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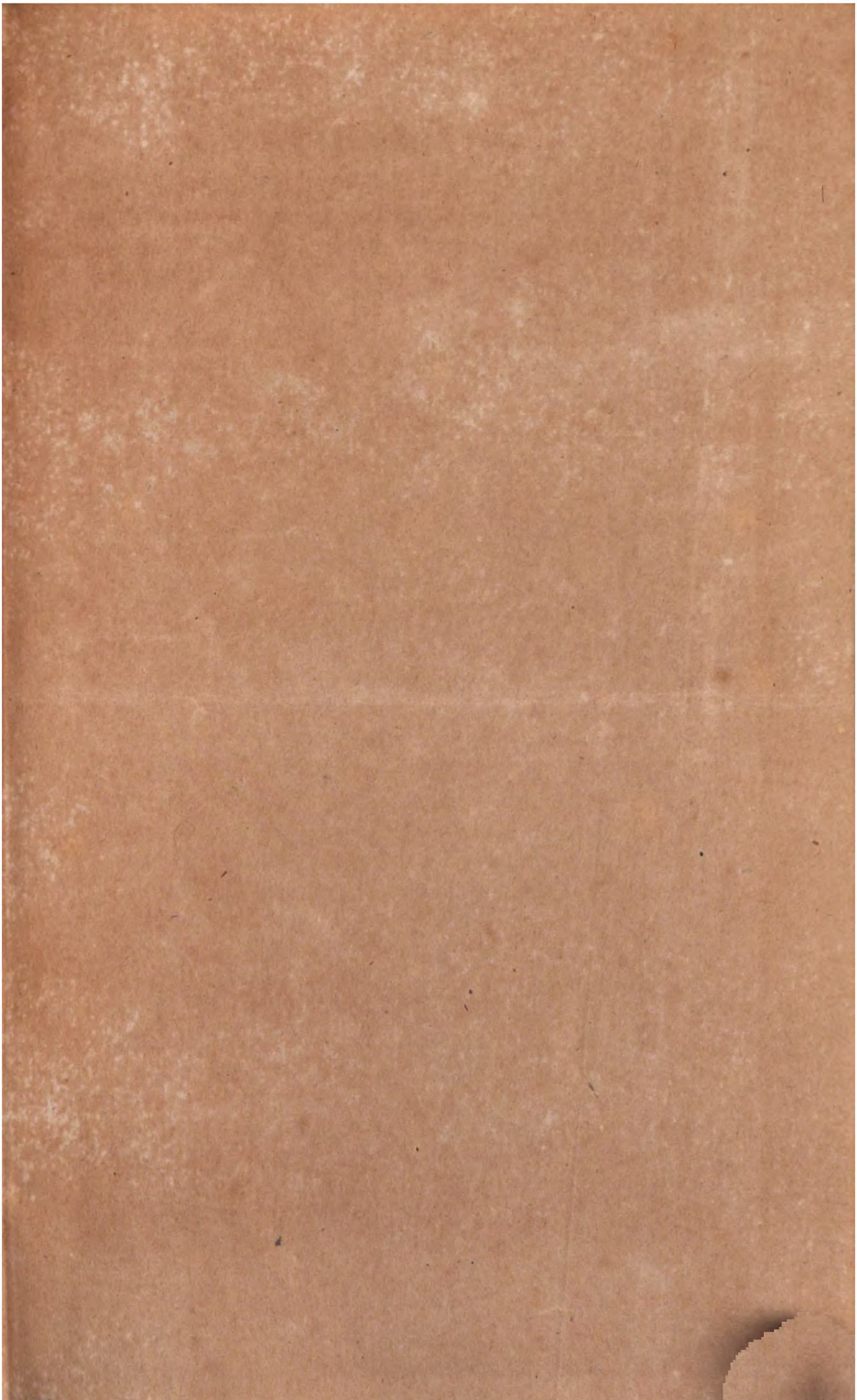
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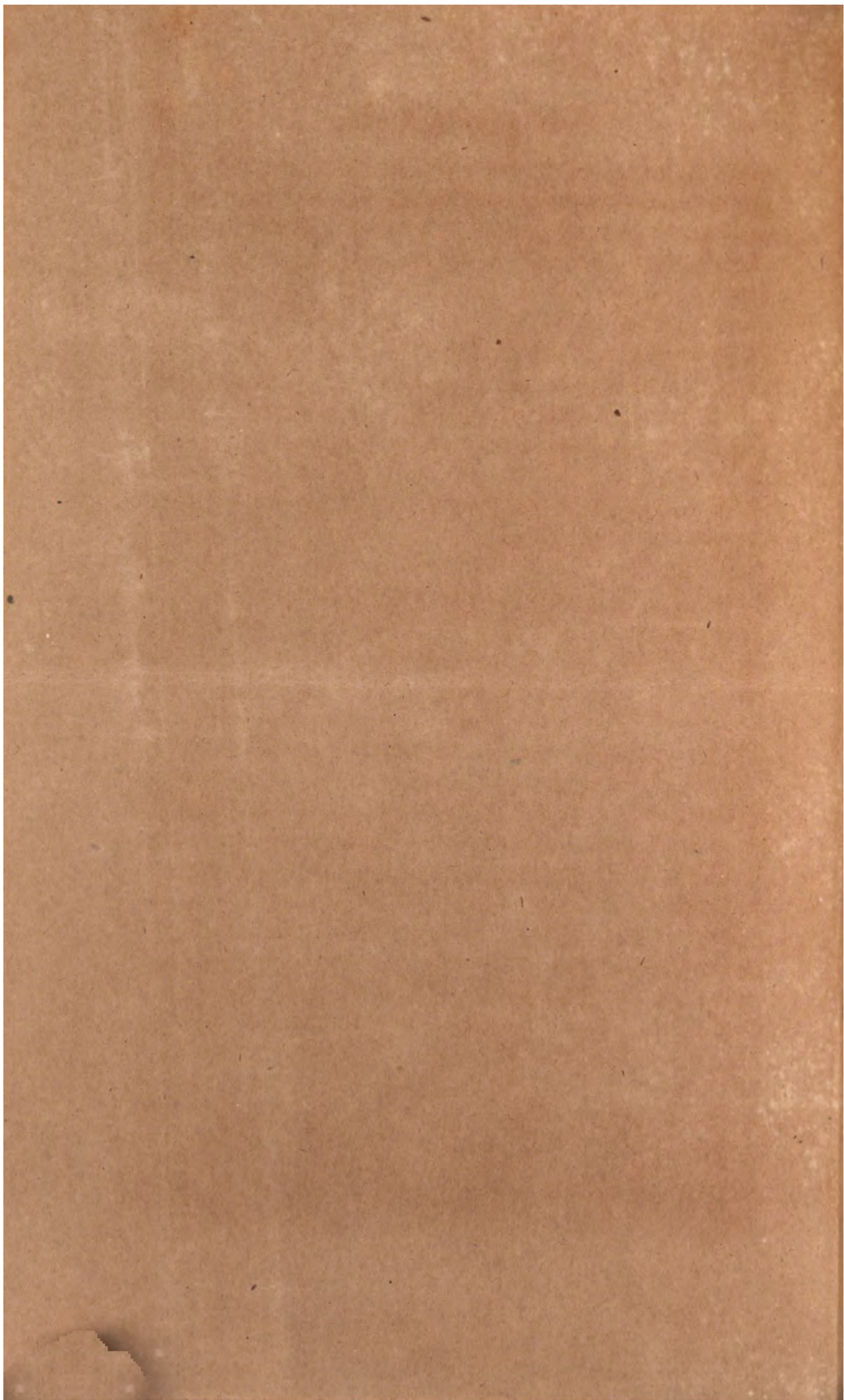
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T H E O R Y
O F L E G I S L A T I O N ;

B Y

J E R E M Y B E N T H A M .

TRANSLATED FROM THE FRENCH OF ETIENNE DUMONT,

B Y R . H I L D R E T H ,

Author of "Banks, Banking, and Paper Currencies," "Despotism in America,"
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V O L . I I .

P R I N C I P L E S O F T H E P E N A L C O D E .

B O S T O N :
W E E K S , J O R D A N , & C O M P A N Y ,
N O . 1 2 1 W A S H I N G T O N S T R E E T .

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NEW-ENGLAND TYPE AND STEREOTYPE FOUNDRY.

PRINCIPLES OF THE PENAL CODE.

PART FIRST. OF OFFENCES.

INTRODUCTION.

THE object of this first part is, to describe offences, to classify them, and to point out the circumstances by which they are aggravated or extenuated. It is a treatise upon diseases, which of necessity precedes the inquiry as to cures.

The common nomenclature of offences is not only incomplete, it is deceptive. Unless we begin by reforming it, we never shall be able to dispel the obscurity in which the science of penal legislation is involved.

CHAPTER I.

Classification of Offences.

WHAT is meant by an offence? The sense of this word varies according to the subject under discussion. If the

question relates to a system of laws already established, *offences* are whatever the legislator has prohibited, whether for good or for bad reasons. If the question relates to a theoretical research for the discovery of the best possible laws, according to the principle of utility we give the name of *offence* to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce. Such is the only sense of this word throughout this treatise.

The most general classification of offences may be derived from the classes of persons who suffer by them. They may be divided into the four following kinds :—

1st. *Private offences.* Those which are injurious to such or such assignable individuals,* other than the delinquent himself.

2d. *Reflective offences, or offences against one's self.* Those by which the delinquent injures nobody but himself; or if he injures others, it is only in consequence of the injury done to himself.

3d. *Semi-public offences.* Those which affect a portion of the community, a district, a particular corporation, a religious sect, a commercial company, or any association of individuals united by some common interest, but forming a circle inferior in extent to that of the community.

It is never a present evil nor a past evil that constitutes a semi-public offence. If the evil were present or passed, the individuals who suffer, or who have suffered, would be assignable. It would then be an offence of the first class, a private offence. In semi-public offences the point is, a future evil, a danger which threatens, but which as yet attacks no particular individual.

4th. *Public offences.* Those which produce some com-

* An *assignable* individual is such or such an individual in particular, to the exclusion of every other; as Peter, Paul, or William.

mon danger to all the members of the state, or to an indefinite number of non-assignable individuals; although it does not appear that any one in particular is more likely to suffer than any other.*

CHAPTER II.

Subdivision of Offences.

SUBDIVISION OF PRIVATE OFFENCES. Since the happiness of an individual flows from four sources, the offences which may attack it can be arranged under four divisions:—

1. Offences against the person.
2. Offences against property.
3. Offences against reputation.
4. Offences against the condition; that is, against domestic or civil relations, such as the relation of father and child, husband and wife, master and servant, citizen and magistrate, &c.

Offences which are injurious in more respects than one, may be designated by compound terms; as offences against the person and property, offences against the person and reputation, &c.

SUBDIVISION OF REFLECTIVE OFFENCES. Offences against one's self are, properly speaking, vices and imprudences. It is useful to classify them, not in order to subject them to legislative severity, but rather to remind the legislator, by a single word, that such or such an action is beyond his sphere.

The subdivision of these offences is exactly the same as

* The fewer individuals there are in a district or a corporation, the more probable it is that the parties injured will be assignable; so that it is sometimes difficult to determine whether a given offence is pri-

that of offences of the first class ; we are vulnerable by our own hand in as many points as by the hand of another. We can injure ourselves in our person, our property, our reputation, our civil and domestic condition.

SUBDIVISION OF SEMI-PUBLIC OFFENCES. The greater part of these offences consist in the violation of those laws of which the object is, to protect the inhabitants of a district against the different physical calamities to which they may be exposed. Such are laws for preventing the spread of contagious diseases, for preserving dykes and causeways, for restraining the ravages of hurtful animals, for guarding against famine. The offences which tend to produce calamities of this sort, form the first kind of semi-public offences.

Those semi-public offences which may be consummated without the intervention of a natural scourge, such as threats against a certain class of persons, calumnies, libels which touch the honor of some sect or company, insults to some object of religion, thefts of property belonging to societies, the destruction of the ornaments of a city,—these and others like them form a second kind of semi-public offences. The first sort are founded upon some *calamity* ; the second sort arise from *pure malice*.

SUBDIVISION OF PUBLIC OFFENCES. Public offences may be arranged under nine divisions.

1. *Offences against external security.* Those which tend to expose the nation to the attacks of a foreign enemy ; such as every act which provokes or encourages hostile invasion.

vate or semi-public. The more considerable the district or corporation is, the nearer do the offences which affect them approach to public offences. These three classes are consequently liable to be confounded more or less with each other. But this inconvenience is inevitable in all the ideal divisions which we are obliged to establish for the sake of order and perspicuity.

2 and 3. *Offences against justice and the police.* It is difficult to draw the line which separates these two branches of administration. Their functions have the same object, that of maintaining the internal peace of the state. Justice regards in particular offences already committed; her power does not display itself till after the discovery of some act hostile to the security of the citizens. Police applies itself to the prevention both of offences and calamities; its expedients are, not punishments but precautions; it foresees evils, and provides against wants.

Offences against justice and police are those which have a tendency to thwart or to misdirect the operations of these two magistracies.

4. *Offences against the public force.* Those which have a tendency to thwart or misdirect the operations of the military force destined to protect the state both against external enemies, and against such internal adversaries as the government cannot subdue except by an armed force.

5. *Offences against the public treasure.* Those which tend to diminish the revenue, and to disturb or divert the employment of funds destined to the service of the state.

6. *Offences against population.* Those which tend to a diminution of the numbers of the community.

7. *Offences against national wealth.* Those which tend to diminish the quantity or the value of the property belonging to the individual members of the community.

8. *Offences against the sovereignty.* It is the more difficult to give a clear idea of these offences, because there are many states in which it would be almost impossible to resolve the question of fact—Where does the supreme power reside? The following is the simplest explication. We ordinarily give the collective name of government to the whole assemblage of persons charged with the different political functions. There is commonly in states, *a person* or *a body of persons*, who assign and distribute to the mem-

bers of the government their several departments, their several functions and prerogatives; and who have authority over them, and over the whole. The person, or the collection of persons, which exercises this supreme power, is called the *sovereign*. Offences against the sovereignty, are those which tend to thwart or to misdirect the operations of the sovereign, thus having a direct tendency to thwart or misdirect the operations of the different parts of the government.

9. *Offences against religion.* Governments cannot possess either an universal knowledge of what passes in secret, nor an inevitable power which leaves the guilty no means of escape. To supply these imperfections of human power, it has been thought necessary to inculcate a belief in supernatural power. I speak generally of all religious systems, and not of any one in particular. To this superior power is attributed a disposition to maintain the laws of society, and to punish or to reward, at some future time, such acts as may have escaped punishment, or may have failed to be rewarded, among men. *Religion* is represented as an allegorical personage charged with preserving and strengthening among mankind a fear of this supreme judge. It follows that to diminish or to pervert the influence of religion, is to diminish or to pervert, in the same proportion, the service which the state receives from it, whether that service is exercised in repressing crime or encouraging virtue. Whatever tends to thwart or to misdirect the operations of this power, is an offence against religion.*

* The question here relates to the utility of religion in a political point of view, not to its truth. I say *offences against religion*, the abstract entity, not *offences against God*, the existent Being. For how can a sinful mortal offend an impassive *Being*, or affect his happiness? Under what class could this imaginary offence be arranged? Would it be an offence against his person, his property, his reputation, or his condition?

CHAPTER III.

Some other Divisions.

THE divisions of which we are about to speak, may all be resolved into the fundamental divisions already given; but they are sometimes employed for the sake of brevity, and to mark some particular circumstance in the nature of offences.

1. *Complex offences*, in opposition to *simple offences*. An offence which makes a joint attack upon the person and reputation, or upon the reputation and property, is a complex offence. A public offence may include a private offence. For example, a perjury which saves a criminal from punishment, is a simple offence against justice; a perjury which saves a criminal and at the same time causes the punishment to fall upon a person who is innocent, includes a public and a private offence. It is a complex offence.

2. *Principal and accessory offences*. The principal offence is that which produces the evil in question; accessory offences are acts which have a greater or less preparatory force towards the production of the principal offence. In the crime of counterfeiting, the true principal offence, is the act of issuing the false money; for thence comes his loss who receives it. The act of fabricating the false money, in this point of view, is only an accessory offence.

3. *Positive and negative offences*. Positive offence is the result of an act intended to produce that end. Negative offence results from a neglect to act; from not doing what one is bound to do.

With respect to defamation, Horace has well distinguished these two modifications of the offence:—

——— *Absentem qui rodit amicum,
Qui non defendit, alio culpante . . . hic niger est.*

——— Who blames an absent friend,—
Another blaming, who does not defend him,
They both are black.

Great offences are generally of the positive kind. The gravest of the negative kind belong to the class of public offences. If the shepherd allows himself to sleep, the flock will suffer.

There are many cases of negative offence, which in a perfect system, might and ought to be placed by the side of positive offences. To induce a man to go with a lighted candle in his hand into a room which we know to be full of loose gunpowder, and so to cause his death, is a positive act of homicide; while seeing him go of his own accord, and suffering him to do it, without warning him of the danger, is a negative offence to be ranged under the same head.*

4. *Imaginary offences.* These are acts which produce no real evil, but which prejudice, mistake, or the ascetic principle, have caused to be regarded as offences. They vary with time and place. They originate and end, they rise and they decay, with the false opinions which serve as their foundation. Such at Rome, was the offence for which vestal virgins were buried alive. Such are heresy and sorcery, which have caused so many thousand innocent victims to perish in the flames.

To give an idea of these imaginary offences it is not necessary to prepare a catalogue of them; it will be enough to indicate some principal groups. We say to the legislator, "The evil attributed to such actions is imaginary; it will be better not to prohibit them by law." Such is our advice;—to the legislator however, not to the citizen.

* It is proper to observe, however, that negative offences do not inspire the same degree of alarm, and that they are very difficult to prove.

We do not say,—“because they are imaginary, it will be well to commit them in spite of public opinion and the laws.”

Imaginary offences are, 1st. Offences against laws which impose religious belief, or religious practices. 2d. Offences which consist in making innocent bargains, bargains forbidden by the laws for false reasons; usury, for example. 3d. The offence of an artist or other person emigrating from his native country. 4th. Offences which consist in the violation of prohibitive rules of which the effect is to fetter one class of citizens for the benefit of another, such as a prohibition to export wool, intended to favor the manufacturer at the expense of the farmer.

We shall see hereafter that so far as the public is concerned, offences which originate in the sexual appetite, when there is neither violence, fraud nor an interference with the rights of others, and also offences against one's self, may be arranged under this head.

CHAPTER IV.

Evil of the second order.

THE alarm which different offences inspire is susceptible of many degrees, from disquiet up to terror.

But does not the more or less of alarm depend on the imagination, the temperament, age, sex, position, experience? Can we calculate beforehand effects which vary with so many causes? Has alarm so regular a progress that its degrees can be measured?

Though that which is subject to the imagination, a faculty so changeable and so fantastic, cannot be reduced to rigorous precision, yet the general alarm produced by dif-

ferent offences, follows proportions sufficiently constant, and capable of being determined. Alarm is greater or less according to the following circumstances.*

1st. The greatness of the evil of the first order.

2d. The intention of the delinquent.

3d. The position which has furnished him an opportunity to commit the offence.

4th. His motive.

5th. The greater or less facility of preventing like offences.

6th. The greater or less facility of concealing them, and of escaping punishment.

7th. The character of the delinquent. To this head belong relapses.

8th. The condition of the individual injured, by virtue of which those in a like condition may or may not feel the impression of fear.

It is in the examination of these circumstances that we shall find the solution of the most interesting problems of penal jurisprudence.

CHAPTER V.

Evil of the first order.

THE evil of the first order resulting from an offence, may be estimated according to the following rules :

1. The evil of a complex offence will be greater than that of either of the simple offences, into which it can be resolved.

A perjury, of which the effect shall be to cause the punishment of an innocent person, will produce more evil than

* All these circumstances, except the first and last, have this in common, that they render the repetition of the offence more probable.

a perjury which procures the discharge of a guilty one. In the former case, there is a private offence combined with the public offence; in the latter case there is only a public offence.

2. The evil of a demi-public or public offence, which evil propagates itself, will be greater than the evil of a private offence of the same kind. It is a greater evil to carry a pestilence into a whole continent, than into some small island with few inhabitants, and little frequented. It is this tendency to spread, in which consists the particular enormity of arson and inundation.

3. The evil of a demi-public or public offence, which, instead of multiplying itself, tends constantly to subdivision, will be less than that of a private offence of the same denomination. If the public treasury be robbed, the evil of the first order will be less than in the case of an equal robbery committed upon an individual; for the evil which the individual has suffered, can be made up by granting him, at the public expense, an indemnity equivalent to his loss. This being done, things will be brought to the same state as if the theft, instead of being committed upon Paul or Peter, had been directed against the public treasury.*

Offences against property are the only ones susceptible of this repartition; and the evil of these offences is diminished in proportion as it is distributed among a greater number, and as the individual sufferers are richer.

4. The total evil of an offence is increased, if there result from it a consequential evil to the same individual. If in consequence of an imprisonment or a wound, you have lost a place, a marriage, a lucrative business, it is plain that these losses are a net addition to the primitive evil.

5. The total evil of an offence is increased, if there result from it a derivative evil, which falls upon some other person.

* But though, in a case like this, the evil of the first order is less, it is not so with the evil of the second order,—that is, the alarm. But this will be considered in its proper place.

If in consequence of a wrong done to you, your wife or your children feel the miseries of want, this is an incontestable addition to the primitive evil.

