revelation. As an index to the Divine will, utility is obviously insufficient—what appears pernicious to one person may appear beneficial to another. And as for the moral sense, innate practical principles, conscience, they are merely convenient cloaks for ignorance or sinister interest: they mean either that I hate the law to which I object and cannot tell why, or that I hate the law, and that the cause of my hatred is one which I find it incommodious to avow. If I say openly, I hate the law, ergo, it is not binding and ought to be disobeyed, no one will listen to me; but by calling my hate my conscience or my moral sense, I urge the same argument in another and more plausible form: I seem to assign a reason for my dislike, when in truth I have only given it a sounding and specious name. In times of civil discord the mischief of this detestable abuse of language is apparent. In quiet times the dictates of utility are fortunately so obvious that the anarchical doctrine sleeps, and men habitually admit the validity of laws which they dislike. To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of *utility* may be useful, for resistance, grounded on clear and definite prospects of good, is sometimes beneficial. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.

Another example from Blackstone

In another passage of his *Commentaries*, Blackstone enters into an argument to prove that a master cannot have a right to the labour of his slave. Had he contented himself with expressing his *disapprobation*, a very well-grounded one certainly, of the institution of slavery, no objection could have been made to his so expressing himself. But to dispute the existence of the possibility of the right is to talk absurdly. For in every age, and in almost every nation, the right has been given by positive law, whilst that pernicious disposition of positive law has been backed by the positive morality of the free or master classes.

Paley's definition of civil liberty

Paley's admired definition of civil liberty appears to me to be obnoxious to the very same objection: it is a definition of civil liberty as it ought to be. "Civil liberty," he says, "is the not being restrained by any law but which conduces in a greater degree to the public welfare"; and this is distinguished from *natural* liberty, which is the not being restrained at all. But when liberty is not exactly synonymous with right, it means, and can mean nothing else, but exemption from restraint or obligation, and is therefore altogether incompatible with law, the very idea of which implies restraint and obligation. But restraint is restraint although it be useful, and liberty is liberty though it may be pernicious. You may, if you please, call a useful restraint *liberty*, and refuse the name liberty to exemption from restraint when restraint is for the public advantage. But by this abuse of language you throw not a ray of light upon the nature of political liberty; you only add to the ambiguity and indistinctness in which it is already involved. I shall have to define and analyse the notion of liberty hereafter, on account of its intimate connection with right, obligation, and sanction.

Example from the writers on international law

Grotius, Puffendorf, and the other writers on the so called law of nations, have fallen into a similar confusion of ideas: they have confounded positive international morality, or the rules which actually obtain among civilised nations in their mutual intercourse, with their own vague conceptions of international morality as if *ought to be*, with that indeterminate something which they conceived it would be, if it conformed to that indeterminate something which they call the law of nature. Professor Von Martens, of Göttingen, who died only a few years ago, is actually the first of the writers on the law of nations who has seized this distinction with a firm grasp, the first who has distinguished the rules which ought to be received in the intercourse of nations, or which would be received if they conformed to an assumed standard of whatever kind, from those which *are* so received, endeavoured to collect from the practice of civilised communities what are the rules actually recognised and acted upon by them, and gave to these rules the name of positive international law.

Second: tendency to confound positive law with positive morality, and both with legislation and deontology. Examples from the Roman jurists

I have given several instances in which law and morality as they ought to be are confounded with the law and morality which actually exist. I shall next mention some examples in which positive law is confounded with positive morality, and both with the science of legislation and deontology.

Those who know the writings of the Roman lawyers only by hearsay are accustomed to admire their philosophy. Now this, in my estimation, is the only part of their writings which deserves contempt. Their extraordinary merit is evinced, not in general speculation, but as expositors of the Roman law. They have seized its general principles with great clearness and penetration, have applied these principles with admirable logic to the explanation of details, and have thus reduced this positive system of law to a compact and coherent whole. But the philosophy which they borrowed from the Greeks, or which, after the examples of the Greeks, they themselves fashioned, is naught. Their attempts to define jurisprudence and to determine the province of the juriconsult are absolutely pitiable, and it is hardly conceivable how men of such admirable discernment should have displayed such contemptible imbecility.

At the commencement of the *Digest* is a passage attempting, to define jurisprudence. I shall first present you with this passage in a free translation, and afterwards in the original. "Jurisprudence," says this definition, "is the knowledge of things divine and human, the science which teaches men to discern the just from the unjust." *Jurisprudentia est divinarum atque humanarum rerum notitia, justae atque injustae scientia*. In the excerpt from Ulpian, which is placed at the beginning of the *Digest*, it is attempted to define the office or province of the juriconsult:

"Law derives its name from justice, *justitia*, and is the science or skill in the good and the equitable. Law being the creature of justice, we the juriconsults may be considered as her priests, for justice is the goddess whom we worship, and to whose service we are devoted. Justice and equity are our vocation; we teach men to know the difference between the just and the unjust, the lawful and the unlawful; we strive to reclaim them from vice, not only by the terrors of punishment, but also by the blandishment of rewards; herein, unless we flatter ourselves, aspiring to sound and real philosophy, and not like some whom we could mention, contenting ourselves with vain and empty pretension."

Juri operam daturum prius nosse oportet, unde nomen juris descendat. Est autem a justitia appellatum; nam, ut eleganter Celsus definit, jus est ars boni et aequi. Cujus merito quis nos sacerdotes appellet; justitiam namque colimus, et boni et aequi notitiam profiteamur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum verum etiam praemiorum quoque exhortatione efficere cupientes, veram, nisi fallor, philosophiam, non simulatam affectantes. [Austin's translation is rather free. A more literal rendering would read thus: "First one must know how to describe the work of the law, from which the name of law (*ius*) comes. Now it has been named from justice (*iustitia*); for, as Celsus elegantly

defines, law is the art of the good and the just. Because of this, someone might call us priests, for indeed we worship justice, and we profess knowledge of the good and the just, separating the just from the unjust, distinguishing the lawful from the unlawful: desiring to make men good, not only by fear of punishments but also by the exhortation of rewards: striving to follow true, unfeigned philosophy, unless I am mistaken.” –*Site Editor*]

Were I to present you with all the criticisms which these two passages suggest, I should detain you a full hour. I shall content myself with one observation on the scope and purpose of them both. That is, that they affect to define jurisprudence, or what comes exactly to the same thing, the office or province of the juriconsult. Now jurisprudence, if it is anything, is the science of law, or at most the science of law combined with the art of applying it; but what is here given as a definition of it embraces not only law, but positive morality, and even the test to which both these are to be referred. It therefore comprises the science of legislation and deontology. Further, it affirms that law is the creature of justice, which is as much as to say that it is the child of its own offspring. For when by just we mean anything but to express our own approbation, we mean something which *accords with some given law*. True, we speak of law and justice, or of law and equity, as opposed to each other, but when we do so, we mean to express mere dislike of the law, or to intimate that it conflicts with another law, the law of God, which is its standard. According to this, every pernicious law is unjust. But, in truth, law is itself the standard of justice; What deviates from any law is unjust with reference to that law, though it may be just with reference to another law of superior authority. The terms just and unjust imply a standard, and conformity to that standard and a deviation from it; else they signify mere dislike, which it would be far better to signify by a grunt or a groan than by a mischievous and detestable abuse of articulate language. But justice is commonly erected into an entity, and spoken of as a legislator, in which character it is supposed to prescribe the law, conformity to which it should denote. The veriest dolt who is placed in a jury box, the merest old woman who happens to be raised to the bench, will talk finely of equity or justice—the justice of the case, the equity of the case, the imperious demands of justice, the plain dictates of equity. He forgets that he is there to enforce *the law of the land*, else he does not administer that justice or that equity with which alone he is immediately concerned.

Example from Lord Mansfield

This is well known to have been a strong tendency of Lord Mansfield—a strange obliquity in so great a man. I will give an instance. By the English law, a promise to give something or to do something for the benefit of another is not binding without what is called a consideration; that is, a motive assigned for the promise, which motive must be of a particular kind. Lord Mansfield, however, overruled the distinct provisions of the law by ruling that moral obligation was a sufficient consideration. Now, moral obligation is an obligation imposed by opinion, or an obligation imposed by God: that is, moral obligation is anything which we choose to call so, for the precepts of positive morality are infinitely varying, and the will of God, whether indicated by utility or by a moral sense, is equally a matter of dispute. This decision of Lord Mansfield, which assumes that the judge is to enforce morality, enables the judge to enforce just whatever he pleases.

I must here observe that I am not objecting to Lord Mansfield for assuming the office of a legislator. I by no means disapprove of what Mr. Bentham has chosen to call by the disrespectful, and therefore, as I conceive, injudicious, name of judge-made law. For I consider it injudicious to call by any name indicative of disrespect what appears to me highly beneficial and even absolutely necessary. I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislative. Notwithstanding my great admiration for Mr. Bentham, I cannot but think that instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal

manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases, such as Lord Mansfield employed in the above example; and which would be censurable in any legislator.

[NOTES OMITTED]

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