Besides these rules, which enable us to estimate the evil of the first order, we must take the aggravations into account; that is, the particular circumstances which augment the evil. We shall presently exhibit a complete table of them, founded upon the following principles:—

1. Augmentation of evil resulting from an extraordinary portion of physical pain, not of the essence of the offence. *Addition of physical pain.*

2. Augmentation of evil by a circumstance which, to the essential evil of the offence, adds the accessory evil of terror. *Addition of terror.*

3. Augmentation of evil from some extraordinary circumstance of ignominy. *Addition of disgrace.*

4. Augmentation of evil from the irreparable nature of the damage. *Irreparable damage.*

5. Augmentation of evil arising from the extraordinary sensibility of the individual injured. *Aggravation of suffering.*

These rules are absolutely necessary. We must be able to calculate the evil of the first order, because in proportion to its apparent or real value, alarm will be greater or less. The evil of the second order is only a reflection of the evil of the first order. Other circumstances, however, modify the alarm.

CHAPTER VI.

Of Intention.

WHETHER a man commits an offence knowingly and willingly, or unwillingly and undesignedly, the immediate

evil is exactly the same. But the alarm which results is very different. We regard him who has done an evil with *knowledge and design*, as a bad and dangerous man. He who has done an evil without designing and without knowing it, is looked upon as a man to be feared only by reason of his inadvertence or his ignorance.

The security felt by the public, notwithstanding the commission of an offence, when the act was unintentional, is not surprising. Observe the circumstances of the act. The delinquent had no design to put himself in opposition to the law. He has either committed the offence because he lacked a motive to abstain from it, or it resulted from an unfortunate concurrence of circumstances; it is an isolated and fortuitous fact, which has no tendency to produce a repetition of itself. But an offence intentionally committed, is a permanent cause of evil. We see in what the delinquent has done, what he wishes to do, and what he is able to do again. His past conduct is a prognostic of his future conduct. Beside, the idea of a villain saddens and frightens us. It recalls to our minds that dangerous and mischievous class, which surrounds us with secret snares, and carries on its conspiracies in silence.

The people, guided by a just instinct, almost always say of an unintentional offender, that he is more deserving of pity than of blame. In fact, a man of no more than ordinary sensibility cannot but experience the most lively regrets at evils of which he is the innocent cause. He needs consolation rather than punishment. He is even less to be feared than any other man; his regrets for the past furnish a particular security for the future.

Beside, an offence committed without intention holds out the hope of indemnity. When a delinquent expects to encounter punishment, he takes precautions to cover himself against the law; an innocent man acts openly, and will not think of refusing a legal reparation.

Such is the general principle. Its application is a matter of considerable difficulty. To become well acquainted with all the characteristics of intention, it is necessary to examine all the different possible states of mind at the moment of action, as respects design and knowledge; and how numerous are the possible modifications of the understanding and the will!

An archer shoots an arrow, on which is written, *for Philip's left eye*; the arrow strikes Philip's left eye. Here is an intention corresponding exactly to the fact.

A jealous husband surprises his rival, and to perpetuate his vengeance, mutilates him. The operation produces death. In this case, the intention to kill was not full and absolute.

A hunter sees a deer and a man, close together. He really thinks that he cannot shoot at the deer without danger to the man. However, he shoots; and the man is killed. In such a case the killing was voluntary, but the intention to kill was only indirect.

As to the relation of the understanding to the different circumstances of an action, it may be in three states: *knowledge, ignorance, misinformation*. You may know that a beverage is a poison; you may know nothing about it; you may think it can do only a trifling injury, or that it is in certain cases, a remedy.

Such are the preliminaries for settling the question of intention. I shall not attempt at present to enter further into this difficult subject.

CHAPTER VII.

Position of the delinquent ; its effect upon alarm.

THERE are offences which anybody may commit ; there are others dependent upon a particular position, which furnishes the delinquent an occasion for the offence.

This latter circumstance tends, in general, to diminish the alarm, by contracting its sphere.

A larceny produces a general alarm. An act of peculation committed by a guardian upon his ward, produces hardly any.

Whatever might be the alarm caused by the extortions of an officer of the police, a contribution levied by robbers upon the highway, produces terror infinitely greater. Why ? Because everybody sees that an extortioner in place, however rapacious, still has some restraints and some limits. He must have occasions and pretexts to abuse his power ; while robbers on the highway threaten all the world, at all times, and are not at all controlled by public opinion.

This circumstance has the same sort of influence upon other kinds of offences, such as seduction and adultery. You cannot seduce the first woman you meet, as you might rob her. Such an enterprise requires an intimate acquaintance, a certain correspondency of rank and fortune, in one word, the advantage of a particular position.

Of two homicides, one committed to secure an inheritance, the other as a means of robbery, the first evinces a more atrocious character, but the second excites the greater alarm. The man who feels confident of the good disposition of his heirs, experiences no sensible terror at the first event ; but what security can he have against robbers ? The villain who commits a murder to make sure of an inheritance, is not

likely to change into a highway assassin. He will hazard a danger for the sake of an estate, which he would not risk for a few crowns.

This same observation may be extended to all offences which imply a violation of deposit, an abuse of confidence, or a misuse of power, whether public or private. They cause less alarm in proportion as the situation of the delinquent is more peculiar, the number of persons in similar situations smaller, and the sphere of the offence more limited.

However, there is one *important exception*. If the delinquent is clothed with great powers; if he envelops in his sphere of action a great number of persons; his situation, though peculiar, increases the circuit of alarm instead of diminishing it. Let a judge undertake to rob, to kill, to tyrannize; let a military officer make it his business to plunder, to vex, to shed blood; the alarm they will excite, being proportioned to the extent of their powers, may surpass that of the most atrocious robberies.

In these elevated positions, alarm may be created even without offence. A simple mistake without bad intention, may cause the most lively terror. Is an innocent man condemned to death by an honest but ignorant judge? The moment this mistake is known, the public confidence is wounded, the shock is everywhere felt, and inquietude reaches the highest point.

Fortunately, this kind of alarm may be arrested at once, by the displacement of the incompetent officer.

CHAPTER VIII.

The influence of motives upon the greatness of alarm.

IF the offence in question proceeds from a particular motive, rare, and belonging to a class of motives small in number, the alarm will have little extent. If it proceeds from a motive common, frequent, and powerful, the alarm will have a greater extent, because a greater number of persons will feel themselves to be in danger.

Compare the results of an assassination committed by a robber, with those of an assassination committed for revenge. In the first case, the danger is regarded as almost universal; the second is a crime which terrifies those only who have enemies, and enemies whose hatred has reached an uncommon pitch of atrocity. An offence which grows out of a party quarrel causes a greater alarm than the same offence when produced by private hostility.

Towards the middle of the last century, there existed in Denmark and a part of Germany, a religious sect whose principles were more frightful than the blackest passions. According to these fanatics, not good actions, but repentance, was the surest means of gaining heaven; and the efficacy of repentance would be the greater the more it absorbed all the faculties. Now the more atrocious was the crime, the greater certainty there was of giving to remorse an expiatory force sufficiently energetic. Upon the strength of this logic, a madman sought to merit salvation and a hanging, by the murder of an infant child. If this sect had been able to maintain itself, the human race would have come to an end.*

* I have somewhere read, that the great Frederic, when the first instance of this fanaticism made its appearance in Prussia, ordered the assassin to be shut up in a madhouse. He thought putting him to death would be rather a reward than a punishment. This was enough to put a stop to the crime.

Motives are commonly spoken of as *good* or *bad*. This is an error. Every motive, in the final analysis, is the perspective of a pleasure to be procured, or of a pain to be avoided. Now the same motive, which in certain cases leads to the performance of an action esteemed good, or indifferent, may lead in other cases to an action reputed to be bad. A beggar steals a loaf; another person buys one; a third works that he may get the means to buy. The motive which actuates all three, is one and the same, to wit, the physical pain of hunger. A pious man founds a hospital for the poor, another goes on a pilgrimage to Mecca, a third assassinates a prince whom he thinks to be a heretic; their motive may be exactly the same,—the desire of conciliating the divine favor, according to the different opinions which they have formed of it. A geometrician lives in an austere retreat, and gives himself up to the profoundest labors; a man of the world ruins himself and a multitude of creditors by excessive expenditures; a prince undertakes a conquest, and sacrifices myriads of men to his projects; an intrepid warrior rouses the courage of a beaten people, and triumphs over an usurper;—all these men may be animated by a motive exactly the same, the love of reputation.

In this way, we might examine all motives, and we should perceive that each of them may give birth to actions the most laudable, or the most criminal. Motives then ought not to be regarded as exclusively good or bad.

However, in considering the whole catalogue of motives, that is, the whole catalogue of pleasures and pains, we may classify them according to the tendency which they seem to have to unite or to disunite the interests of the individual and of the community. Upon this plan, motives may be distinguished into four classes,—the *purely social motive*, benevolence; *semi-social motives*, the love of reputation, the desire of friendship, religion; *anti-social motives*, antipathy in all

its branches ; *personal motives*, pleasures of sense, love of power, pecuniary interest, the desire of self-preservation.

The personal motives are the most eminently useful, the only ones whose action can never be suspended, because nature has entrusted to them the preservation of individuals. They are the great wheels of society ; but their movements must be regulated, moderated, and maintained in a right direction, by motives drawn from the two first classes.

It must not be forgotten that even the anti-social motives, necessary, to a certain degree, for the defence of the individual, may, and often do, produce useful actions, actions absolutely necessary to the existence of society ; for example, the denouncement and prosecution of criminals.

Another classification of motives may be made, by considering their more common tendency to produce good or bad effects. The social and demi-social motives may be called *tutelary motives* ; the anti-social and personal, may be denominated *seductive motives*. These denominations must not be taken in a rigorous sense, but they are not without justice and truth ; for whenever there is a conflict of motives acting in opposite directions, it is found that the social and demi-social motives generally operate in conformity with utility, while the anti-social and personal motives are those which tend the other way.

Without entering into a deeper investigation of motives, let us stop at that point in which the legislator is interested. To judge an action, it is necessary to look first to its effects abstracted from everything else. The effects being well ascertained, we may in certain cases ascend to the motive, in order to discover its influence on the greatness of the alarm, but without giving any attention to the good or bad quality which its common name implies.* For

* What I mean by the *common names of motives*, are those names which carry with them an idea of approbation or disapprobation. A

the most approved motive cannot transform a pernicious action into an action useful or indifferent ; nor can a motive the most reprobated transform a useful action into a bad one. All that the motive can do, is, to raise or lower the moral quality of the action. A good action prompted by a *tutelary* motive, becomes better ; a bad action founded on a *seductive* motive, is so much the worse. Let us apply this theory to practice. A motive belonging to the seductive class, is no offence in itself, but it may form a means of *aggravation*. A motive of the tutelary class will not have the effect to justify or to excuse, but it may serve to diminish the necessity of a punishment ; in other words, it forms a ground of *extenuation*.

Let us recollect that there is no room for considering the motive, except when it is manifest and palpable. It would often be very difficult to discover the true or dominant motive, when the action might be equally produced by different motives, or where motives of several sorts might have co-operated in its production. In the interpretation of these doubtful cases, it is necessary to distrust the malignity of the human heart, and that general disposition to exhibit a brilliant sagacity at the expense of good nature. We involuntarily deceive even ourselves as to what puts us into

neuter name is that which expresses the motive without any association of blame or praise, for example, *pecuniary interest, love of power, desire of friendship or favor, whether of God or man, curiosity, love of reputation, pain from the infliction of an injury, desire of self-preservation*. But these motives have common names, as avarice, cupidity, ambition, vanity, vengeance, animosity, &c. When a motive bears a name of reprobation, it seems contradictory to maintain that any good can result from it ; if it bears a name of favor, it seems equally contradictory to suppose it can result in evil. Almost all moral disputations rest upon this foundation of ambiguity. To cut them up by the roots, it is only necessary to give neuter names to motives. We can then go on with the examination of their effects, without being disconcerted by the common association of ideas.

action. In relation even to our own motives, we are wilfully blind, and are always ready to break into a passion against the oculist, who desires to remove the cataract of ignorance and prejudice.

CHAPTER IX.

Facility or difficulty of preventing offences. Their influence on alarm.

THE mind sets itself at once to examine the means of attack and the means of defence, and according as the offence is judged more or less easy to be consummated, our inquietude is greater or less. This is one of the reasons which raises the evil of an act of robbery so far above that of a theft. Force can effect many things which would be beyond the reach of stratagem. Robbery directed against a dwelling-house is more alarming than robbery on the highway; that done by night is more terrifying than that done in the day-time; that which is combined with arson, than that which is limited to ordinary means.

On the other hand, the greater facility we see in repelling an offence, the less alarming it appears to us. The alarm cannot be very great, when the offence cannot be perpetrated except with the consent of him who suffers by it. It is easy to apply this principle to cases of fraudulent acquisition, seduction, duels, and to offences against one's self, particularly suicide.

The rigor of laws against domestic theft has doubtless originated in the difficulty of guarding against it. But the aggravation which results from that circumstance, is not equal to the effect of another circumstance which tends to diminish the alarm, to wit, the peculiarity of position neces-

sary to furnish occasion for the theft. The domestic thief once known, is no longer dangerous. He needs my consent to plunder me; I must introduce him into my house, and give him my confidence. When it is so easy to guard against him, he can inspire only a very feeble alarm.*

CHAPTER X.

Effect produced upon alarm by greater or less facilities for secrecy.

THE alarm is greater, when by the nature, or the circumstances of the offence, it is more difficult to discover it, or to find out its author. If the delinquent remains unknown, his success is an encouragement to him and to others; there seems no limit to the impunity of similar offences; and the injured party loses the hope of indemnity.

There are offences which admit particular precautions adapted to secrecy, such as a disguise, the choice of the night as the time of action, and anonymous, threatening, extorsive letters.

There are also distinct offences, which are committed to render the discovery of other offences more difficult. Persons are imprisoned, abducted or murdered for the sake of suppressing their testimony.

In cases where, by the nature of the offence, the author must be known, the alarm is considerably diminished. Thus a personal injury resulting from some momentary transport of passion, excited by the presence of an enemy,

* The principal reason against severity of punishment in this case is, that it gives masters a repugnance to prosecute, and of course favors impunity.

inspires less alarm than a theft which affects concealment,—although the evil of the first order may be greater in the former case, than in the latter.

CHAPTER XI.

Effect of the delinquent's character upon alarm.

THE character of the delinquent will be presumed from the nature of the offence, especially from the magnitude of the evil of the first order, which is the most apparent part of it. Other presumptions will be furnished by circumstances and details attending the perpetration of the offence.

The character of a man will appear more or less dangerous, according as the tutelary motives appear to have more or less empire over him, as compared with the seductive motives.

There are two reasons why character ought to exert an influence upon the choice and the quantity of the punishment: first, because it augments or diminishes the alarm; secondly, because it furnishes an index of sensibility. There is no need of employing such strong means to restrain a character, weak, but good at bottom, as would be necessary in case of an opposite temperament.

The grounds of aggravation which may be derived from this source, are as follows:—

1. The less an injured party is capable of defending himself, the stronger ought to be the natural sentiment of compassion. The law of honor coming to the support of this instinct of pity, makes it an imperious duty to be tender with the feeble, and to spare those who cannot resist. The first index of a dangerous character is, *oppression of the weak.*

2. If weakness alone ought to excite compassion, the sight of suffering ought to act in that direction with a yet stronger force. A refusal to succor misfortune, forms of itself a presumption little favorable to character. But what shall we think of him who selects the moment of distress to add new anxieties to an afflicted spirit, to render a disgrace more bitter by a new affront, or to complete the plunder of suffering poverty? The second index of a dangerous character is, *aggravation of distress*.

3. It is an essential branch of moral police, that those who have been able to form superior habits of reflection, those in whom greater wisdom and experience can be presumed, should obtain the regard and the respect of those who have not been able, in the same degree, to acquire habits of reflection, and the advantages of education. This kind of superiority is commonly met with among the most distinguished citizens, in comparison with the less elevated, among the old men and the more aged of the same rank, and in certain professions consecrated to public instruction. There have been formed among the mass of the people, sentiments of deference and of respect, relative to these distinctions; and this respect, which is of the greatest use in repressing without effort the seductive passions, is one of the most solid foundations of morals and of laws. The third index of a dangerous character is, *disrespect towards superiors*.

4. When the motives which have led to crime are comparatively light and trifling, it is evident that the sentiments of honor and benevolence have very little force. If that man is esteemed dangerous who is pushed by an imperious desire of vengeance to transgress the laws of humanity, what shall be thought of him who gives himself up to acts of cruelty out of a mere motive of curiosity, imitation or amusement? The fourth index of a dangerous character is, *gratuitous cruelty*.

5. Time is particularly favorable to the development of

the tutelary motives. At the first assault of a passion, as at the first blast of a storm, the sentiments of virtue may bend for a moment; but if the heart is not perverted, reflection presently restores their former force, and leads them back in triumph. If a considerable space of time has elapsed between the project of a crime and its accomplishment, it is an unequivocal proof of a ripe and settled wickedness. The fifth index of a dangerous character is, *premeditation*.

6. The number of accomplices is another mark of depravity. This concert supposes reflection, and a sustained and continuous plan. Besides, the union of several against one, is the double mark of cruelty and of cowardice. The sixth index of a dangerous character is, *conspiracy*.

To these grounds of aggravation may be added two others less easy to classify—*falsehood*, and *violation of confidence*.

Falsehood impresses a deep and degrading blot upon the character, which even brilliant qualities cannot efface. In this respect public opinion is just. Truth is one of the first wants of man; it is one of the elements of our existence; it is as necessary to us as the light of day. Every instant of our lives we are obliged to form judgments and to regulate our conduct according to facts, and it is only a small number of these facts which we can ascertain from our own observation. There results an absolute necessity of trusting to the reports of others. If there is in these reports a mixture of falsehood, so far, our judgments are erroneous, our motives wrong, our expectations misplaced. We live in restless distrust, and we do not know upon what to put dependence. In one word, falsehood includes the principle of every evil, because in its progress, it brings on at last the dissolution of human society.

The importance of truth is so great, that the least violation of its laws, even in frivolous matters, is always attended with a certain degree of danger. The slightest

deviation from it, is an attack upon the respect we owe to it. It is a first transgression which facilitates a second, and familiarizes the odious idea of falsehood. If the evil of falsehood is so great, in things which are themselves of no consequence, what must it be upon those more important occasions, when it serves in itself as the instrument of crime?

Falsehood is a circumstance sometimes essential to the nature of an offence, and sometimes simply accessory. It is necessarily involved in perjury, and in fraudulent acquisition under all its modifications. In other offences, it is collateral and accidental. It is only in relation to these latter offences, that it can furnish a separate ground of aggravation.

Violation of confidence has reference to a particular position; to an intrusted power which imposes upon the delinquent some strict obligation which he has violated. It may be considered sometimes as the principal offence, and sometimes as an accessory offence. It is not necessary to enter here into details.

There is one general remark which may be made upon all these grounds of aggravation. Though they all furnish indications unfavorable to the character of the delinquent, that is no reason for a proportionate augmentation of punishment. It will be sufficient to modify it in a certain way, analogous to the attending aggravation, and so as to excite in the minds of the citizens a salutary antipathy against the aggravating circumstance. But this will become more clear when we treat of the means of rendering punishments characteristic.*

* We may here propose a question interesting to the moralist and the legislator:—If an individual indulges in actions which the public opinion condemns, but which, according to the principles of utility, it ought not to condemn, can we deduce from this circumstance an indication unfavorable to his character?

I answer, that a virtuous man, though he submits, in general, to the tribunal of public opinion, may still vindicate his independence in par-

Let us now pass to the *extenuations*, which may be derived from the same source of character, and which should have an effect to diminish punishment. I give this name to circumstances which furnish a favorable indication with respect to the character of the delinquent, and which tend in consequence to lessen the alarm. They may be reduced to nine.

1. Absence of bad intention.
2. Self-preservation.
3. Provocation.
4. Preservation of some near friend.
5. Transgression of the limit of self-defence.
6. Submission to menaces.
7. Submission to authority.
8. Drunkenness.
9. Childhood.

It is a point common to these circumstances, except the two last, that the offence does not originate in the will of the delinquent. The primary cause is, the act of another, the will of another, or some physical accident. Aside from that event, the offender would not have dreamed of the offence; he would have remained entirely innocent; and particular cases, in which he thinks the judgment of that tribunal contrary to reason and his own happiness; or where it demands a sacrifice painful to him, and of no real use to anybody. Take a Jew at Lisbon for example; he dissembles, he violates the laws, he braves an opinion which has all the force of popular sanction in its favor, and is he therefore the worst of men? Shall he be thought capable of all crimes? Would he calumniate, rob, and commit perjury if he had a hope of doing it with impunity? No; a Jew in Portugal is no more given to these offences than elsewhere.—Let a monk permit himself secretly to violate some of the absurd and painful observances of his convent, does it follow that he is a false and dangerous man, ready to violate his word upon a point where probity is involved? This conclusion would be quite unfounded. Simple good sense, enlightened by self-interest, is often able to explode a general error, without leading on that account to a contempt of essential laws.

even though he should not be punished, his future conduct would still be as good as if he had not committed the offence.

Each of the circumstances above enumerated, demands details and explanations. But I shall confine myself here to the observation, that the judge must be allowed a great latitude in appreciating the validity and extent of these different grounds of extenuation.

Does the question relate to a provocation? A provocation, to deserve indulgence, must be recent; it must have been received in the course of the same quarrel. But what constitutes the same quarrel? What ought to be looked upon as a recent injury? It is necessary to trace lines of demarcation. *Let not the sun go down upon your wrath*, is the precept of scripture. Sleep ought to calm the transport of the passions, the fever of the senses, and prepare the mind for the influence of the tutelary motives. In the case of homicide, this natural period might serve to distinguish what is premeditated and what is the effect of sudden passion.

In the case of drunkenness it is necessary to examine if the intention to commit the offence did not exist beforehand; if the drunkenness were not feigned; and if it were not designed to create energy for the perpetration. Repetition ought perhaps to annihilate this excuse. He who knows by experience that wine renders him dangerous, does not merit indulgence for the excesses into which it may lead him.

The English law does not admit any plea of extenuation in the case of drunkenness. That would be, it is said, to excuse one offence by another. This reasoning seems to be hardhearted and superficial. It springs from the ascetic principle, that austere and hypocritical doctrine, which those of a certain profession think themselves obliged to maintain, but which is scouted by all the rest of the world.

As to childhood, we do not here speak of that tender age which is not responsible for its actions, and at which punishments would produce no effect. Infancy of that sort is not an extenuation ; for in fact there is no offence. Such a child is not a moral agent. What good would be done by punishing judicially, for the crime of arson, an infant four years old ?

Within what limits ought this ground of extenuation to be restricted ? A limit sufficiently reasonable seems to be, the epoch at which enough of mental maturity is presumed to release a person from pupillage, and to render him master of himself. Before that period he is not thought to have sufficient understanding to be entrusted with the management of his own affairs. Why should the law despair, before it allows him to hope ?

It is not intended that the ordinary punishment ought necessarily to be diminished in the case of every offence committed before the age of majority. That diminution ought to depend upon all the circumstances of the case. What is intended is, that after that epoch is passed, punishment shall no longer be liable to diminution under the plea of childhood.

Infamous punishments are those which ought principally to be remitted under this plea. He who has no hope of recovering his reputation, will hardly recover his virtue.

When I speak of the age of majority, I do not mean the Roman majority, fixed at twenty-five years ; because it is an injustice and a folly to retard so long the liberty of men, and to retain them in the leading-strings of infancy after the full development of their faculties. It is the English rule of twenty-one years, which I have in view. We have seen Great Britain governed for years by a minister who managed, with great reputation, the infinitely complicated system of its finances, long before the age at

which, in the rest of Europe, he would not have been capable of selling an acre of land.

CHAPTER XII.

Cases in which there is no alarm.

THERE is no alarm whatever in those cases in which the only persons exposed to danger are incapable of fear.

This circumstance explains the insensibility of many nations on the subject of infanticide, that is, homicide committed on the person of a new-born infant, with the consent of the parents. I say, with their *consent*, for otherwise, the alarm would be almost the same as if the sufferer were an adult. As the susceptibility to fear is less on the part of infants, the more readily is paternal tenderness alarmed on their account.

I do not justify these nations. It is a striking additional mark of their barbarity that they have given to the father the right of destroying the infant without the consent of the mother, who, after all the dangers of maternity, is deprived of her reward, and reduced by this unworthy servitude to the same state with the inferior animals whose fecundity is a burden to us.

Infanticide, such as I have described it, ought not to be punished as a principal offence, since it produces no evil either of the first or of the second order. But it ought to be punished as an introduction to crimes, and as furnishing a proof against the character of those who commit it.

It is not possible to fortify too strongly the sentiments of respect for humanity, or to inspire too much repugnance against everything that conduces to cruel habits. This

offence ought then to be punished by branding it with disgrace. It is commonly the fear of shame which is its cause; it needs a greater shame to repress it. But at the same time the occasions for punishing it ought to be made very rare, by requiring for a conviction of it, proofs difficult to be collected.

The laws against this offence, under pretence of humanity, are a most manifest violation of it. Compare the offence with the punishment. The offence is what is improperly called the death of an infant, who has ceased to be, before knowing what existence is,—a result of a nature not to give the slightest inquietude to the most timid imagination; and which can cause no regrets but to the very person who, through a sentiment of shame and pity, has refused to prolong a life begun under the auspices of misery. And what is the punishment?—the barbarous infliction of an ignominious death upon an unhappy mother, whose very offence proves her excessive sensibility; upon a woman guided by despair, who, in hardening her heart against the softest instinct of nature, has harmed no one but herself! She is devoted to infamy because she has dreaded shame too much, and the souls of her surviving friends are poisoned with grief and disgrace! And if the legislator was himself the first cause of the evil; if he may justly be considered as the real murderer of these innocents, how still more odious does his rigor appear! It is he alone who, by severity against a weakness well entitled to indulgence, has excited that combat of tenderness and shame, which tears the mother's heart, and makes her the destroyer of her child.

CHAPTER XIII.

Cases in which there is greater danger than alarm.

THOUGH there is a general correspondency between *danger* and *alarm*, there are cases in which the proportion is not exact; the danger may be much greater than the alarm.

This is the case with all mixed offences which include a private evil, and at the same time a danger, whence results their character of public offences.

It might happen that a prince was robbed by faithless agents, and the public oppressed by subaltern vexations. The accomplices in these disorders, forming a powerful phalanx, might permit nothing but mercenary praises to reach the throne, and truth might be esteemed the greatest of crimes. Timidity, under the mask of prudence, would soon become the leading trait in the national character. If during this universal abjection, a virtuous citizen, daring to denounce the guilty, should become the victim of his zeal, his destruction would excite little alarm; his magnanimity would appear only an act of madness; and the citizens, promising themselves not to imitate his example, would be unmoved by a misfortune in their power to shun. But alarm, thus subsiding, gives place to a greater evil;—the danger of impunity to all public crimes; the cessation of all voluntary services to justice; a profound indifference for everything not personal to one's self.

It is said that in some of the Italian states, those who have given testimony against robbers or brigands, exposed to the vengeance of their accomplices, are obliged to seek in flight a security which the law does not afford. It is more dangerous to lend aid to justice than to take arms against it; a witness runs more risks than an assassin. The alarm which results from this state of things is not great,

because all can avoid exposure to the evil; but in proportion as alarm diminishes, danger is augmented.

CHAPTER XIV.

Grounds of Justification.

I PROCEED to speak of some circumstances which in connection with an offence operate to take away its injurious quality. We may give to these circumstances the common name of *means of justification*, or for shortness, *justifications*.

General justifications, which apply to nearly all offences, may be reduced to the following heads:—

1. Consent.
2. Repulsion of a greater evil.
3. Medical practice.
4. Self-defence.
5. Political power.
6. Domestic power.

How do these circumstances furnish justifications? We shall see that sometimes they import proof of the absence of evil; and sometimes they evince that the evil has been compensated, that is, that a good more than equivalent, has resulted from it. The question here relates to the evil of the first order; for in all these cases there is no evil of the second order. I confine myself to some general observations.

1. *Consent*; meaning the consent of the person who suffers the evil, if there is an evil. What more natural than to presume that there is in fact no evil, or that it is perfectly compensated, where there is such a consent? We therefore admit the general rule of the lawyers, that *he who consents*

suffers no injury. This rule is founded upon two very simple propositions: one, that every person is the best judge of his own interest; the other, that no man will consent to what he thinks hurtful to himself.

This rule admits many exceptions of which the reason is palpable;—such as coercion, fraud, concealment, a consent out of date or revoked, madness, drunkenness, childhood.

2. *Repulsion of a greater evil.* This is the case in which evil is done to prevent a greater evil. It is to this ground of justification, that we must refer the extreme measures which may become necessary on occasions of contagious diseases, sieges, famines, tempests, shipwrecks.

But the more serious a remedy of this nature is, the more evident ought its necessity to be. The welfare of the state has served as a pretext for all crimes. To give validity to this means of justification, three essential points must be established—the *certainty* of the evil to be avoided; the *absolute inapplicability* of any means less costly; the *certain efficacy* of the means employed.

It is hence that the justification of tyrannicide must be derived, were tyrannicide justifiable; but it is not; for it is not necessary to assassinate a hated tyrant, it is enough to desert him, and he is lost. James II. was abandoned by everybody, and the revolution was completed without the effusion of blood. Nero himself saw his power overthrown by a simple decree of the senate, and the death he was obliged to inflict with his own hand was a more terrible lesson for tyrants, than if it had been dealt by the dagger of a Brutus. Greece boasts its Timoleon; but we may see in the perpetual convulsions by which she was agitated, how ill this doctrine of tyrannicide accomplished its object. It only served to irritate suspicious tyrants, and to render them ferocious in proportion to their cowardice. When the blow failed, the vengeance was frightful. If it succeeded in

popular states, factions immediately regained all their violence, and the victorious party inflicted all the evils it had feared; in monarchies, the terrified successor harbored a profound resentment; and if he became oppressive, he disguised his tyranny under the plausible pretext of providing for his own security.

It is said that the penetrating eye of Sylla discovered more than a single Marius, in a voluptuous youth yet famous only for his debaucheries. He saw the fires of the most ardent ambition concealed under the most effeminate softness of manners, and he regarded those dissolute pleasures only as a cover to the project of enslaving his country. Would these suspicions have authorized him to put Cæsar to death? Is it a fact then, that an assassin only need turn prophet, to justify a murder? May an impostor, who pretends to a supernatural insight into futurity, immolate all his enemies for crimes not yet committed? Under pretence of avoiding an evil, this would be to produce the greatest of all evils, the annihilation of general security.

3. *Medical practice.* This ground of justification is only a subdivision of the preceding. An individual is made to suffer for his own good. A man is seized with an apoplexy. Shall we wait for his consent to bleed him? There cannot be a doubt as to the propriety of using the lancet, because it is very certain that it is not the patient's wish to die.

The case is very different if a man, master of his faculties, and able to consent, thinks proper to refuse it. Shall we give his friends or physicians the right to force an operation which he declines? This would be to substitute a certain evil for a danger almost imaginary. Distrust and terror would watch by the sick man's bed. If a physician, through humanity, goes beyond his right, and the experiment turns out unfavorably, he ought to be exposed to the rigor of the laws, and his intention, at most, should only serve as an extenuation of his offence.

4. *Self-defence.* This too is a modification of the second ground of justification. In fact, it is only the repulsion of a greater evil, since even the death of an unjust aggressor is a less evil for society, than the suffering of an innocent person. This right of defence is absolutely necessary. The vigilance of magistrates can never make up for the vigilance of each individual in his own behalf. The fear of the law can never restrain bad men so effectually as the fear of the sum total of individual resistance. Take away this right, and you become, in so doing, the accomplice of all bad men.

This ground of justification has its limits. Overt acts must not be employed except to defend the person or the property. To answer a verbal injury by a corporal injury, would not be self-defence; it would be, vengeance. Voluntarily to do an irreparable evil merely to avoid one which might be repaired, would be passing the legitimate bounds of self-defence.

But can we defend nobody but ourselves? Ought we not to have the right of protecting our fellows against an unjust aggression? Surely it is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is a noble movement which makes us forget our own danger at the first cry of distress. The law ought to beware how it enfeebles this generous alliance between courage and humanity. Let him rather be honored and rewarded who performs the function of the magistrate in favor of the oppressed. It concerns the public safety that every honest man should consider himself as the natural protector of every other. In this case there is no evil of the second order; on the contrary, all the effects of the second order are good.

5 and 6. *Political and domestic power.* The exercise of lawful power implies the necessity of doing evil to repress evil. Lawful power may be divided into political and

domestic. The magistrate and the father, or he who stands in the father's place, cannot maintain their authority, the one in the state, and the other in the family, unless they are armed with coercive means against disobedience. The evil which they inflict, is called punishment or chastisement. The whole object of these acts is, the good of the great or little society which they govern; and it is hardly necessary to say, that this exercise of lawful authority is a complete ground of justification, since no one would choose to be a magistrate or a father, if he were not secure in the exercise of his power.

PART SECOND.

POLITICAL REMEDIES AGAINST THE EVIL OF OFFENCES.

CHAPTER I.

Subject of this Part.

HAVING considered offences, as *diseases* of the body politic, we are led by analogy to regard as *remedies*, the means of prevention or redress.

These remedies may be arranged in four classes:—

1. Preventive Remedies.
2. Suppressive Remedies.
3. Satisfactory Remedies.
4. Penal Remedies, or Punishments.

Preventive Remedies are means which tend to prevent offences. They are of two kinds: direct means, which have an immediate application to such or such an offence in particular; indirect means, which consist in general precautions against an entire class of offences.

Suppressive Remedies are means which tend to put a stop to an offence already begun, an offence in progress but not completed, and so to prevent the evil, or at least a part of it.

Satisfactory Remedies consist of reparations or indemnities, secured to those who have suffered from offences.

Penal Remedies or *Punishments* are also useful; for after a stop has been put to the evil, after the party injured has been indemnified, it still remains, to prevent like offences, whether on the part of the same offender, or of others. There are two ways of arriving at that end; one, to correct the will, the other, to take away the physical power. To take away the inclination to repeat the act, is reformation; to take away the power, is incapacitation. A remedy which operates by fear, is called a punishment; whether or not it produces a physical incapacity, depends upon its nature.

The principal end of punishments is, to prevent like offences. What is past is but one act; the future is infinite. The offence already committed concerns only a single individual; similar offences may affect all. In many cases, it is impossible to redress the evil that is done; but it is always possible to take away the will to repeat it; for however great may be the advantage of the offence, the evil of the punishment may be always made to outweigh it.

These four kinds of remedies sometimes require as many separate operations; sometimes the same operation suffices for the whole.

In this part, I shall treat of direct preventive remedies, suppressive remedies, and satisfactory remedies; the third part will treat of punishments; in the fourth part, will be considered the indirect means of preventing offences.

CHAPTER II.

Direct means of preventing Offences.

BEFORE an offence is committed, it may give warning of its approach in many ways; it passes through a train of preparations which often allow it to be arrested before it reaches its catastrophe.

This part of police may be exercised either through functions assigned to all individuals alike, or by special powers entrusted to authorized persons.

The powers given to all the citizens for their protection are those which are exercised before justice takes cognizance of the matter, and which may be called, on that account, *ante-judicial* means. Such is the right to oppose open force to the execution of an apprehended offence; to seize a suspected person; to guard him; to carry him before a magistrate; to call in aid; to sequester into responsible hands articles believed to be stolen, or those the destruction of which it is desired to prevent; to summon the bystanders as witnesses; to require the passers-by to assist in carrying before the magistrates those who are suspected of bad designs.

The obligation of lending themselves to this service may be imposed upon all the citizens, and its fulfilment should be strictly required, as one of the most important duties of society. It will even be proper to establish rewards for those who may have aided to prevent an offence, or who have assisted to deliver the guilty into the hands of justice.

Is it said that these powers may be abused, and that unprincipled people may employ them to obtain assistance in an act of mere outrage? This danger is imaginary. The affectation of order and publicity would be quite unsuited to such views, and would too manifestly expose to

punishment. There is not much danger in granting rights which cannot be exercised but at the risk of suffering the legal consequences in case of their misapplication. To refuse justice the aid which it might receive from these means, would be to suffer an irreparable evil, through fear of an evil which carries with it its own redress.

Besides those powers which ought to appertain to every citizen, there are others, which should be confined to the magistrate, and which may be very useful in preventing apprehended offences.

1. *Admonition.* This is a simple intimation, given however by a judge, warning the suspected individual that he is watched, and recalling him to his duty by a respectable authority.

2. *Threats.* This is the same means reinforced by a menace of the law. In the first case, it is the persuasive voice of a father, in the second, it is a magistrate whose severe rebuke intimidates.

3. *Exacting a promise to keep away from a certain place.* This means, applicable to the prevention of many offences, is particularly so to quarrels, to personal injuries, and to seditious plots.

4. *Partial banishment.* A prohibition to the suspected person to go into the presence of the threatened party; to be found in the neighborhood of his house; or in any other place adapted to become the theatre of the apprehended offence.

5. *Security.* The obligation to furnish sureties, who are bound to forfeit a certain sum in case the required limits be passed over.

6. The establishment of *guards* or *watchmen* for the protection of the person or property in danger.

7. *Seizure* of arms or other implements designed to assist in the execution of the apprehended offence.

Besides these general means, there are others which may

be specially applied to certain offences; but I shall not enter here into these details of police and administration. The choice of these means, the occasion and the manner of applying them, depend upon a great number of circumstances; they are besides sufficiently simple, and almost always indicated by the nature of the case. If the question relates to a defamatory writing, it should be seized before publication; if it relates to things to be eaten or drunk, or to medicines of a dangerous nature, they ought to be destroyed before being put to use. Judicial visits and inspections are proper means to prevent frauds, clandestine acts, and offences of contraband.

This kind of cases seldom admits of precise rules. Something must be left to the discretion of public officers and judges. But the legislator ought to give such instructions as will prevent arbitrary abuses.

These instructions should rest upon the following maxims. The more rigorous is the means, the more scrupulous we ought to be as to its use. Greater liberties may be taken in proportion to the magnitude of the apprehended offence, and its apparent probability; in proportion as the delinquent appears more or less dangerous, and as he has more means of accomplishing his evil intentions. There is one limit which ought never to be passed. Never use a preventive means of a nature to do more evil than the offence to be prevented.

CHAPTER III.

Of Chronic Offences.

BEFORE treating of suppressive remedies, that is, of the means of stopping the progress of offences, we must first

discover what are the offences whose progress can be stopped; for there are some which do not admit of this measure; and those which do, do not all admit it in the same manner.

The capability of being stopped, supposes that the offence has a sufficient duration to admit the intervention of justice; but all offences do not have such duration. Some have a transient, others a permanent effect. Homicide and violation cannot be repaired. Theft may last only a moment, or if the thing stolen has been consumed or destroyed, it may last forever.

It is necessary to distinguish the circumstances according to which offences have a greater or less duration, because they have an influence on the suppressive means which may be applied to them.

1. An offence acquires duration by the simple continuation of an act, capable of ceasing at each instant, without ceasing to have been an offence. The detention of a person, the abstraction of a thing, are offences of this kind.

2. Wherever the design of committing an offence is regarded as an offence in itself, it is clear that the continuance of the offence will be co-extensive with the continuance of the design. This class of chronic offences is a subdivision of the former.

3. The greater part of negative offences, those which consist in omissions, have a certain duration. Not to provide for the support of a child, not to pay one's debts, not to appear at the summons of a court, not to make known one's accomplices, not to put a person in the enjoyment of a right that belongs to him,—all these appertain to this class.

4. There are material works, of which the continuance is a prolonged offence, such as a manufacture injurious to the health of a neighborhood, a building which obstructs a road, a dam which interrupts the course of a river.

5. Productions of the mind, through the intervention of printing, may have the same effect. Such are libels, pretended histories, alarming prophecies, obscene pictures, in one word, every thing which presents to the citizens, under the durable signs of language, ideas which ought not to be presented.

6. A series of repeated actions may have in their collectiveness, a character of unity, in virtue of which he who commits them is said to have contracted a habit. Such are the fabrication of false money, forbidden processes in a manufacture, and contraband in general.

7. There is a degree of duration in certain offences, which though distinct in themselves, yet taken together, assume a character of unity, because one is the occasion of the other. A man commits a theft in a garden, he beats the owner who hastens to oppose him, he pursues him into his house, insults his family, spoils his furniture, kills a favorite dog, and continues his depredations. Thus is formed an indefinite series of offences, the duration of which may give time for the intervention of justice.

8. There is a certain duration in the proceedings of a number of offenders, who, with or without concert, pursue the same object. Thus from a confused medley of acts of destruction, threats, verbal injuries, personal injuries, insulting cries, and provoking shouts, is formed that sad and fearful composition called a tumult, a rising, an insurrection,—forerunners of rebellion and civil war.

Chronic offences are apt to lead to a catastrophe. A projected offence ends in an executed offence. Simple corporal injuries have a tendency towards irreparable corporal injuries, and homicide. There is no offence of which imprisonment may not be the forerunner. It may be used for getting rid of a marriage tie which proves to be inconvenient, or to carry out a scheme of seduction; to suppress testimony, to extort a secret, to prevent a claim of property;

to force the prisoner to aid in some criminal enterprise;— in one word, imprisonment may always have some particular catastrophe according to the object of the offender.

In the course of a criminal undertaking, the end may change with the means. A thief surprised in the act, through fear of punishment, or enraged by the loss of his plunder, may become an assassin.

The foresight of the magistrate ought to picture in every case the probable catastrophe of the offence, and prevent it by a prompt and well-directed interference. In determining the punishment, reference must be had to the intentions of the offender; in applying preventive and suppressive remedies, we must take into account all the probable consequences, both those intended, and those which the offender overlooks, or does not foresee.

CHAPTER IV.

Suppressive Remedies for Chronic Offences.

THE different kinds of chronic offences demand different suppressive remedies. These suppressive means are the same as the preventive means of which we have given a catalogue. The difference is, in the time, and the application.

There are cases in which the preventive means to be used, correspond so visibly to the nature of the offence, that they scarcely need to be indicated. It is very plain that wrongful imprisonment demands release, and that theft requires restitution. The only difficulty is, to know where the person or thing detained can be found.

There are other offences, such as seditious meetings, and

some negative offences, particularly the non-payment of debts, which require more complicated means to suppress them. We shall have occasion to examine these cases under their proper head.

The evil of dangerous writings is an evil very difficult to suppress. They lie hid, they multiply, they revive with more vigor after the most notable attempts to destroy them. When treating of indirect means of prevention, we shall show how this evil may be most effectually met.

The magistrate must be allowed more latitude in the employment of suppressive, than in the use of preventive means. The reason is plain. When the question is to suppress, there is an actual offence, and consequently a punishment fixed for it. Too much is not risked to stop it, provided we do not go further than we must go to punish it. But while the point merely is to prevent an offence, we cannot be too scrupulous how we act; perhaps no such offence is intended, perhaps we are deceived in the person to whom we attribute the intention, perhaps the person suspected is acting in good faith, and instead of committing the offence, he will stop of himself. Each *perhaps*, demands a procedure milder and more moderate in proportion as the apprehended offence is more problematical.

The offences of illegal detention and deportation are of such a nature as to demand some particular means for preventing and suppressing them. These means may be reduced to the following precautions:—

1. To require a register of the houses, of all kinds, in which individuals are detained in spite of themselves, such as prisons, hospitals for the insane or for idiots, and private institutions for persons thus disordered.

2. To have a second register containing the causes of detention, and not to permit a person of unsound mind to be detained till after a juridical consultation of physicians. These two registers, kept in the tribunals of each district,

should be publicly exposed, or at least left open to be consulted by everybody.

3. To establish some signal, such as shall be as much as possible in the power of a person forcibly carried away, which shall be a sufficient authority to any passer-by, to call the ravishers to account, to accompany them if they declare an intention to carry the prisoner before a magistrate, and to compel them to go, if they evince a different intention.

4. Granting to all the right to obtain authority to search every house in which they suspect a person to be forcibly detained.

CHAPTER V.

Observations upon Martial Law.

IN England, in the case of seditious disturbances, it is not the fashion to begin by a military assassination. Warning precedes the punishment; martial law is proclaimed, and the soldier cannot act till the magistrate has spoken.

The intention of this rule is excellent, but what shall we say of its execution? The magistrate is obliged to go into the midst of the tumult, he must pronounce a long drawing formula, which nobody understands; and bad luck to those who are on the spot an hour after!—they are declared guilty of a capital offence. This statute, dangerous for the innocent and difficult to be executed against the guilty, is a mixture of weakness and violence.

In such a moment of disorder, the magistrate ought to announce his presence by some extraordinary signal. The *red flag*, so famous in the French revolution, had a great

effect upon the imagination. In the midst of cries, the ordinary means of language do not answer. The multitude cannot hear; it is necessary to speak to their eyes. An harangue supposes attention and silence; but visible signs have a rapid and powerful operation. They say at once all they have to say; they have but one sense, and that unequivocal; a studied disturbance, a concerted uproar, cannot prevent their effect.

Besides, words lose their influence through a multitude of unforeseen circumstances. If the orator is personally odious from his mouth even the language of justice is hateful. If his character, his air, or the style of his oratory, have in them anything ridiculous, this ridicule extends to his official acts. Here is an additional reason for speaking to the eyes by respectable symbols, not subject to like caprices.

But as it may be necessary to join words to signs, a speaking trumpet is an essential accompaniment. The singularity even of that instrument would give to the orders of justice more dignity and eclat; it would banish every idea of familiar conversation, and convey the notion of not hearing a man, the mere individual magistrate, but the privileged minister, the herald of the law.

This means of being heard afar has long been used at sea. There, distance and the noise of winds and waves early made evident the insufficiency of the human voice. The poets have often compared a tumultuous people to a stormy ocean. Does this analogy belong exclusively to the agreeable arts? It would be of much more importance in the hands of justice.

The orders should be in few words—nothing which is of the nature of ordinary discourse or discussion. Let it not be *by command of the king*. Speak in the name of justice. The chief magistrate may be an object of hatred, just or unjust; perhaps that very hatred is the cause of the

tumult. To call up his image would be to inflame passions instead of allaying them. If not odious already, such a procedure would expose him to become so. Every favor, everything which bears the character of pure beneficence, ought to be presented as the personal act of the father of his people. All rigorous proceedings, those of severe benevolence, ought to be attributed to nobody. Let the hand that acts be veiled. Throw the responsibility upon some creature of reason, some animated abstraction; such as *Justice*, daughter of necessity and mother of peace, whom men ought to fear, but whom they cannot hate, and who ought always to possess their supremest homage.

CHAPTER VI.

Nature of Satisfaction.

SATISFACTION is a good received, in consideration of a damage suffered. If the question relate to an offence, satisfaction is an equivalent given to the party injured on account of the damage he has sustained.

Satisfaction is *complete*, whenever the good conferred is equal to the amount of evil suffered; so that if the injury should be repeated and the same reparation should follow, the event would appear indifferent to the injured party. If something is wanting to raise the value of the good to an equality with the evil, the satisfaction is partial and imperfect.

Satisfaction has two aspects or two branches, the past and the future. Satisfaction for the past, is what is called *indemnity*; satisfaction for the future, consists in putting a stop to the evil of the offence. If the evil ceases of itself,

nature has performed the functions of justice, and in this respect, the tribunals have nothing more to do.

If a sum of money has been stolen, from the moment it is restored to the owner, the satisfaction for the future is complete. It only remains to indemnify him for the past, for the temporary loss which he experienced while the offence continued.

But if the question is of a thing spoiled or destroyed, satisfaction for the future can only take place by giving to the party injured a similar or equivalent article. Satisfaction for the past would consist in an indemnity for the temporary privation.

CHAPTER VII.

Reasons on which the necessity of satisfaction is founded.

SATISFACTION is necessary to put a stop to the evil of the first order, to re-establish things in the state in which they were before the offence was committed, and to restore the sufferer to the condition in which he would have been, if the law had not been violated.

Satisfaction is yet more necessary to put a stop to the evil of the second order. Punishment alone is not sufficient for that purpose. It tends, without doubt, to diminish the number of offenders; but this number, though diminished, can never be considered as nothing. Examples of the commission of offences, as they are more or less known, excite more or less of apprehension. Every observer sees in them the chance of suffering in his turn. If it be desired to dissipate this sentiment of fear, it is necessary that the offence should be as constantly followed by satisfaction as by punishment. If it were followed by punishment without satisfaction, as many offenders as were punished, so many

proofs there would be of the inefficacy of punishment; and consequently so much alarm weighing upon society.

But here needs to be made an essential observation. To take away the alarm, it is enough that the satisfaction is complete in the eyes of observers, although not complete to the persons interested. How can we determine whether the satisfaction is complete for him who receives it? The balance, in the hands of passion, would always incline to the side of interest; to the greedy it would be impossible to give enough; the vindictive never would think his adversary sufficiently humbled. We must suppose then an impartial observer, and regard that satisfaction as sufficient which he would estimate as equivalent to the evil endured.

CHAPTER VIII.

The different kinds of satisfaction.

WE may distinguish six kinds:—

1. *Pecuniary satisfaction.* As money is a pledge for the greater part of pleasures, it is an efficacious compensation for a multitude of evils. But it is not always in the offender's power to pay it, nor always proper that the offended party should receive it. To offer a man whose honor has been outraged, a compensation in money for the insult, is a new affront.

2. *Restitution in nature.* This satisfaction consists, either in returning the thing taken away, or in giving a thing similar or equivalent to that taken away or destroyed.

3. *Attestatory satisfaction.* If the evil results from a falsehood, a statement false in point of fact, satisfaction is complete by a legal attestation of the truth.

4. *Honorary satisfaction.* An operation which has for

its end either to maintain or to re-establish in favor of an individual a portion of honor, of which the offence had deprived him, or threatened to deprive him.

5. *Vindictive satisfaction.* Everything which implies a manifest pain to the offender, implies a pleasure of vengeance to the party injured.

6. *Substitutive satisfaction,* or satisfaction at the expense of a third party; when a person not a party to the offence is held responsible in his fortune, for the person who committed it.

To determine our choice as to the kind of satisfaction, three things must be considered,—the *ease* of furnishing it; the *nature* of the evil to be compensated; and the probable *sentiments* of the party injured. These different heads will presently be taken up, and more fully considered.

CHAPTER IX.

The quantity of satisfaction.

As much as the satisfaction fails of being complete, to the same degree the evil remains without a remedy.

We may fix, by two rules, what is necessary to prevent a deficit in this respect.

1st. *Follow the evil of the offence in all its ramifications, and among all parties to it, and proportion the satisfaction accordingly.*

If the question relates to irreparable corporal injuries, two things must be considered; a means of enjoyment, and a means of subsistence taken away forever. There cannot be a compensation of the same nature, but there ought to be applied to the evil a perpetual periodical remedy.

If the question relates to a homicide, it is proper to consider the loss experienced by the heirs of the deceased, and to make it up by a gratification paid at once, or periodically for a longer or shorter term.

If the question relates to an offence against property, we shall see, under the head of pecuniary satisfaction, what is required to put the reparation on a level with the offence.

2d. In doubtful cases, the balance ought to incline in his favor who has suffered the injury, rather than in favor of him who committed it.

All accidents ought to be at the risk of the offender. All satisfaction ought rather to be superabundant than defective. If superabundant, the excess, being in the nature of a punishment, cannot but serve to prevent like offences. If defective, that deficit always leaves a certain degree of alarm; and in vindictive offences, all the unsatisfied evil is a matter of triumph to the offender.

Laws are everywhere very imperfect upon this point. On the side of punishments, there has been little fear of excess; on the side of satisfaction, a deficit has caused little concern. Punishment, which, if it goes beyond the limit of necessity, is a pure evil, has been scattered with a prodigal hand. Satisfaction, which is purely a good, has been dealt out with the most evident parsimony.

CHAPTER X.

The certainty of satisfaction.

CERTAINTY of satisfaction is an essential branch of security; and in proportion as this certainty is wanting, in the same proportion security is diminished.

What shall be thought of those laws, which to the natural

causes of uncertainty, add other factitious and voluntary causes? To obviate this defect, the following rules are necessary.

1st. *The obligation to satisfy ought not be extinguished by the death of the injured party. The satisfaction due to the deceased, is due to his heirs.*

To make the right of receiving satisfaction dependent upon the life of an individual, is to take away from that right a part of its value. It is like reducing a perpetual annuity into an annuity for life. Satisfaction is not to be obtained except by a process which may last a long time. If the claimant is an aged or infirm person, the value of his right fluctuates with his health; if the claimant is on his death-bed, his right is worth nothing.

Moreover, if you diminish on one side the certainty of satisfaction, you increase on the other the hope of impunity. You show in perspective to the offender a time when he may hope quietly to enjoy the fruit of his offence. You give him a motive to retard, by a thousand impediments, the judgment of the court, and even to hasten the death of the injured party. At all events, you put out of the protection of the law those persons who have the greatest need of it,—the dying and the sick.

It is true, that although the obligation of satisfaction be extinguished by the death of the injured party, the offender may still be subjected to another punishment; but what other punishment can be so fit and proper?

2d. *The right of the injured party ought not to be extinguished by the death of the offender, the author of the wrong. The satisfaction due from him, is due from his heirs.*

To determine otherwise would be to diminish the value of the right, and to encourage offences. A man conscious that death was near, might commit an injustice with no other object except to advance the fortune of his children,—a case more common than is generally supposed.

Is it said that if satisfaction be given to the injured party, after the death of the delinquent, it is only by an equivalent suffering imposed upon his heirs? But there is a great difference between the two cases. The expectation of the injured party is a clear, precise, decided expectation, firm in proportion to his confidence in the protection of the laws. The expectation of the heir is but a vague hope. The object of it is not the entire succession, but a certain, unknown, net produce, after all lawful deductions. That which the deceased might have spent in pleasures he has spent upon injustice.

CHAPTER XI.

Pecuniary Satisfaction.

THERE are cases in which pecuniary satisfaction is demanded by the very nature of the offence; there are other cases in which it is the only satisfaction that circumstances permit.

It should be employed by preference, upon occasions where it promises to have the greatest effect.

Pecuniary satisfaction is at its highest point of propriety in cases where the damage experienced by the injured party, and the advantage obtained by the delinquent, are alike of a pecuniary nature; as in theft, peculation, and extortion. The remedy and the evil are homogeneous; the compensation may be exactly measured by the loss, and the punishment by the profit of the offence.

This kind of satisfaction is not so well founded when there is a pecuniary loss upon one side, without any pecuniary profit upon the other; as in the case of offences committed through hostility, negligence, or accident.

It has still less foundation in those cases in which it is not possible to value in money either the evil of the party

injured, or the advantage of the offender; as in case of injuries to honor.

The more a means of satisfaction is incommensurable with the injury; the more a means of punishment is incommensurable with the advantage of the offence; the more likely are both to fail of their end.

The old Roman law which appointed a fixed sum of money as the damages for a blow, was no protection to honor. The reparation having no common measure with the outrage, its effect was precarious, whether as a satisfaction or a punishment.

There is still in existence an English law, which is a true relic of barbarous times. A daughter is considered as the servant of her father; if she is seduced, the father cannot obtain any other satisfaction than a sum of money, the price of the domestic services which he is supposed to have lost by the pregnancy of his daughter.

As respects injuries to the person, a pecuniary indemnity may be proper or not, according to the respective wealth of the parties.

In regulating a pecuniary satisfaction, the two branches of the past and the future must not be forgotten. Satisfaction for the future consists merely in putting a stop to the evil; satisfaction for the past consists in an indemnity for the wrong endured. To receive a sum due, is a satisfaction for the future; to receive the accrued interest upon that sum, is a satisfaction for the past.

Interest ought to begin from the happening of the evil to be compensated; from the moment, for example, when the debt became due; when the thing in question was taken, damaged or destroyed; or when the service to which one had a right, was refused.

This interest, granted as a satisfaction, ought to be higher than the ordinary rate of commerce; at least, whenever there is a suspicion of bad faith. Such an excess is very

necessary. If the interest did not exceed the customary rate, there would be cases when the satisfaction would be incomplete, and other cases in which a profit would result to the offender,—the pecuniary profit, for example, of obtaining a forced loan at the ordinary interest; a pleasure of vengeance or hostility, if the offender has wished to keep the injured party in need, and to enjoy his distress.

For the same reason, compound interest should be allowed; that is, every time a payment of interest became due, that interest should be added to the principal, and should become a part of it. The capitalist, at each payment, might have converted his interest into capital, or have drawn an equivalent advantage from it. If this part of the damage is left without satisfaction, there will be a loss to the innocent party, and a gain to the delinquent.

The expense of satisfaction ought to be shared among the offenders in proportion to their wealth, or, according to circumstances, in proportion to their respective degrees of criminality. For in fact, the obligation to satisfy is a punishment; and it would be in the highest degree unequal if co-delinquents of unequal wealth were mulcted in the same sum.

CHAPTER XII.

Restitution in nature.

RESTITUTION in nature is chiefly important in the case of property which possesses a value of affection.*

* Such as immovables in general, also family relics, portraits, the handiwork of a dear friend, domestic animals, antiquities, curiosities, pictures, manuscripts, instruments of music, in fine, everything which is unique, or which appears to be so.

But it is due in every case. The law ought to assure me everything which is mine, without forcing me to accept equivalents, even though I have no particular objection to them. Without restitution in nature, security is incomplete. How can we be secure as to the whole, when we are secure of nothing in particular?

A thing taken away, either in good or bad faith, may have passed into the hands of a stranger who holds it in good faith. Shall it be restored to the former owner, or be kept by the new one? The rule is simple. The thing ought to remain with the person who may be supposed to have the greatest affection for it. This superior degree of affection may be easily estimated, from the relations of the two parties to the thing in question, from the time they have possessed it, from the services they have drawn from it, from the cares and expense it has cost them. These indications commonly unite in favor of the original owner.*

The preference is also due to him in doubtful cases, and for these reasons:—1st. The new owner may have been an accomplice in the fraudulent acquisition, though it may be impossible to get proofs of it. This suspicion is not unjust; formed by the law and not by man, bearing upon the class and not upon the individual, it does not impeach anybody's honor. 2d. If the new owner was not an accomplice, he may have been guilty of negligence or rashness, either by omitting ordinary precautions to verify the title of the seller, or by putting an undue confidence in proofs of little weight.

* When the thing or animal in question is of the kind which produces its like, we may ascertain, by the same considerations, on which side is likely to be the superiority of affection as respects its fruits or offspring, as wine of a particular vineyard, the colt of a favorite horse, &c. It may well be that the claims of the former owner are not so strong in this case as in the other. The new possessor is only owner at second hand of the thing or animal that produces, but he is the first owner of the things produced.

3d. When the question relates to grave offences, such as robbery, the preference ought to be given to the former possessor, in order to strengthen the motives which induce him to prosecute. 4th. If the spoliation has been an act of malice, to leave the thing in the possession of anybody except the injured party, would be to leave the offender a gainer by the offence.

A purchase of such articles at a low price ought always to be followed by restitution, at the price paid. If this circumstance does not prove the purchaser to be an accomplice, it always carries with it a strong presumption of bad faith. The purchaser cannot have overlooked the probability of a wrongful possession on the part of the seller; for it is the danger of carrying them to an open market which causes the low price of stolen goods.

When the possessor, though esteemed innocent, is obliged, on account of the bad faith of the seller, to restore the thing to the original owner, there ought to be awarded to him a pecuniary equivalent, to be fixed by the magistrate.

The expenses of preservation, and for a stronger reason, the costs of improvements, and other extraordinary outlays, ought to be liberally allowed to him who restores the property. This is not only a means of favoring general wealth, it is for the interest even of the original proprietor, though the indemnity be paid at his expense. According as this indemnity is granted or refused, the improvement of the thing is favored or prevented.

Neither the original owner nor the subsequent possessor ought to gain at the expense of the other. The losing party ought to be allowed a claim of indemnity, first against the offender, and in his default, upon the subsidiary fund of we shall presently speak.

When an identical restitution is impossible, there ought to be substituted for it, as far as may be, the restitution of a similar thing. Suppose two rare medals of the same com-

age. The owner of one of them has seized upon the other, and spoiled or lost it, by negligence or design. In such a case the best satisfaction is, to give *his* medal to the injured party.

In offences of this kind, pecuniary satisfaction is liable to prove insufficient or useless. A value of affection is seldom appreciated by third persons. It needs a very enlightened benevolence, and philosophy very uncommon, to sympathize with tastes different from our own. The Dutch florist who sells tulip bulbs for their weight in gold, laughs at the antiquary who pays a great price for a rusty lamp.*

Legislators and judges have too often thought like the vulgar. They have applied gross rules to cases which required a nice discernment. There are cases in which the offer of money is not a satisfaction, but an insult. Shall a lover take money as the price of his mistress' portrait, of which a rival has robbed him?

Mere restitution in nature leaves a deficiency of satisfaction, proportioned to the amount of enjoyment lost during the continuance of the offence. An example will show how this amount is to be estimated. Suppose a statue illegally taken away. This statue put up at auction would

* Some years since a canary-bird was the subject of a lawsuit before one of the parliaments of France. A journalist who gave an account of it amused himself at the expense of the parties, and regarded the whole affair as very ridiculous. I cannot agree with him. Is it not the imagination which gives a value to the objects esteemed most precious? As laws are made only out of deference to the universal sentiments of men, can they show too much anxiety to guard everything which makes a part of human happiness? Should they not acknowledge and protect the sensibility which attaches us to creatures we have raised and familiarized, and who in their turn are attached to us? This lawsuit, so frivolous in the eyes of the journalist, was but too serious a matter, since one of the parties had sacrificed to it, to say nothing of money, his probity and his honor. Can an object rated so highly, be considered a trifle?

have brought an hundred pounds sterling, according to the estimate of experts. A year elapses between the robbery and the restitution ; interest is at five per cent. Put down, under the head of satisfaction for the past, ordinary interest, five pounds, additional for penal interest, (see ch. xi.) say two pounds ten shillings ; total, seven pounds ten shillings.

In fixing the damages, we must not forget the deterioration, whether accidental or necessary, which the thing may have undergone in the interval between the commission of the offence and the restitution. The statue would not have deteriorated, at least not necessarily ; but a horse of the same price must, of course, have diminished in value. A collection of tables of natural deterioration, year by year, according to the nature of the several articles, is one of the things which the library of justice requires.

CHAPTER XIII.

Attestatory satisfaction.

THIS means of satisfaction is particularly adapted to offences of falsehood whence there is liable to result an opinion prejudicial to an individual, but the weight of which, its extent, and even its existence, cannot be established by evidence. While the error exists, it is a constant source of actual or probable evil ; there is but one means of arresting it, and that is, to make its falsehood evident.

This is the proper place for enumerating the principal offences of falsehood.

1. *Simple mental injuries, consisting in the spread of false alarms ;* for example, stories of apparitions, ghosts, vampires, sorcerers, diabolical possessions ; false reports of a nature to strike some individual with fear or sadness,

pretended deaths, stories of the bad conduct of near relations, of conjugal infidelities, of losses of property; falsehoods adapted to alarm a class more or less numerous, as reports of contagious diseases, invasions, conspiracies, conflagrations, &c.

2. *Offences against reputation*, of which there are many kinds: *defamation*, by the positive statement of particular injurious facts; *diminution of reputation*, which consists in weakening what cannot be destroyed,—concealing from the public, for example, a circumstance which would add to the eclat of a celebrated action; *interception of reputation*, which consists in preventing the performance of an action honorable to the individual in question, or in taking from him the occasion of distinguishing himself by causing an enterprise to be regarded as impossible, or finished already; *usurpation of reputation*, of which all plagiarisms, whether of authors or artists, are examples.

3. *Fraudulent acquisition*. Examples—false reports to affect the rate of exchange, or the price of stocks.

4. *Disturbance in the enjoyment of domestic and civil rights*. Examples—denying to a husband, a wife, or a child their legal titles to that condition; or setting up a false claim of that nature; or aiding in a like falsity in regard to any privilege or civil condition.

5. *Preventing acquisition*. Preventing a man from buying or selling by false reports as to the value of the thing, or his right to dispose of it. Preventing a person from acquiring a certain condition, such as marriage, by false reports which make him postpone it, or give it over.

In all these cases the arm of justice is powerless; forcible means are null or imperfect. The only efficacious remedy is, an authentic declaration which destroys the falsehood. To dissipate error, to publish the truth,—how respectable a function, how worthy of the highest tribunals!

What should be the form of attestatory satisfaction? It may vary with the means of publicity; it may consist in printing and publishing the judgment at the expense of the offender; in handbills distributed under the direction of the injured party; or publications in the national and foreign newspapers.

The idea of this satisfaction, so simple and so useful, is drawn from French jurisprudence. When a man had been calumniated, the parliaments almost always ordered that the sentence which re-established his reputation, should be printed and circulated at the expense of the calumniator.

But why force the offender to declare that he has been guilty of false charges, and to acknowledge publicly the honor of the party interested? This form is objectionable in several respects. It is wrong to compel a man to the expression of certain sentiments, which perhaps he does not entertain, and to risk the judicial command of a falsehood. It is wrong to enfeeble the reparation by an act of constraint; for what does a compulsory retraction prove, except the weakness or the fear of him who utters it?

The offender may be the organ of his own condemnation if it be thought fit so to augment the punishment; but he may be so, without swerving from the exactest truth, provided the formula prescribed to him includes only the opinion of the court, as being the opinion of the court, not his own. "The court has decided that I have alleged a falsehood;—the court has adjudged that I have departed from the character of an honest man;—the court are of opinion that in all this business my opponent has conducted himself like a man of honor." This is all that concerns the public, or the injured party. This is triumph enough for truth, humiliation enough for the offender. What is gained by forcing him to say, "I have alleged a falsehood;—I have departed from the character of an honest man;—my opponent has comported like a man of honor?" This declaration, strong-

er than the former, in appearance, is much less so in reality. The fear which dictates such avowals, does not change the actual sentiments of the speaker; and when the mouth pronounces them before a numerous audience, all feel and understand that the heart makes no assent.

Where the question is of a fact, the court is less likely to be deceived; and a direct avowal of falsehood exacted in his own name, from the guilty party, will almost always be conformable to his intimate opinion; but when the question relates to an opinion, to wit, that of the offender, a disavowal which is commanded will almost always be contrary to his interior conviction. In such contests, impartial people will condemn an individual ten times for once that he condemns himself.

Even if he is calm enough to give himself up to reflection, the triumph of his opponent is before his eyes, he is himself the instrument of it, and the irritation of wounded pride must increase his prejudices. He may have been deceived, and you compel him to accuse himself of falsehood; you place him in a cruel position, where, the honester he is, the more he will suffer; that is, he will be more severely punished in proportion as he deserves it less.

How many scoundrels, by the decision of a court, would make themselves be declared men of honor and probity, by the very persons who best knew the contrary! Besides, what signifies such a general declaration? Because a particular imputation is false or doubtful, does it follow that a man's character is above all imputation? Because a person has been once slandered, is his reputation therefore above all blame? Let one of these patents of honor be once granted to a man in bad estimation, and at once a contradiction appears between public opinion and the sentence of the judges; their authority is weakened, and they are no longer resorted to for a remedy, which by being badly administered has lost its efficacy.

With respect to promises, less reserve is necessary. It is enough if the engagement includes nothing contrary to honor, or to probity. For example, a promise ought not to be extorted from a man to serve against his country or his party; but a promise not to fight may be extorted, because such an undertaking on his part produces no loss to his party or his country; for he would not have been able to serve them, if instead of being set at liberty upon his promise, he had been put to death, or kept in irons.

CHAPTER XIV.

Honorary Satisfaction.

WE have seen what remedy can be provided for those offences against reputation of which falsehood is the instrument. But there are others more dangerous; hatred has surer means of striking a deadly blow at honor. It does not always lurk under a timid calumny; it makes an open attack; not however by those violent means which put the person in danger. Humiliation is its end. An act the least painful in itself, is often the most so in its consequences; a greater evil to the person would be a less injury to the honor; for when we would make a man an object of contempt, we should avoid exciting in his favor a sentiment of pity which will produce an antipathy against his adversary. Hatred has exhausted all its refinements upon this kind of offences. They must be opposed by those particular remedies to which we give the name of *honorary satisfaction*.

To perceive the necessity of this course, it is necessary to examine the nature and tendency of these offences; the

causes of their importance ; the remedy hitherto applied to them by the usage of duelling ; and the imperfection of that remedy. These inquiries, which relate to all that is most delicate in the human heart, have been almost entirely neglected by those who have made laws ; and yet they are the first foundation of all good legislation upon the subject of honor.

In the actual state of manners among the most civilized nations, the ordinary and natural effect of these offences is, to take from the offended person a more or less considerable portion of his honor ; that is, he no longer enjoys the same esteem among his fellows ; he loses a proportional part of the pleasures, services and good offices of every kind, which are the fruits of that esteem ; and he finds himself exposed to the disagreeable consequences of their contempt.

Now as the evil, at least the essential part of it, consists in this change in the sentiments of men, it is they who ought to be considered as its immediate authors. The nominal offender has inflicted but a trifling wound, which left to itself, would soon close up. It is other men who pour a poison into it, which makes it dangerous, and often incurable.

At the first view, the rigor of public opinion against an insulted person seems a piece of revolting injustice. Does a man stronger or more daring abuse his superiority to mal-treat, in a certain manner, a person whose feebleness ought to be his protection ? All the world, as if by a concerted movement, instead of being angry with the oppressor, arrange themselves upon his side, and heap upon his victim a succession of cowardly sarcasms and neglects, often more bitter than death itself. At the signal of some worthless wretch, the public eagerly dashes upon the innocent object of his malice, like a ferocious dog, which only waits his master's order. Thus it is that a scoundrel who desires

to inflict upon some worthy man the torments of disgrace, employs those who are called men of the world, men of honor, as the executioners of his tyrannical injustice; and as the contempt with which the injury is attended is in proportion to the injury itself, this domination of ruffians is the more inexcusable, as its abuses are the more atrocious.

Whether an insult be deserved or not, is a question which nobody deigns to ask; deserved or not, it furnishes a triumph not only to its insolent author, but to everybody else who chooses to assist in aggravating it. People take honor to themselves for treading on the fallen; an affront received, separates a man from his equals, and like a social excommunication, renders him impure in their eyes. Thus the real evil, the ignominy, is more the work of other men than of the first offender; he has but pointed out the game, they have torn it to pieces; he orders the punishment, they are the executioners.

For example, let a man go so far as publicly to spit in another's face. In itself, what is this evil?—a drop of water, forgotten as soon as felt. But this drop of water turns into a corrosive poison which torments the sufferer through his whole life. What works the change? Public opinion, that opinion which distributes at pleasure honor and shame. The cruel enemy who inflicted it knew well that this affront would be the forerunner and the signal for a torrent of contempt.

A brute, a vile wretch, can at pleasure dishonor a virtuous man! He can fill with chagrin and distress the termination of the most respectable career! And how does he enjoy this fatal power? He enjoys it, because an irresistible corruption has subjugated the first and the purest of tribunals, that of the popular sanction. In consequence of this deplorable state of things, all the citizens depend individually for their honor upon the worst man among them,

and are collectively subject to his orders, to execute his decrees of proscription against each individual in particular.

Such is the charge which may be brought against public opinion; and these imputations are not without foundation. Men, admirers of power, are often guilty of injustice towards the feeble; but when we probe to the bottom the effects of this kind of offences, we perceive that they produce an evil independently of opinion, and that the sentiments of the public upon affronts received and endured, are not, in general, so contrary to reason as at first sight they appear to be; I say in general, because there are a great number of cases in which public opinion is quite without excuse.

To perceive all the evil which may result from these offences, it is necessary to put all remedies out of view; it is necessary to suppose there are none. Upon this supposition, these offences may be repeated at will; an unlimited career is opened to insolence; the person insulted to-day, may be insulted to-morrow, the next day, every day, and every hour; each new affront facilitates another, and renders more probable a succession of injuries of the same kind. Now under the notion of a *corporal insult*, is comprehended every act offensive to the person which can be inflicted without causing a lasting physical evil, every act which produces a disagreeable sensation, inquietude, or pain. But an act of this sort, which if single, would be scarcely sensible, may produce, by force of repetition, a very painful degree of uneasiness, or even intolerable torture. I have read somewhere that water, falling drop by drop upon the crown of the naked head, is one of the most cruel tortures ever invented. *Gutta cavat lapidem*, dropping water hollows the rock, says the Latin proverb. Thus the individual exposed by his relative weakness to suffer vexations of this sort, at the will of his persecutor, and destitute, as we have supposed, of all legal protection, would be reduced

to a most miserable situation. Nothing more is needed to establish on one side absolute despotism, and on the other complete servitude.

But such an one is not the slave of a single person only; he is the slave of everybody who has a mind to play the despot. He is the sport of the first comer, who, knowing his weakness, may be tempted to abuse it. Like a Spartan helot, he is dependent upon all the world, always fearing and always suffering, an object of general ridicule, and of a contempt not even softened by compassion; in one word, lower than any slave, because the misfortunes of a slave spring from a compulsory condition entitled to pity; while *his* degradation grows out of the baseness of his character.

These little vexations, these insults, have for another reason, a sort of pre-eminence in tyranny over violent attacks. Those acts of wrath sufficient to quench at once the hostility of the offender, and even to give an immediate feeling of repentance, offer to view a termination of sufferings; but a humbling and malignant insult, far from exhausting the hatred which produces it, appears rather to serve as an incentive; so that it presents itself to the imagination as the forerunner of a succession of injuries, the more alarming because indefinite.

What is here said of corporal insults may be applied to threats, since it is to their threatening quality alone that corporal insults owe all their consequence.

Outrages in words are not altogether of the same character. They are only a kind of vague defamation, an employment of injurious terms of indeterminate signification, and of which the meaning varies much, according to the condition of persons.* What is signified by these verbal assaults

* We must carefully distinguish outrageous words of special defamation, from those which have no particular object. The former can

is this, that the person assailed is thought worthy of public contempt; but on what particular account, is not specified. The probable evil which may result is, the renewal of similar reproaches. We may fear too lest a profession of contempt publicly made, may invite other men to join in it. It is in fact an invitation which many will be ready to accept. The pride of censure, the pleasure of triumphing at another's expense, the spirit of imitation, the inclination to believe all strong assertions, give weight to these sorts of injuries. But they seem to owe their principal importance to the negligence of the laws, and to the usage of duelling,—that subsidiary remedy, by which the popular sanction has attempted to supply the silence of the laws.

It is not surprising that legislators, fearing to give too much importance to trifles, have left in a state of almost universal abandonment, that part of security which consists in a freedom from the petty acts of vexation above enumerated. The physical evil, so natural a measure of the importance of an offence, is almost nothing; and the distant consequences quite escaped the inexperience of those by whom laws were first established.

Duelling offered itself to fill this gap. This is not the place to inquire into its origin, or to examine its variations and apparent absurdities. It is enough that duelling exists; that in fact it assumes the form of a remedy, and serves to restrain that enormity of disorder which otherwise would result from the negligence of the laws.

This usage once established, produces the following consequences.

The first effect of duelling is, to put a stop, in a great measure, to the evil of those offences to which it applies, that is, to the shame which results from insult. The offended

be refuted; they furnish room for attestatory satisfaction. The latter, being vague and indefinite, do not offer the same hold.

party is no longer in that miserable condition, exposed by his weakness to the outrages of the insolent, and the contempt of all. He is delivered from a state of continual fear. The blot upon his honor is effaced; and if the duel has followed immediately upon the affront, there is no blot; it has no time to fix itself; for dishonor does not consist in receiving an insult, but in submitting to it.

The second effect of duelling is, that it acts as a punishment, and tends to prevent the reproduction of like offences. Every new example is a promulgation of the penal laws of honor, a notification that offensive acts cannot be indulged in, without exposure to the consequences of a private combat, that is, according to the event of the duel, to the danger of different degrees of bodily suffering, or to death itself. Thus the brave man, impelled by the silence of the law to expose himself in order to punish an insult, upholds the general security, while laboring for his own.

But considered as a *punishment*, the duel is extremely defective.

1. It is not a means of which everybody can avail themselves. There are numerous classes who cannot participate in the protection which it affords, such as women, children, old men, the sick, and those who lack courage to purchase exemption from shame at the risk of so great a danger. Besides, by an absurdity in the point of honor worthy of its feudal origin, the upper classes have not admitted their inferiors to the equality of the duel; the peasant outraged by a gentleman cannot obtain this satisfaction. The insult in this case may have less serious effects, but still it is an insult, and an evil without a remedy. In all these respects, the duel considered as a punishment, is *inefficacious*.

2. Often it is no punishment whatever, because opinion attaches a reward to it, which may appear in many eyes superior to all its dangers. This reward is, the honor attributed to the proof of courage, an honor which has often

an attractive power, superior to the force of all opposing motives. The time has been, when it was essential to the character of a gallant gentleman to have fought at least one duel. A turn of the eye, an inattention, a preference, a suspicion of rivalry, anything, was cause enough with men who only wanted a pretext, and who found themselves a thousand times paid for the danger, by obtaining the applauses of both sexes, by each of which, bravery, for different reasons, is equally admired. Punishment being thus amalgamated with reward, has no longer a truly penal character, and becomes still more *inefficacious*.

3. The duel considered as a punishment, is also defective by excess, or according to the proper expression, which will be elsewhere explained, it is too *expensive*. Sometimes indeed it amounts to nothing; but it may be, capital. Between these extremes of all, and nothing, there is a hazard of all the intermediate degrees, wounds, scars, mutilations, limbs crippled or lost. It is plain that if a satisfaction for insults were to be chosen, the preference should be given to a punishment less uncertain and less hazardous, which can neither extend to the life of the offender, nor be entirely powerless.

There is still another singularity in the penal justice which appertains to a duel. Costly to the aggressor, it is no less so to the injured party. The offended person cannot claim a right to punish the offender but by exposing himself to the same punishment; and even with a manifest disadvantage, for the chance is naturally in favor of him who has the choice of his antagonist. This punishment then is at once *expensive* and *misdirected*.

4. Another particular inconvenience of this jurisprudence of duelling, consists in this,—it aggravates the evil of the offence in every case in which a challenge is not sent, except for some known impossibility of sending it. If the offended party does not send a challenge, he is forced to

betray two capital defects of character,—want of courage, and want of honor; want of that virtue which protects society, and without which it cannot be maintained; and want of sensibility to the love of reputation, one of the great foundations of morality. It thus happens that the offended party finds himself, by the law of duelling, in a worse situation than if there were no such law, for if he refuses this austere remedy, it changes into a poison, the infection of which he cannot escape.

5. If in certain cases the duel, in quality of punishment, is not so inefficacious as it appears to be, it is only because an innocent person has exposed himself to a punishment, which is in fact a pure evil. Such is the case of persons who by reason of some infirmity of sex, age, or state of health, cannot employ this means of defence. In their condition of personal feebleness they have no resource, except chance grants them a protector, who has at the same time the power and the will to risk his person, and to fight in their place. It is thus that a husband, a lover, a brother, may take upon themselves to punish an injury to a wife, a mistress and a sister; and if in such a case the duel becomes efficacious as a protection, it is only by hazarding the security of a third person, who finds himself burdened with a quarrel, with which he has no personal connection, and with the origin of which he had nothing to do.

It is certain that duelling, considered as a branch of penal justice, is an absurd and monstrous means; but absurd and monstrous as it is, it cannot be denied that it answers well its principal object, *it entirely effaces the blot which an insult imprints upon the honor*. Vulgar moralists, by condemning public opinion upon this point, only confirm the fact. Now whether this result of duelling is legitimate or not, no matter; it exists; and has its cause. It is essential that the legislator should look into it; so interesting a phenomenon should not remain without investigation.

An affront makes him who is the object of it, be looked upon as degraded by his own feebleness and cowardice. Always placed between insult and disgrace, he can no longer stand on an equal footing with other men, nor pretend to the same attentions. But if, after an insult, I present myself to my adversary, and consent to risk my life against his, by that act I emerge from the humiliation into which I had sunk. If I fall, at least I am delivered from the public contempt, and the insolent dominion of my enemy. If he falls, I am freed from humiliation, and the guilty is punished. If he is only wounded, it is a sufficient lesson for him and for those who might be tempted to imitate his conduct. Am I wounded, or is neither hurt?—still the combat is not useless; it always produces its effect. My enemy perceives that he cannot renew his insults but at the peril of his life; I am not a passive being who may be outraged with impunity; my courage protects me, nearly as the law would do, if it visited such offences by a capital or afflictive punishment.

But if, when this means of satisfaction is open to me, I patiently endure an insult, I render myself contemptible in the eyes of the public, because such conduct betrays timidity, and timidity is one of the greatest imperfections in the character of a man. A poltron has always been an object of contempt.

But ought this want of courage to be classed among the vices? Is the opinion which degrades poltrony, a hurtful or a useful prejudice?

It can hardly be doubted that this opinion is conformable to the general interest, if we consider that the first passion of every man is, the desire of his own preservation, and that courage is more or less a factitious quality, a social virtue which owes its birth and growth to public esteem, more than to every other cause. A momentary ardor may be kindled by anger, but a courage tranquil and sustained

is only formed and ripened under the happy influences of honor. The contempt then which is felt for poltrony is not a useless sentiment; the suffering which it brings upon poltrons, is not a pain wholly thrown away. The existence of the body politic depends upon the courage of the individuals who compose it. The external security of a state against its rivals, depends upon the courage of its soldiers; the internal security of a state against those very soldiers, depends upon the courage of the mass of citizens. In one word, courage is the public soul, the tutelary genius, the sacred palladium by which alone we can be protected against all the miseries of servitude, remain in the condition of men, or escape falling beneath the very brutes. Now the more honorable courage is, the greater will be the number of courageous men; the more poltrony is despised, the fewer poltrons.

This is not all. Where duels are in vogue, he, who being in a condition to fight, puts up with an insult, not only betrays timidity; he revolts against the popular sanction which has made it a law to fight, and shows himself, on an essential point, indifferent to reputation. But the popular sanction is the most active and the most faithful minister of the principle of utility, the most powerful and the least dangerous ally of the political sanction. The laws of the popular sanction, as a general rule, are in accordance with the laws of utility. The more sensitive a man is upon the point of reputation, the more likely he is to be virtuously inclined; the less sensitive he is on that point, the more readily does he yield to the seduction of all the vices.

The result of this discussion is, that in the state of abandonment, in which the laws have hitherto left the honor of the citizens, he who endures an insult without recurring to the satisfaction which public opinion prescribes, is thereby reduced to a humiliating dependence, and exposed to receive an indefinite series of affronts. He exhibits a want of that

sentiment of courage on which the general security depends ; and a lack of sensibility to reputation, that sensibility which is the protector of all the virtues, and a defence against all the vices.

Upon examining the progress of public opinion in relation to insults, it appears to me that generally speaking, it has been good and useful ; and the successive changes which the practice of duelling has undergone, have made it more and more conformable to the principle of utility. The public would be wrong, or rather its folly would be palpable, if being spectator of an insult, it immediately directed a decree of infamy against the insulted party ; but that, it does not do. This decree of infamy is issued only in case the person insulted shows himself a rebel to the law of honor, and signs with his own hand the judgment of degradation.

To speak generally then, the public has some reasons for this system of honor.* The real blunder is, on the part of the laws. 1st. In having suffered in respect to insults, that anarchy and want of all legal redress, which has caused the strange and unlucky remedy of duelling to be resorted to ; 2d. In having set itself in opposition to duelling, a remedy imperfect and objectionable, but the only remedy against insults in the power of the sufferers ; 3d. In having opposed it, by disproportioned and inefficacious means.

* Does the public know what reason there is in its opinion ? Is it guided by the principle of utility, or by a mere spirit of imitation, and a blind instinct ? Does the duellist act from an enlightened view of his own and the general interest ? This is a question more curious than useful ; but the following observation may help to resolve it. It is one thing to be determined by the presence of certain motives, and another thing to perceive the influence of those motives. There is no action, no judgment without a motive, as there is no effect without a cause. But to ascertain the influence which a motive exercises upon us, we must know how to turn the mind inward upon itself and to anatomize thought. The mind must be divided into two parts, of

CHAPTER XV.

Remedies for offences against Honor.

WE will begin with the means of satisfaction for offended honor; and will afterwards point out the reasons which justify those means.

Offences against honor may be divided into three classes, verbal outrages,—corporal insults,—insulting threats. The punishment, if rendered analogous to the offence, may be made to operate at the same time as a means of satisfaction to the party injured.

List of these punishments.

1. Simple admonition.
2. The offender obliged to read aloud his own sentence.
3. The offender on his knees before the injured party.
4. An apology pronounced by him.
5. Emblematical dresses (in certain particular cases.)
6. Emblematical masks.
7. The witnesses of the insult called in, to be witnesses of the reparation.
8. The persons whose good opinion is most important to the offender, called to be present at the execution of the sentence.
9. Publicity of the judgment.
10. Banishment, longer or shorter, either from the presence of the injured party, or from that of his friends. For an insult given in a public place, as a market, a theatre, or a church, banishment from those places.
11. For a corporal insult, a retort of the same kind, inflicted by the injured party, or if he prefer it, by the hand of the executioner.

which one is employed in observing the other,—a difficult operation, so seldom practised that few are capable of it.

12. For an insult to a woman, the man to be dressed in women's clothes, and the retort to be inflicted by the hand of a woman.

Many of these means are new, and some of them will appear singular; but new means are necessary, since experience has shown the insufficiency of the old ones; and as to their apparent singularity, that very thing adapts them to their end, for it enables them by analogy to the insult, to transfer to the offender the contempt he desired to fix upon the innocent sufferer. These means are varied and numerous to meet the number and variety of this sort of offences, to correspond to the gravity of cases, and to furnish reparations adapted to the different social distinctions; for it is not fit to treat in the same way an insult to a subaltern and to a magistrate, to an ecclesiastic and to a soldier, to a youth and to an old man. All this theatrical play, apologies, attitudes, emblems, forms solemn or grotesque, according to the difference of cases, in one word, these public satisfactions turned into spectacles, would furnish to the injured party immediate pleasures, and pleasures of recollection, which would well compensate the mortification of the insult.

Since the injury is wrought by artificial means, artificial means should aid in the reparation; otherwise it would fail to strike the imagination in the same way, and would not be complete. The offender has availed himself of a certain form of insult to turn the public contempt upon his adversary; it is necessary to employ an analogous form of infliction in order to turn this contempt back upon him. Opinion causes the disease, opinion must cure it. The wounds inflicted by the spear of Telephus could only be healed by the touch of the same weapon. This is a symbol of the operations of justice, in matters of honor. An affront has done the evil, an affront must work the cure.

Let us follow out the effect of a satisfaction of this kind.

The injured man, reduced to an intolerable state of inferiority in respect to his aggressor, can no longer frequent with security his old places of resort, and he discovers in the future only a perspective of injuries. But immediately after the legal reparation, he regains what he had lost; he walks securely with upraised head, and even acquires a positive superiority over his adversary. How is this change produced? It is because he appears no longer a feeble and miserable being whom any one may tread under foot; the power of the magistrate has become his; no one will be tempted to repeat an insult so signally punished. His oppressor, who for a moment seemed so high, has fallen from his car of triumph; the punishment to which he has been subjected in the sight of so many witnesses proves that he is no longer to be feared; and nothing of his violence remains, except the recollection of his chastisement. What more can the insulted party desire? What more could he do, if he had the strength of a giant?

If legislators had always fitly applied this system of satisfactions, duelling never would have come into existence, for it always has been, and now is, only a supplement to the insufficiency of the laws. In proportion as this void of legislation is filled, by regulations adapted to the protection of honor, we shall see the usage of duels diminished; and it would cease at once if a system of honorary satisfactions were introduced, conformed to public opinion, and faithfully administered. In former times, duels served as a means of decision in a great number of cases, in which it would be the height of absurdity to employ them now. A suitor who should send a challenge to his antagonist to prove a title, or to establish a right, would be thought a fool; but in the twelfth century that means was constantly employed for those purposes. Whence the change? It comes from that change in jurisprudence which has gradually taken place. Justice growing more enlightened, and direct-

ing itself by better rules and forms, has offered means of redress preferable to the duel.* The same cause will continue to produce the same effects. As soon as the law shall offer a certain remedy against offences that wound the honor, no one will be tempted to recur to an equivocal and dangerous means. Who loves pain and death? Nobody. Such a sentiment is equally a stranger to the heart of the hero and to the soul of the coward. It is the silence of the laws, it is the forgetfulness of justice, which drives the wise man to this sole, sad resource of self-protection.

To give to honorary satisfaction all the extent and force of which it is susceptible, the definition of offences against honor ought to have latitude enough to embrace them all. Follow public opinion, step by step; be its faithful interpreter. All which opinion regards as an assault upon honor, let the laws so regard. Is a word, a gesture, a look sufficient, in the public eye, to constitute an insult?—that word, that gesture, that look, in the view of justice, should constitute an offence. The intent to injure, is an injury. Everything intended to testify contempt for a man, or to draw contempt upon him, is an insult, and ought to have its reparation.

Is it said that these insulting signs, doubtful in their nature, fugitive and often imaginary, would be difficult to ascertain, and that persons easily offended, seeing an insult where there was none, might subject the innocent to undue punishment?

This danger amounts to nothing; for it is quite easy to trace the line of separation between real and imaginary injuries. This may be accomplished by allowing the plain-

* In France, the duel in civil cases was abolished by Philip-le-Bel, in 1305. He had rendered the parliament stationary at Paris, and had done much for the establishment of judicial order.

tiff to question the defendant as to his intention—"Did you design by such a word or action to testify contempt for such a person?" If the defendant denies the intention, his answer, true or false, is enough to purge the honor of him who has been, or who thinks himself, offended. For even if the injury were quite unequivocal, to deny it, is to have recourse to falsehood; it is the avowal of a fault, it is the betrayal of fear or weakness, in one word, it is an act of inferiority, it is to humble one's self before an adversary.

In arranging the catalogue of offences which have the character of insult, there are some necessary exceptions. Care must be taken not to involve in a decree of proscription useful acts of public censure, an exercise of the power of the popular sanction. There must be reserved to friends and to superiors the authority of correction and reprimand; it is necessary to protect the liberty of history, and the liberty of criticism.

CHAPTER XVI.

Vindictive Satisfaction.

THIS subject does not require many particular rules. Every kind of satisfaction, as it is a punishment to the offender, naturally produces a pleasure of vengeance to the injured party.

That pleasure is a gain; it calls to mind Samson's riddle; it is the sweet coming out of the terrible; it is honey dropping from the lion's mouth. Produced without expense, a clear gain resulting from an operation necessary on other accounts, it is an enjoyment to be cultivated, like any other; for the pleasure of vengeance, abstractly considered, is like every other pleasure, a good in itself. It is innocent while

restrained within the limits of the law; it only becomes criminal at the moment when it breaks those limits. It is not vengeance which is to be regarded as the most malignant and dangerous passion of the human heart; it is antipathy, it is intolerance—the hatreds of pride, of prejudice, of religion, of politics. The enmity which is dangerous is not that which is well founded, but that which springs up without any substantial cause.

Useful to the individual, this motive is also useful to the public; indeed it is necessary. It is this vindictive satisfaction which sets the tongues of witnesses in motion; it is this which animates the accuser and engages him in the public service, in spite of the embarrassments, the expenses, the enmities to which it exposes him; it is this too which surmounts the public pity in the punishment of criminals. Take away this resource, and the power of the laws will be very limited; or at all events, the tribunals will not obtain assistance, except for money, a means not only burdensome to society, but exposed to other very serious objections.

Common moralists, always duped by words, are not able to comprehend this truth. The spirit of vengeance is odious; all satisfaction drawn from that source is faulty; forgiveness of injuries is the first of virtues. No doubt those implacable characters which no satisfaction can soften, are odious, and ought to be so. Forgetfulness of injuries is a virtue necessary to humanity,—but it becomes a virtue only after justice has done its work, when it has furnished or denied, a satisfaction. Before that, to forget injuries is to invite their repetition; it is not being the friend, it is being the enemy of society. What more can crime desire than an arrangement by which offences shall be always pardoned?

What ought to be done to afford this vindictive satisfaction? Everything which justice requires for the sake of satisfactions of other kinds, and for the punishment of the

offence; but nothing more. The least excess consecrated to the sole object of vengeance, would be a pure evil. Inflict the proper punishment, and let the injured party derive from it such a degree of satisfaction as comports with his situation, and of which his nature is susceptible.

But though nothing should be added to the severity of punishment, with this particular end in view, the punishment may be modified for the accomplishment of this end, according to what may be supposed to be the sentiments of the injured party, from his position, or from the nature of the offence. The preceding chapter contains some examples of this sort; others will be given when treating of the choice of punishments.

CHAPTER XVII.

Substitutive Satisfaction; or satisfaction at the charge of a third party.

IN ordinary cases, the expense of satisfaction ought to fall upon the author of the evil; because, falling in that way, it tends in quality of punishment to prevent the evil, that is, to diminish the frequency of the offence. Where it falls upon another person, it has no such tendency.

Where this reason does not exist with regard to the first respondent, the law of responsibility must be modified in consequence; or in other terms, a third person must be called in to pay, instead of the author of the damage, when he cannot himself furnish the satisfaction, and when such an obligation imposed upon a third person tends to prevent the offence.

This may happen in the following cases :

1. The Responsibility of a master for his servant.
2. " " of a guardian for his ward.
3. " " of a father for his children.
4. " " of a mother for her children, in her character of guardian.
5. " " of a husband for his wife.
6. " " of an innocent person who profits by the offence.

I. RESPONSIBILITY OF A MASTER. This responsibility is founded upon two reasons, the one of security, the other of equality. This obligation imposed upon the master, acts like a punishment, and diminishes the chance of like mishaps. He is interested to know the character and to watch over the conduct of those for whom he is responsible. By making him accountable for neglect of this duty, the law appoints him a police inspector, and a domestic magistrate.

Besides, the condition of a master almost necessarily supposes a certain fortune ; the quality of being an injured party, supposes nothing of that sort. Since an inevitable evil lies between two parties, it is best to throw the weight of it upon him who has most means of sustaining it.

This responsibility may have some inconveniences, but if it did not exist there would be more and worse ones. If a master wished to occasion a trespass upon the lands of his neighbor, to expose him to some accident, to inflict a piece of vengeance upon him, to make him live in continual inquietude, he would only need choose some vicious domestics, to whom he might hint the service of his passions and his hatreds, and that, without commanding anything, without being an accomplice, and without affording any evidence of participation ; always ready to sustain or to disavow, he would make them the instruments of his designs, and

would run no risks himself.* By showing them a little more than ordinary confidence, by taking advantage of their attachment, their devotedness, their servile vanity, there is nothing he could not attain by general instigations, without exposing himself to the danger of commanding anything in particular; and he would enjoy with impunity the evil which he had done by their hands. "Unfortunate that I am," cried Henry II., one day, when wearied with the haughtiness of an insolent prelate. "What! so many servants who boast their zeal, and not one who dares to avenge me!" The murder of Becket was the fruit of this imprudent or criminal apostrophe.

What, in the master's case, diminishes in a great degree the danger of his responsibility, is, the responsibility of the servant. The real author of the evil, as far as circumstances permit, ought to be the first to support its troublesome consequences; he ought to be charged with the burden of satisfaction according to his capacity; so that a negligent or vicious servant may not coolly say while doing the damage, "It is my master's affair, not mine."

Besides, the responsibility of the master is not always the same; it must vary according to circumstances, which must be examined with attention.

The first thing to be considered, is, the degree of connection subsisting between the master and the servant. If the question is of a day-laborer, or a man engaged by the year; of a workman who lodges abroad, or in the house; of an apprentice or a slave; it is clear that the closer the connection is, the greater should be the responsibility. A

* There are many ways of injuring another without any trace of participation. I have been told by a French lawyer, that when the parliaments wished to save a culprit, they selected with design some unskilful person to report the cause, hoping that his blunders would leave some loop-hole for annulling the sentence! Chicane so artful is almost entitled to the epithet of genius.

foreman is less dependent upon his employer than a lackey upon his master.

The second thing to be considered, is, the nature of the work upon which the servant is employed. The presumptions against the master will be weaker in those cases in which his interest is most exposed to suffer by the negligence of his servants, and stronger in the contrary cases. In the first case the master already has a sufficient motive to be watchful; in the second he may not have that motive, and the law should supply it.

Third. The master is peculiarly responsible when the mischief has happened by occasion, or in the act, of his service; because it is to be presumed that he directed it; or at least, that he foresaw what has happened; and because he can easier watch his servants at those times than while they are at liberty.

There is a case which seems to reduce to a low degree, if it does not altogether annihilate, the strongest reason for the master's responsibility; viz., when the evil is caused by a grave offence, accompanied consequently by a proportionate punishment. If a man of mine, for example, having a personal quarrel with my neighbor, sets his barn on fire, ought I to be responsible for a damage which I could not prevent? If the fellow did not fear being hung, would he fear a dismissal from my service?

Such are the presumptions which serve as a basis to responsibility; presumption of negligence on the part of the master; presumption of his superiority in wealth. But it is not to be forgotten that presumptions are nothing when belied by facts. For example, an accident has happened by the overturn of a vehicle. Nothing is known of the injured party. It is presumed that he stands in need of an indemnity from the owner of the vehicle, who offers himself to the imagination as being well able to support the loss. But what becomes of this presumption, when it is known that

this owner is a poor farmer, and the injured party an opulent landlord; that the first would be ruined if obliged to pay an indemnity, hardly of the slightest consequence to the other? Presumptions ought to guide, but not to govern us. The legislator ought to consult them in establishing general rules; he should leave it to the magistrate to modify their application according to individual cases.

The general rule would establish the responsibility of the master; but the magistrate, according to circumstances, might change this arrangement, and make the weight of the loss fall upon the true author of the evil.

The greatest abuse which can result from leaving to the magistrate the utmost latitude in this distribution, will be, to produce, in certain cases, the same inconvenience which must necessarily result from a general and inflexible rule. Should the magistrate on one occasion, favor the author of the evil, and the master on another? He who suffers wrong will suffer no more from this partiality than he might have suffered from the inflexibility of the law.

In our systems of law, no attention has been given to these modifications. The entire burden of the loss has been thrown sometimes upon the servant who has caused the damage, and sometimes upon the master; whence it follows, that sometimes security and sometimes equality have been neglected, both of which ought alternately to have the preference, according to the nature of the case.

II. RESPONSIBILITY OF A GUARDIAN. The ward is not an advantage to the guardian; in general, he is a burden. If the ward has sufficient means to furnish satisfaction, it is not necessary that another should pay for his acts. If he has no means of his own, the wardship is too heavy a burden in itself to be loaded with factitious responsibility. All that security requires is, to attach to the negligence of the guardian, proved or even presumed, an amend more or less

weighty, according to the nature of the proofs, but such as never to exceed the amount required for satisfaction.

III. RESPONSIBILITY OF A FATHER. If a master ought to be responsible for the faults of his servants, for a much stronger reason a father ought to be so for those of his children. If a master can and ought to watch over those who depend upon him, it is a duty more pressing upon a father, and much easier to be fulfilled. He not only exercises over his children the authority of a domestic magistrate, but he has all the ascendancy of affection; he is not only the guardian of their physical existence—he has it in his power to be the controller of their feelings. If a master may abstain from employing, or may dismiss upon discovery, a servant who evinces dangerous dispositions, a father, who can fashion at his pleasure the character and habits of his children, is justly thought to be the author of all the dispositions which they manifest. If they are depraved, it is almost always the effect of his negligence or of his vices; and he ought to bear the consequences of an evil which he might have prevented.

If after a reason so weighty, there needs yet another argument, it may be said that children, saving the rights which their quality of sensitive beings confers upon them, are a part of the father's property, and ought so to be regarded. He who enjoys the advantages of the possession, ought to support its inconveniences. The good is more than a compensation for the evil. It would be strange if the loss or depredations occasioned by children, should be borne by an individual who knows nothing of them except by their heedlessness or their malice, rather than by him who finds in them the greatest source of his happiness, and who indemnifies himself by a thousand hopes for the actual cares of their education.

But this responsibility has a natural limit. The majority of a son, or the marriage of a daughter, putting an end to

the father's authority, puts an end also to his legal responsibility. He ought not to be answerable for actions which he no longer has the power to prevent.

To perpetuate for life the father's responsibility, on the plea that he is the author of the vicious dispositions of his children, would be unjust and cruel; for in the first place it is not true that all the vices of an adult are attributable to the defects of his education. Diverse causes of corruption, after the epoch of independence, may triumph over the most virtuous education. Besides, the condition of a father is sufficiently unfortunate when the bad dispositions of a son arrived at man's estate, break out into offences. What he has already suffered in his family, the anguish he feels from the misconduct or dishonor of a son, is a kind of punishment which nature inflicts upon him, and which the law need not aggravate. It would be pouring poison upon his wounds, and that without any hope of repairing the past, or providing against the future. Those who have attempted to justify such barbarous jurisprudence by the example of China, have not recollected that the authority of a father, ending, in that country, only with his life, it is but just that his responsibility should continue as long as his power.

IV. RESPONSIBILITY OF THE MOTHER. The obligation of the mother is naturally regulated by her rights, on which her means of control depend. If the father is alive, the mother's responsibility, like her power, remains absorbed, as it were, in that of her husband. If he is dead, and she has taken the reins of domestic government into her own hands, she becomes responsible for those who are subject to her authority.

V. RESPONSIBILITY OF A HUSBAND. This case is as simple as the preceding. The obligation of a husband depends upon his rights. As the administration of the property belongs to him alone, unless the husband were answerable, the injured party would be without remedy. This reason-

ing supposes the order of things generally established; that order so necessary to the peace of families, to the education of children, to the maintenance of manners,—that order so ancient and universal, which subjects the wife to the power of the husband. As he is her chief and her guardian, he is answerable for her in the eye of the law. He is even charged with a responsibility still more delicate before the tribunal of opinion; but that is a matter which does not appertain to the present subject.

VI. RESPONSIBILITY OF AN INNOCENT PERSON. It often happens that a person, without having had any share in an offence, derives from it a certain and perceptible profit. Is it not proper that this person should be called upon to indemnify the injured party, if the offender cannot be found, or cannot furnish an indemnity?

Such a procedure would be conformable to the principles which we have laid down, namely, first, regard for *security*; for there might be an aiding and abetting, though there might be no proof of it; next, the care of *equality*; since it is better for one person merely to be deprived of a gain, than for another to be left to suffer a loss.

Examples will make this clearer. By means of a breach made in a dike, he who was in possession of the benefit of irrigation has been deprived of it, and it has been bestowed upon another. He who comes into the enjoyment of this unexpected advantage, ought to share a part at least of his gain with the person who has experienced the loss.

A tenant for life, whose property passes by settlement to a stranger, is killed, and leaves a family in want. The residuary proprietor, who realizes in consequence a premature possession, ought to make some allowance to the children of the deceased.

A benefice is vacated, because the possessor has been killed; if he leaves a wife and children in poverty, the successor owes them an indemnity proportionate to their need, and to his gain.

CHAPTER XVIII.

Subsidiary satisfaction at the public expense.

THE best fund whence satisfaction can be drawn, is the property of the delinquent,—since it then performs, as we have seen, with superior convenience the functions both of satisfaction and of punishment.

But if the offender is without property, ought the injured person to remain without satisfaction? No; for according to the reasons already laid down, satisfaction is almost as necessary as punishment. It ought to be furnished out of the public treasury, because it is an object of public good, and the security of all is interested in it. This obligation of the public to furnish satisfaction, is founded upon a reason which has the evidence of an axiom. A pecuniary charge divided among the mass of individuals, is nothing to each contributor, in comparison with what it would be to an individual, or a small number.

If *insurance* is useful in enterprises of commerce, it is not less so in the great social enterprise, in which the associates find themselves united as partners, in consequence of a train of chances, without knowledge or choice on their part, without the power of separation, or of securing themselves by any prudential means from a multitude of snares which they mutually spread for each other. The calamities which spring from offences, are evils not less real than those which result from accidents of nature. If the owner of a house sleeps sounder because it is insured against fire, his sleep will be sounder yet, if he is also insured against robbery. Putting out of sight the abuses to which it is liable, it seems impossible to give too much extension to a means so ingenious, which renders real losses so slight, and which gives so much security against eventual evils.

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But all kinds of *insurances* are exposed to great abuse from fraud or negligence; fraud on the part of those who feign or exaggerate losses, for the sake of obtaining indemnities not due; negligence on the part of the assurers, in not taking necessary precautions, or on the part of the assured, who use less diligence in protecting themselves against losses which are certain to be made up.

In a system of satisfactions at the public expense we have then to fear—

1. A secret connivance between a party pretending to be injured and the author of a pretended offence, to obtain an indemnity not due.

2. Too great security on the part of individuals, who not having the same consequences to fear, will no longer make the same efforts for the prevention of offences.

This second danger is little to be dreaded. Nobody will neglect an actual possession certain and present, in the hope of recovering, in case of loss, an equivalent for the thing lost, even a perfect equivalent; and when we consider that an indemnity cannot be obtained without trouble and expense, that there is a temporary privation, that the vexations of a claim and its pursuit are to be encountered, and the disagreeable part of an accuser to be played; and that after all, under the best system of procedure, success is always doubtful;—these things considered, it is plain that every man will still have motives enough to watch over his property, and not to encourage offences by negligence.

On the side of fraud, the danger is much greater. It can only be prevented by detailed precautions, which will be explained elsewhere. It will here suffice to point out, as examples, two opposite cases, one in which the utility of the remedy surpasses the danger of abuse, the other in which the danger of abuse is greater than the utility of the remedy.

Whenever the damage is occasioned by an offence of which the punishment is severe, and the author of which

must be juridically ascertained, and also the fact of an offence committed, fraud is very difficult. The only method an impostor, who pretends to be injured, can employ to procure an accomplice, is to give him a part of the profits of the fraud; but provided there has not been a neglect of the clearest principles of proportion between offences and punishments, the punishment which such an accomplice must encounter, would be more than equivalent to the total profit of the fraud.

Observe, that the offender must be judicially convicted, before the satisfaction is granted; without that precaution the public treasure would be exposed to pillage. Nothing would be more common than stories of imaginary robberies, of pretended thefts committed by unknown persons who had taken to flight, in a manner the most secret, and in nights the darkest. But when it is necessary to bring the offenders into court, a secret understanding is not easy. This is not a part which can be readily filled; for besides the certainty of punishment for the alleged offence encountered by the person who charges himself with it, in case the imposture be discovered there will be still a particular and additional punishment to be shared by both accomplices; and if it be recollected how difficult it is to fabricate a probable history of an offence absolutely imaginary, it is likely that these kinds of frauds will be very rare, if they ever happen at all.

The danger most to be apprehended, is the exaggeration of a loss resulting from a real offence. But then it is necessary that the offence be susceptible of such sort of falsehood,—a case sufficiently rare.

It would seem then that it may be regarded as a general maxim, that in all cases in which the punishment of the offence is severe, there is no occasion for apprehending that an imaginary offender will charge himself with the offence for the sake of a doubtful gain.

But for the opposite reason, when the damage results from an offence of which the punishment is slight or nothing, if the public treasure were responsible in such cases, the danger of abuse would be at its highest point. Insolvency is an example of this sort. Who so poor that he would not be trusted, if the public were his security? What treasure would suffice to pay the creditors, whose debtors were really deficient, and how easy it would be to get up false debts?

Not only would such an indemnity be liable to abuse, it would be unreasonable; for in the transactions of commerce, the risk of loss makes a part of the price of merchandise, and of the interest of money. Let the merchant be sure of losing nothing, and he would sell cheaper; so that to demand an indemnity from the public for a loss thus made up for beforehand, would be asking to be paid twice over.

There are still other cases in which satisfaction ought to be a public charge.

1. The case of physical calamities, such as inundations and fires. Aids furnished by the state to sufferers in that way, are not solely founded on the principle that an evil divided among many becomes light; they rest also upon this other principle, that the state, as protector of the national wealth, is interested to prevent the deterioration of its domain, and to re-establish the means of reproduction in places which have suffered. Such were the liberalities, so called, of the great Frederic, towards provinces desolated by some scourge; they were acts of prudence and conservation.

2. Losses and misfortunes in consequence of hostilities. Those who have been exposed to the invasions of a public enemy, have so much the clearer right to a public indemnity, since they may be considered as having sustained a shock which threatened all the citizens, and as having been by their situation the most exposed points of the public defence.

3. Evils resulting from unintentional mistakes of the ministers of justice. An error of justice is always of itself a subject of lamentation; but that such an error when known, should not be repaired by proportional indemnities, is an overthrow of social order. Ought not the public to follow the same rules of equity which it imposes upon individuals? Is it not an odious thing that the government should exert its power to exact severely all that is due to it, and should avail itself of the same means to refuse the payment of its own debts? But this obligation is so evident that no attempt to demonstrate it, can make it clearer.

4. Responsibility of a community for a high-handed offence committed in a public part of its territory. It is not properly the public which is responsible in this case; it is the district or the province which should be taxed for the reparation of an offence resulting from negligence of police.

In cases of competition, the interests of an individual ought to take precedence of those of the treasury. What is due to an injured party under the title of satisfaction, ought to be paid in preference to what is due to the public by way of fine. This is not the decision of vulgar jurisprudence, but it is the decision of reason. The loss to an individual is an evil that is felt; the gain to the public is a good felt by nobody. What the offender pays in quality of fine, is a punishment and nothing more; what he pays in quality of satisfaction is also a punishment, and a severer one; it is, beside, a satisfaction to the injured party, and so far, a good. What I pay to the state, a creature of reason with which I have no quarrel, affects me only with the sort of chagrin I should feel if I dropped the same money into a well; what I pay to my adversary, the satisfaction which I am forced to make, at my own expense, to him I wished to injure, is a degree of humiliation which gives to punishment its most appropriate character.

PART THIRD.

PUNISHMENTS.

CHAPTER I.

Punishments which ought not to be inflicted.

THE cases in which punishment ought not to be inflicted, may be reduced to four heads: when punishment would be, 1st, Misapplied; 2d, Inefficacious; 3d, Superfluous; 4th, Too expensive.

I. PUNISHMENTS MISAPPLIED. Punishments are misapplied wherever there is no real offence, no evil of the first order, or of the second order; or where the evil is more than compensated by an attendant good, as in the exercise of political or domestic authority, in the repulsion of a weightier evil, in self-defence, &c.

If the idea of what constitutes a real offence has been clearly apprehended, it will be easy to distinguish real from imaginary offences,—from those acts, innocent in themselves, which have been arranged among offences by prejudice, antipathy, mistakes of government, the ascetic principle, in the same way that several wholesome kinds of food are considered among certain nations as poisonous or unclean. Heresy and witchcraft are offences of this class.

II. **INEFFICACIOUS PUNISHMENTS.** I call those punishments *inefficacious*, which have no power to produce an effect upon the will, and which, in consequence, have no tendency towards the prevention of like acts.

Punishments are inefficacious when directed against individuals who could not know the law, who have acted without intention, who have done the evil innocently, under an erroneous supposition, or by irresistible constraint. Children, imbeciles, idiots, though they may be influenced, to a certain extent, by rewards and threats, have not a sufficient idea of futurity to be restrained by punishments. In their case, laws have no efficacy.

If a man is determined to act by a fear superior to that of the heaviest legal punishment, or by the hope of a preponderant good, it is plain that the law can have little influence over him. We have seen laws against duelling disregarded, because men of honor are more afraid of shame than of punishment. Punishments directed against religious opinions generally fail to be effectual, because the idea of everlasting reward, triumphs over the fear of death. According as these opinions have more or less influence, punishment, in such cases, is more or less efficacious.

III. **SUPERFLUOUS PUNISHMENTS.** Punishments are superfluous in cases where the same end may be obtained by means more mild,—instruction, example, invitations, delays, rewards. A man spreads abroad pernicious opinions; shall the magistrate therefore seize the sword and punish him? No;—if it is the interest of one individual to give currency to bad maxims, it is the interest of a thousand others to refute him.

IV. **PUNISHMENTS TOO EXPENSIVE.** If the evil of the punishment exceeds the evil of the offence, the legislator will produce more suffering than he prevents. He will purchase exemption from a lesser evil, at the expense of a greater evil.

Two tables should be kept in view, one representing the evil of offences, the other, the evil of punishments.

The following evils are produced by every penal law: 1st. *Evil of coercion.* It imposes a privation more or less painful according to the degree of pleasure which the thing forbidden has the power of conferring. 2d. *The sufferings caused by the punishment,* whenever it is actually carried into execution. 3d. *Evil of apprehension* suffered by those who have violated the law, or who fear a prosecution in consequence. 4th. *Evil of false prosecutions.* This inconvenience appertains to all penal laws, but particularly to laws which are obscure, and to imaginary offences. A general antipathy often produces a frightful disposition to prosecute, and to condemn upon suspicions, or appearances. 5th. *Derivative evil* suffered by the parents or friends of those who are exposed to the rigor of the law.

Such is the table of evils or of *expenses*, which the legislator ought to consider every time he establishes a punishment.

It is from this source that the principal reason is drawn for general amnesties, in case of those complicated offences which spring from a spirit of party. In such cases it may happen that the law envelops a great multitude, sometimes half the total number of citizens, and perhaps more than half. Will you punish all the guilty? Will you only decimate them? In either case the evil of the punishment is greater than the evil of the offence.

If a delinquent is loved by the people, so that his punishment will cause national discontent; if he is protected by a foreign power whose good-will it is necessary to conciliate; if he is able to render the nation some extraordinary service;—in these particular cases, the grant of pardon is founded upon a calculation of prudence. It is apprehended that punishment of the offence will cost society too dear.

CHAPTER II.

Proportion between Offences and Punishments.

Adsit

Regula, peccatis quæ pœnas irroget æquas :

Ne scutica dignum, horribile sectere flagello.

Hor. l. i. Sat. III.

Let's have a rule

Which deals to crimes an equal punishment :

Nor tortures with the horrid lash for faults

Worthy a birchen twig.

MONTESQUIEU perceived the necessity of a proportion between offences and punishments. Beccaria insists upon its importance. But they rather recommend than explain it; they do not tell in what that proportion consists. Let us endeavor to supply this defect, and to give the principal rules of this moral arithmetic.

First rule. *The evil of the punishment must be made to exceed the advantage of the offence.*

The Anglo-Saxon laws which established a price for the lives of men, two hundred shillings for the murder of a peasant, six times as much for that of a noble, and thirty-six times as much for that of the king, notwithstanding this show of pecuniary proportion, were evidently deficient in moral proportion. The punishment might appear as nothing compared to the advantage of the offence.

The same error is committed whenever a punishment is decreed which can only reach a certain point, while the advantage of the offence may go much beyond.

Some celebrated authors have attempted to establish a contrary maxim. They say that punishment ought to be diminished in proportion to the strength of temptation; that

temptation diminishes the fault, and that the more potent seduction is, the less evidence we have of the offender's depravity.

This may be true, but it does not contravene the rule above laid down;—for to prevent an offence, it is necessary that the repressive motive should be stronger than the seductive motive. The punishment must be more an object of dread than the offence is an object of desire. An insufficient punishment is a greater evil than an excess of rigor; for an insufficient punishment is an evil wholly thrown away. No good results from it, either to the public, who are left exposed to like offences, nor to the offender, whom it makes no better. What would be said of a surgeon who, to spare a sick man a degree of pain, should leave the cure unfinished? Would it be a piece of enlightened humanity to add to the pains of the disorder, the torment of a useless operation?

Second rule. *The more deficient in certainty a punishment is, the severer it should be.*

No man engages in a career of crime, except in the hope of impunity. If punishment consisted merely in taking from the guilty the fruits of his offence, and if that punishment were inevitable, no offence would ever be committed; for what man is so foolish as to run the risk of committing an offence with certainty of nothing but the shame of an unsuccessful attempt? In all cases of offence, there is a calculation of the chances for and against; and it is necessary to give a much greater weight to the punishment, in order to counterbalance the chances of impunity.

It is true then that the more certain punishment is, the less severe it need be. Such is the advantage that results from simplicity of laws, and a good method of procedure.

For the same reason it is desirable that punishment should follow offence as closely as possible; for its impres-

sion upon the minds of men is weakened by distance, and besides, distance adds to the uncertainty of punishment, by affording new chances of escape.

Third rule. *Where two offences are in conjunction, the greater offence ought to be subjected to severer punishment, in order that the delinquent may have a motive to stop at the lesser.*

Two offences may be said to be in conjunction when a man has the power and the will to commit both of them. A highwayman may content himself with robbing, or he may begin with murder, and finish with robbery. The murder should be punished more severely than the robbery, in order to deter him from the greater offence.

This rule would be perfectly carried out, if it could be so ordered that for each portion of evil committed, there should be a corresponding portion of punishment. Let a man who has stolen ten crowns be punished as severely as if he had stolen twenty, and he will be a fool to take the less sum in preference to the greater. Equal punishment for unequal offences is often a motive for committing the greater offence.

Fourth rule. *The greater an offence is, the greater reason there is to hazard a severe punishment for the chance of preventing it.*

We must not forget that the infliction of punishment is a certain expense for the purchase of an uncertain advantage. To apply great punishments to small offences, is to pay very dearly for the chance of escaping a slight evil.

The English law which condemned women to be burnt for passing counterfeit coin, was a direct invasion of this rule of proportion. If burning were a punishment ever to be adopted, it ought to be confined to the single case of incendiary homicides.

Fifth rule. *The same punishment for the same offence ought not to be inflicted upon all delinquents. It is necessary*

to pay some regard to the circumstances which affect sensibility.

The same nominal punishments are not the same real punishments. Age, sex, rank, fortune, and many other circumstances, ought to modify the punishments inflicted for the same offence. If the offence is a corporal injury, the same pecuniary punishment would be a trifle to the rich, and oppressive to the poor. The same punishment which would brand with ignominy a man of a certain rank, would not produce even the slightest stain in case the offender belonged to an inferior class. The same imprisonment would be ruin to a man of business, death to an infirm old man, and eternal disgrace to a woman, while it would be next to nothing to an individual placed under other circumstances.

Let it be observed, however, that the proportion between punishments and offences ought not to be so mathematically followed up as to render the laws subtle, complicated, and obscure. Brevity and simplicity are a superior good. Something of exact proportion may also be sacrificed to render the punishment more striking, more fit to inspire the people with a sentiment of aversion for those vices which prepare the way for crimes.

CHAPTER III.

Of Prescription as regards Punishment.

OU^GH^T punishment to be limited in point of time?—in other words, if the delinquent is successful for a given period in evading the law, ought he to escape punishment? Shall the law in such a case no longer take cognizance of

the offence? This is a question still contested. There must always be much that is arbitrary both in the choice of offences which shall have the privilege of this pardon, and in the number of years after which the privilege shall begin.

Pardon can be safely allowed for offences of rashness and negligence, offences resulting from a fault exempt from bad intention. The very accident which makes such offenders, puts them on their guard, and thenceforth they are little to be feared. For such individuals pardon is a good; and in such cases it is an evil to nobody.

Prescription may also be extended to offences not completed, to attempts that have failed. The delinquent, during the interval, has undergone the punishment in part,—for to fear it, is to feel it. Besides, he has abstained from like offences, he has reformed, he has become a useful member of society. He has recovered his moral health without the employment of that bitter medicine which the law had prepared for him.

But when the question relates to more serious offences, for example, the fraudulent acquisition of a large sum of money, polygamy, a rape, a robbery, it would be odious and fatal to allow wickedness, after a certain time, a triumph over innocence. No treaty should be had with malefactors of that character. Let the avenging sword remain always hanging above their heads. The sight of a criminal in the peaceful enjoyment of the fruit of his crime, protected by the laws he has violated, is a consolation to evildoers, an object of grief to men of virtue, a public insult to justice and to morals.

To perceive all the absurdity of an impunity acquired by lapse of time, it is only necessary to imagine the law to be expressed in terms like these: "But if the murderer, the robber, the fraudulent acquirer of another's goods, shall succeed for twenty years in eluding the vigilance of the tribu-

nals, his address shall be rewarded, his security shall be re-established, and the fruit of his crimes shall become his lawful possession.”

CHAPTER IV.

Mistaken Punishments, or punishments misapplied.

PUNISHMENT ought to bear directly upon the individual who is to be subjected to its influence. If you desire to influence Titius, it is upon Titius that the punishment ought to act. If a punishment destined to influence Titius falls upon any one else than Titius himself, it is quite clear that such a punishment is misapplied.

But a punishment directed against those who are dear to a man is a punishment to that man; for he participates in the sufferings of those to whom he is attached by sympathy, and a hold can be got upon him by means of his affections. This doctrine is true, but is it good? is it conformable to the principle of utility?

To ask if a punishment of sympathy acts with as much force as a direct punishment, is to ask if, in general, attachments to others are as strong as the love of one's self.

If self-love is the stronger sentiment, it follows that recourse should not be had to punishments of sympathy till we have exhausted all the direct sufferings of which human nature is capable. No torture is so cruel that it ought not to be employed before punishing the wife for the acts of the husband, or children for the offences of their father.

In punishments misapplied, four principal faults are perceptible:—

1st. What shall be thought of a punishment which must

often fail for want of objects on which to act? If to inflict suffering upon Titius you set about finding the persons who are dear to him, you have no other guide than the domestic relations; you are conducted by that thread to his father and his mother, his wife and his children. The most cruel tyranny has attempted to go no further. But there are many men who have no father nor mother, no wife nor child. It is necessary then to apply to this class of men a direct punishment; but the same direct punishment that answers in their case, will it not answer in every case?

2d. And does not this punishment suppose sentiments which may not exist? If Titius does not concern himself about his wife and children, if he has contracted a dislike to them, at the very least he will be indifferent to their sufferings, and this part of his punishment will not affect him.

3d. But what makes this system so frightful, is the profusion, the multiplication of evils involved in it. Consider the chain of domestic connections, calculate the number of descendants that a man may have; the punishment is communicated from one to the other; it spreads step by step like a contagion; it envelops a crowd of individuals. To produce a direct pain equivalent to one, it is necessary to create a pain indirect and misapplied, equivalent to ten, to twenty, to thirty, to a hundred, to a thousand.

4th. Punishment thus turned aside from its natural course, has not even the advantage of conforming to the public sentiment of sympathy and antipathy. When the offender has paid his personal debt to justice, the public vengeance is satisfied, and demands nothing more. If you pursue him beyond the scaffold, and extend the punishment to an innocent and unhappy family, the public pity presently revives; an indistinct sentiment pronounces the laws unjust; humanity declares against you; and every day enlists new partisans on the side of your victim. Respect for the government, and confidence in it, is lessened in every heart;

and all that is gained by this policy is, a reputation of ignorance with the wise, and of barbarity with the multitude.

The ties that bind men together are so complicated, that it is not possible completely to separate the lot of the innocent from the lot of the guilty. The evil designed by the law for a single individual, bursts its bounds, and extends itself along all those connecting ties of common sensibility which result from the affections, from honor, and mutual interests. A whole family is in suffering and in tears for the offence of one. But this evil inherent in the nature of things, this evil which all the wisdom and all the benevolence of the legislator cannot entirely prevent, is no reproach to him, and does not constitute a misapplication of punishment. If the father is compelled to undergo a punishment for his offence, that punishment must, in the nature of things, be a disadvantage to his children; it cannot be avoided; but if after the death of the guilty father, the paternal succession is ravished from the innocent children, it is a voluntary act of the legislator, who himself turns the punishment aside from its legitimate channel.

The legislator, in this respect, has two duties to fulfil. In the first place, he ought to avoid punishments misapplied in their primitive application. The innocent son of the greatest criminal ought to receive from the law as complete a protection as the most illustrious citizen. In the second place, it is necessary to reduce to its least term that portion of misapplied suffering which falls upon the innocent, in consequence of a direct punishment inflicted on the guilty. If a rebel, for example, is condemned to perpetual imprisonment or to death, everything has been done against him which should be done. A total confiscation of his property, to the prejudice of his heirs, or at least of his wife and children, would be a tyrannical and odious act. The rights of an unfortunate family smitten in its head, are on that account only the more sacred. A national treasure com-

posed of such spoils, is like those impure exhalations which carry in their bosom the germs of disease.

It will be sufficient to give a simple enumeration of the most common cases in which legislators have misapplied punishments, by making them bear upon the innocent, for the sake of an oblique effect upon the guilty.

1st. *Confiscation.* A remnant of barbarity which still exists throughout almost all Europe. It is applied to many offences, especially to crimes of state.* This punishment is the more odious, since it cannot be employed till the danger is past; and the more imprudent, since it prolongs animosities and a spirit of revenge, of which the remembrance ought to be effaced as soon as possible.

2d. *Corruption of blood.* A cruel fiction of the lawyers to disguise the injustice of confiscation. The innocent grandson cannot inherit from the innocent grandfather, because his rights are corrupted and destroyed in passing through the blood of a guilty father. This corruption of blood is a fantastic idea; but there is a corruption too real in the understandings and the hearts of those who dishonor themselves by such sophisms.

3d. *Loss of privileges whereby an entire corporation is punished for the misbehavior of a part of its members.* In England, the city of London is exempted, by a particular act, from such an infliction; but what city, what corporation ought to be subject to it, provided its privileges are not contrary to the interest of the state?

* Confiscation, for offences of state, ought hardly to be looked upon as a judicial punishment; for in civil wars, generally speaking, as both parties act in good faith, there can be no criminality. Confiscation is a measure purely hostile. To leave their fortunes untouched, would be leaving munitions of war in hands of the enemy. But a precaution adapted to a state of war, to which recourse should be had only in extreme cases, ought to cease, or be softened as much as possible, as soon as the danger ceases to exist.

4th. *Disastrous lot of bastards.* The incapacity to inherit is not here referred to. The loss of that right is no more a legal punishment in case of bastardy, than in the case of younger sons; and endless contests might result, if heirs could be brought forward, whose birth had not the attestation of publicity. But the incapacity to fulfil certain trusts, the privation of many public rights, to which they are subjected in several states of Europe, is a true punishment, which falls upon innocent children for a fault of imprudence committed by their parents.

5th. *Infamy attached to the relatives of persons who have committed serious offences.* This is not the place to consider what appertains merely to public opinion. Opinion in this respect has taken the character of antipathy only in consequence of mistakes of the law, which in many cases has branded the families of criminals. This kind of injustice, little by little, is passing away.

CHAPTER V.

Of requiring Security for good behavior.

To require security for good behavior, is to demand of a person who is suspected of designing to commit some unlawful act, that he procure some other person, who will consent to undergo a certain penalty, provided the apprehended offence is committed.

At first view, this appears contrary to the principles above laid down, since it exposes the innocent to be punished for the guilty. It ought then to be justified by an advantage more than equivalent to that evil. This advantage is the

great probability of preventing an offence, and of protecting the general security by individual responsibility.

The great influence which it exercises over the conduct of the suspected individual, constitutes the chief merit of this procedure. He reflects that generous friends have given him a decisive proof of confidence or attachment in risking their fortunes and their quiet to protect his liberty and his honor. They are hostages who have voluntarily surrendered themselves on his account. Shall he be vile enough to turn their kindness against themselves? Shall he quench every sentiment of gratitude? Shall he publicly declare himself a traitor to friendship, and condemn himself to solitary remorse? But suppose him imprudent, fickle or vicious, and not capable of restraining himself,—still the security required of him is not useless. Those who thus are responsible for him, being interested in his actions, are guardians given him by the law; their vigilance will make up for his neglect; their eyes will closely watch his proceedings. Beside their personal interest in making themselves be listened to, they have the strongest title to be heard, from the service they have rendered, and from the right which they ought always to have, to withdraw their security, and to leave the suspected to his fate. Such is the operation of this means in preventing offences.

It serves in another way to diminish the alarm, because it furnishes a favorable indication of the character, or the resources, of the suspected individual. It is a kind of contract of assurance. You demand, for example, the imprisonment of a man who has attempted to do you a certain injury. One of his friends presents himself, and disputes the necessity of so rigorous a means. "I ought to know him better than you do, and I assure you that you have nothing to fear from him. This penalty which I consent to pay in case I am mistaken, is a proof of my belief and my sincerity."

Such are the advantages of demanding security for good

behavior. It may produce an evil; but that evil must be compared with its benefits, and especially with the vigorous measures which it would be necessary to employ against suspected persons, if this procedure were not resorted to. Whenever an evil results to him who becomes security, that evil, having been voluntarily incurred, produces no danger and no alarm. If, through an imprudent zeal, he has become security with his eyes shut, the consequences concern him alone. None are alarmed lest the same evil should befall them. But in the greater number of cases, this engagement results from a feeling of security. He who becomes bound for another, knows better than anybody else the character and situation of the person for whom he engages; he is well aware of the risk he runs; and he does not assume it, except with the opinion that he can do so with safety.

Let us now consider in what cases it is proper to employ this means.

1. It is useful for the prevention of offences apprehended from quarrels of hostility or honor, especially duels. In general, this class of delinquents cannot be suspected of a want of sensibility to public esteem; it is honor which puts them in hostile array. But honor does not command vengeance more positively than it forbids ingratitude, and especially that black ingratitude which punishes the benefactor by means of his very benefit.

2. It is extremely well adapted to prevent abuses of confidence, offences which violate the duties of a trust. Nobody is compelled to undertake such and such employments; it is fit that these employments should not be entrusted except to men who have, in riches or reputation, wherewith to furnish a sufficient guarantee for their good behavior. At the same time, the security which is exacted, being attached to the office, cannot be offensive to anybody.

3. This means may have a peculiar utility in certain

situations of political affairs, in case of enterprises against the state, where many delinquents are concerned. Such men, often rather misled than perverse, nourish exalted sentiments of affection and honor, and in the midst of their revolt against society, almost always preserve intimate relations with each other. When such a conspiracy is discovered, the conspirators most suspected should be compelled to give security for their conduct. This means, at first sight so feeble, is very efficacious; not only because the principals, seeing themselves watched, take the alarm; but because the sentiment of honor of which we have spoken, furnishes a real or plausible motive, a motive founded upon justice and gratitude, for renouncing the enterprise.

4. When sureties are required to prevent the escape of an accused person, there is the advantage of restraint upon the partiality of the judge. Without this condition, a corrupt magistrate, or one of too easy temper, under pretext of a provisional enlargement, might withdraw an accused criminal from corporal or even pecuniary punishment, and change a severe penalty into simple banishment. This abuse becomes impossible when the judge cannot set the accused at liberty, except upon sufficient security.

Only a single word is necessary as to the penalty to which the sureties should be subjected. That penalty should be pecuniary, and never anything else. Any afflictive punishment would be revolting, and would not furnish an indemnity.

It is true that a pecuniary punishment may bring on the imprisonment of the sureties, in case they are not able to pay their bonds. But if they were insolvent when they became sureties, they have deceived the court. If their insolvency is posterior to their suretyship, on the occurrence of that event they ought to have withdrawn their security, by an application to the court. However, as in the case of other insolvencies, attention must be paid to circumstances; fraud

must be distinguished from misfortune. If the suretyship was the cause of insolvency, in that case particular indulgence is needed.

CHAPTER VI.

The choice of Punishments.

IN order that a punishment may adapt itself to the rules of proportion above laid down, it should have the following qualities:—

1. *It ought to be susceptible of more or less, or divisible,* in order to conform itself to variations in the gravity of offences. Chronic punishments, such as imprisonment and banishment, possess this quality in an eminent degree. They are divisible into portions of any requisite magnitude. It is the same with pecuniary punishments.

2. *Equal to itself.* It ought, to a certain extent, to be the same for all individuals guilty of the same offence, being made to correspond to their different measures of sensibility. This demands attention to age, sex, condition, fortune, individual habits, and many other circumstances; otherwise the same nominal punishment, being often found too severe for some persons, too mild for others, will overshoot the mark, or will fail to reach it. A fine fixed by law will never be a punishment equal to itself, on account of differences of fortune. Banishment has the same inconvenience; too severe for one, to another, it is nothing.

3. *Commeasurable.* If a man has two offences before his eyes, the law ought to give him a motive to abstain from the greater. He will have that motive, if he can see that the greater offence will draw upon him a greater punishment. It ought then to be in his power to compare these punishments, to measure their different degrees.

There are two methods of fulfilling this object: 1st. By adding to a given punishment another quantity of punishment of the same kind ; for example, to five years' imprisonment for such an offence, two years' additional for such an aggravation. 2d. By adding a punishment of a different kind ; for example, to five years' imprisonment for such an offence, public ignominy for such an aggravation.

4. *Analogous to the offence.* The punishment will more easily engrave itself on the memory, it will present itself more strongly to the imagination, if it has a resemblance, an analogy to the offence, a common character with it. The *lex talionis* is admirable in this respect—*An eye for an eye, a tooth for a tooth.* The most imperfect understanding is capable of connecting these ideas. But these sort of punishments are rarely practicable, and in most cases would be too expensive.

There are other means of analogy. Search out, for example, the motives of offences, and generally you will recognise the dominant passion of the offender, and you may punish him, according to the proverbial saying, with the instrument of his sin. Offences of cupidity will best be punished by pecuniary fines, when the wealth of the offender admits it; offences of insolence, by humiliation ; offences of idleness, by compulsory labor, or forced rest.

5. *Exemplary.* A real punishment which should not be apparent, would be lost upon the public. The great art consists in augmenting the apparent punishment without augmenting the real punishment. This may be accomplished, either in the selection of the punishments themselves, or by accompanying their execution with striking solemnities.

The *auto-de-fe* would be one of the most useful inventions of jurisprudence, if instead of being an act of faith it were an act of justice. What is it but a public execution, a solemn tragedy which the legislator presents to the assembled people ; a tragedy truly important, truly pathetic by the

sad reality of its catastrophe, and by the greatness of its object! The preparations, the scenery, the ornaments, cannot be too studied, since upon them the effect principally depends. The tribunal, the scaffold, the dresses of the officers of justice, the habiliments of the criminals, the religious service, the procession, all the accompaniments, ought to bear a grave and mournful character. Why should not the executioners be covered with a mourning crape? The terror of the scene would be increased by it, and at the same time these useful servants of the state would be concealed from the unjust hatred of the people. Were it possible to keep up the illusion, all might pass in effigy. The reality of punishment is only necessary to maintain the appearance of it.

6. *Economical*; that is, punishments should have only that degree of severity absolutely necessary to answer their end. All beyond is not only so much superfluous evil, but produces a multitude of inconveniences, which intercept the ends of justice.

Pecuniary punishments are highly economical, since all the evil felt by him who pays, turns into an advantage for him who receives.

7. *Remissible* or *revokable*. It is necessary that the damage inflicted should not be absolutely irreparable, since unfortunately cases may occur in which the infliction may be subsequently discovered to have been without lawful cause. As long as testimony is susceptible of imperfection, as long as appearances may be deceitful, as long as men have no certain criterion whereby to distinguish truth from falsehood, one of the most important precautions which mutual security requires, is, not to admit of punishments absolutely irreparable, except upon the clearest evidence of their necessity. Have we not seen all the appearances of crime accumulated upon the head of a culprit, whose innocence was demonstrated, when nothing remained but to lament

over the mistake of an arrogant precipitation? Weak and inconsistent that we are! We judge like fallible creatures; we punish as if we could not be deceived!

To these important qualities of punishment, three others may be added, of less extensive utility, but to be aimed at, when it is possible to procure them without detracting from the great object of example.

1. It is a great merit in a punishment to contribute to the *reformation of the offender*, not only through fear of being punished again, but by a change in his character and habits. This end may be attained by studying the motive which produced the offence, and by applying a punishment which tends to weaken that motive. A house of correction, to fulfil this object, ought to admit a separation of the delinquents, in order that different means of treatment may be adapted to the diversity of their moral condition.

2. *Taking away the power of doing injury.* It is much easier to obtain this end than the preceding. Mutilations and perpetual imprisonment possess this quality. But the spirit of this maxim leads to an excessive rigor. It is this which has rendered the punishment of death so frequent.

If there are cases in which it is possible to deprive the offender of the power of doing injury only by taking away his life, it is upon very extraordinary occasions; for example, in civil wars, where the name of a leader, as long as he lives, is enough to inflame the passions of a multitude. And even in such cases, death inflicted upon actions of a character so equivocal ought rather to be looked upon as an act of hostility, than as a punishment.

3. *To furnish an indemnity to the injured party*, is another useful quality in a punishment. It is a means of accomplishing two objects at once, punishing an offence and repairing it; removing the evil of the first order, and putting a stop to alarm. This is a characteristic advantage of pecuniary punishments.

I conclude this chapter by a general observation of the highest importance: *The legislator, in the choice of punishments, ought carefully to avoid such as shock established prejudices.* If there has been formed in the minds of the people a decided aversion to a given kind of punishment, though it has all the other requisite qualities, it ought not to be admitted into the penal code, because it would do more harm than good. In the first place, it is an evil to inspire the public with a painful feeling by the establishment of an unpopular punishment. It is no longer the guilty alone who are punished. It is the most innocent and tender-hearted persons, upon whom is inflicted a punishment very real, though it has no particular name, by wounding their sensibility, braving their opinion, and presenting to them the image of violence and of tyranny. What can be expected from conduct so injudicious? The legislator, by despising public sentiment, imperceptibly turns it against himself. He loses the voluntary assistance which individuals lend to the execution of the law when they are content with it; the people, instead of being his assistants, are his enemies. Some endeavor to facilitate the escape of the guilty; others feel a scruple at denouncing them; witnesses hesitate to testify; there is formed insensibly a fatal prejudice which attaches a kind of shame and of reproach to the service of the law. This general discontent may go further; it sometimes bursts out into open resistance to the officers of justice, or to the execution of sentences. A success against authority is regarded by the people as a victory; and the unpunished delinquent triumphs over the weakness of the laws.

What renders punishments unpopular, is almost always their bad selection. The more the penal code is conformed to the rules we have laid down, the more it will secure the enlightened esteem of the wise, and an approbation of feeling on the part of the multitude. Such punishments will

be thought just and moderate. Everybody will be struck with their propriety, their analogy to offences, and with that scale of gradation by which aggravation of punishment is made to correspond to aggravation of offence, and mildness of punishment to smallness of offence. This kind of merit, founded upon domestic and familiar notions, is level to the comprehension of every mind. Nothing is more fit to give the idea of a paternal government, to inspire confidence, to make public opinion act in concert with authority. When the people are on the side of the laws, the chances of escape are reduced to their lowest term.

CHAPTER VII.

The kinds of Punishments.

THERE is no punishment, which taken separately unites all the requisite qualities. To attain that end, it is necessary to have a choice among many punishments, to vary them, and to make several of them enter into the same infliction. Medicine has no panacea. Different means must be recurred to, according to the nature of disorders and the temperament of the patient. The art of medicine consists in studying all remedies, in combining them, and in putting them into operation according to circumstances.

The catalogue of punishments is the same with that of offences. The same evil done by authority of the law, or in violation of the law, will constitute a punishment, or an offence. The nature of the evil is the same, but how different the effect! The offence spreads alarm; the punishment re-establishes security. Offence is the enemy of all; punishment is the common protector. Offence, for the advantage

of a single person, produces a universal evil; punishment, by the sufferings of an individual, produces a general good. Suspend punishment, the world becomes a scene of robbery, and society is dissolved. Re-establish it, and the passions grow calm, order is restored, and the weakness of each individual is sustained by the protection of the public force.

The whole matter of punishment may be distributed under the following heads:—

1. *Capital punishments*; such as put an immediate end to the life of the offender.

2. *Afflictive punishments*; such as consist in corporal sufferings, but which produce only a temporary effect, as flagellation, compulsory fasting, &c.

3. *Indelible punishments*; such as produce a permanent effect upon the body, as branding and amputation.

4. *Ignominious punishments*; their principal aim is, to expose the offender to the contempt of the spectators, and to make him be looked upon as unworthy the society of his old friends. The amend honorable is an example.

5. *Penitential punishments*; destined to awaken the sentiment of shame, and to expose to a certain degree of censure. They are not severe or public enough to bring on infamy, nor to make the offender be looked upon as unworthy the society of his former companions. It is, in fact, such chastisements as these that a father has the power to inflict upon his children, and which the most tender father would feel no scruple at inflicting upon the child he most loved.

6. *Chronic punishments*; their principal rigor consists in their duration, so that they would be almost nothing if it were not for that circumstance. Banishment and imprisonment are examples. They may be perpetual, or temporary.

7. *Punishments simply restrictive*; those which, without participating in any of the preceding characters, consist in some restraint, some restriction, in being prevented from

doing what one would desire; for example, the prohibition to exercise a certain profession, the prohibition to frequent a certain place.

8. *Punishments simply compulsive*; those which oblige a man to do a thing from which he would wish to be exempted; for example, the obligation to present one's self at certain times before an officer of justice. This punishment consists not in the thing itself, but in the inconvenience of the constraint.

9. *Pecuniary punishments*; they consist in depriving the delinquent of a sum of money, or of some article of actual property.

10. *Punishments quasi pecuniary*; they consist in depriving the offender of a kind of property in the services of individuals,—pure and simple services, or services combined with some pecuniary profit.

11. *Characteristic punishments*; punishments which, by means of some analogy, present to the imagination a lively idea of the offence. These punishments do not properly form a separate class; they are distributed among all the others, ignominious, penitential, afflictive, &c. A characteristic punishment is a manner of inflicting one of the preceding punishments with some circumstance which has relation to the nature of the offence. Suppose a counterfeiter, instead of being punished with death, were condemned to some other punishments, and among other things, to be branded indelibly. If the word *counterfeiter* were branded on his forehead, and upon each cheek the impress of a *piece of current money*, this punishment, recalling the offence by a sensible image, would be eminently characteristic.

In a house of correction, the delinquents, according to the diversity of their offences, should be obliged to wear emblematical dresses, or other exterior marks of some striking analogy. Thus the notion of their offence would become inseparable from them; their mere presence would

be like a new proclamation of the law; and the hope of escaping this shame, by resuming a common dress, would be a powerful attraction to engage them to good conduct.

CHAPTER VIII.

Justification of Variety in Punishments.

*Et quoniam variant morbi, variabimus artes ;
Mille mali species, mille salutis erunt.*

And as diseases vary, aids must vary ;
A thousand kinds of ill, a thousand cures.

WE have already seen that the choice of punishments is the result of a multitude of considerations, that they ought to be susceptible of more or less, equal to themselves, commensurable, analogous to the offence, exemplary, economical, reformative, popular, &c.

We have seen that a single punishment never can have all these qualities, that it is necessary to combine them, to vary them, to assort them, in order to find the composition which we need.

If a code founded upon these principles were only a project, it might be regarded as a fine speculation impossible to be realized. Cold and indifferent men who are always armed with a despairing incredulity wherever the happiness of mankind is concerned, would not want that common reproach of impracticability, so convenient to idleness and so flattering to self-love. But the work is done, the plan is executed ; a penal code has been constructed upon these principles, and that code, in which all these rules are scrupulously adhered to, has no quality more remarkable than

its clearness, its simplicity, its precision.* All penal legislation hitherto known, without having accomplished a moiety of the object, is infinitely more complicated, more vague, more difficult to comprehend.

It has been necessary to seek out a great variety of punishments, to adapt them to each offence, and to invent new means of rendering them exemplary and characteristic. But the same persons who will agree to the general proposition that these two qualities are essential, will perhaps be constantly revolting against their application. Punishments naturally excite antipathy, and even horror, when considered separately from offences. Besides, opinions, upon a matter submitted to sentiment and imagination, are so floating and capricious, that the same punishment which would excite the indignation of one, as too severe, would be blamed by another, as too mild and quite inefficacious.

I wish here only to anticipate an objection. A penal system ought not to be thought cruel because it includes a great variety of punishments. The multiplicity and the variety of punishments prove the industry and the cares of the legislator. To have but one or two kinds of punishment is an effect of ignorance of principles, and of a barbarous contempt of proportion. I might mention states in which despotism is all-powerful, and civilization but little advanced, where it may be said that but one kind of punishment is known. The more we study the nature of offences and of motives, the more we examine the diversity of characters and circumstances, the more we shall feel the necessity of employing different means to counteract them.

Offences, those interior enemies of society, which carry on against it an obstinate and varied war, display all the

* This refers to the penal division of that *Universal Code*, to the construction of which Bentham devoted the greater part of his life. It has not been published, and indeed was never finished to the satisfaction of the author.—*Translator*.

instincts of mischievous animals ; some employ violence ; others have recourse to stratagem ; they know how to assume an infinity of shapes, and everywhere keep up a secret correspondence. If they have been combatted without being conquered, if the revolt continues to subsist, it must be principally ascribed to the defect of legal tactics, and of the instruments hitherto employed to suppress them. Certainly, there needs as much talent, calculation, and prudence to defend society as to attack it, and to prevent offences as to commit them.

To determine whether a penal code is rigorous, observe how it punishes the most common offences, those against property. The laws everywhere have been too severe upon this point, because punishments being ill-chosen and misapplied, it has been attempted to compensate by rigor what was wanting in justice. It is necessary to be less prodigal of punishment as respects offences which attack property, in order to deal it with more severity upon offences which attack the person. The first are susceptible of indemnity, the others do not admit it, at least not in kind. The evil of offences against property may be reduced to a trifle by means of insurances, while all the treasure of Potosi cannot recall to life one murdered person, or calm the terrors spread by such a crime. But the question is not whether a penal code be more or less severe ; that is a wrong view of the subject. The only question is, whether the severity of the code be necessary or not.

It is cruel to expose even the guilty to useless sufferings ; and such is the consequence of punishments too severe. But is it not more cruel still to leave the innocent to suffer ? Such is the result of punishments too mild to be efficient.

We may conclude, that variety in punishments is one of the perfections of a penal code, and that the more repugnant to a sensitive heart is the search for these means, the more necessary is it that the legislator should be so pene-

trated with humanity, as to gain this victory over himself. Was Sangrado, whose only physic consisted in bleeding, more humane than Boerhaave, who consulted all nature to discover new remedies?*

* The ideas suggested in this chapter are expanded at much greater length, and sustained by additional arguments, in the *Theory of Punishments*, which is one of the works of Bentham, compiled and published by Dumont. Notwithstanding all the reasonings of Bentham upon the subject of diversity of punishment, I am constrained, by his own principles, to adopt the opinion that *imprisonment*, variously modified, is the only punishment which the legislator need employ,—with the exception of those *satisfactions*, pecuniary and honorary, which ought to form a part of every code, and which in a certain sense may be regarded as punishments.

Imprisonment combines all the qualities enumerated by Bentham as desirable in a punishment. 1. It is peculiarly *susceptible of more or less*. 2. It may easily be made *equal to itself*, that is, uniform in its severity as respects the punishment of different offenders guilty of the same offence. 3. It is *commensurable* in a high degree. 4. It is *exemplary*, inasmuch as a jail is a constant warning to offenders. 5. It is *economical*, or may easily be made so by proper arrangements, and that too in more senses than one; for while it is considered as a punishment both by the offender and the public, instead of inflicting any injury on the offender, in many cases, it may be made to confer upon him a high degree of benefit, both physical and moral; and as respects the pecuniary expense to the public, every jail, mere houses of detention excepted, might be made, and ought to be made, to support itself. 6. It is *remissible*, and quite as revocable as any other punishment. 7. It also may be regarded as *analogous to the offence*, since every offence consists in an abuse of liberty and power, and is properly punished by a restraint of liberty and power.

It also possesses in a high degree two of the other qualities esteemed by Bentham as important, though less so than those above mentioned. 1. It has a *tendency to reform the offender*, by removing him from the temptations of liberty, and giving virtuous motives an opportunity to regain an ascendancy. 2. It takes away, so long as it lasts, which may be for a long time, *the power of doing injury*.

It is a point of the highest importance that severity of punishment should be proportioned to magnitude of offences, and that, according

CHAPTER IX.

Examination of some common Punishments.

AFFLICTIVE PUNISHMENTS. These are not good for all offences, because they cannot exist in a slight degree, or at least, only in case of persons in a state of the lowest degradation. Every corporal punishment publicly inflicted, is infamous. Inflicted in private, it is less infamous, but it is not exemplary.

The most common afflictive punishment, is whipping. In its ordinary application, this punishment has the inconvenience of not being equal to itself; it varies from the slightest pain to the most atrocious torture, and may even result in death. Everything depends upon the kind of lash, the force of the application, and the temperament of the individual. The legislator who orders this punishment knows not what he does; the judge is nearly as ignorant; its execution will always be in the highest degree arbitrary

to a scale, simple, and easily to be understood. Variety of kinds in punishment seems to be inconsistent with this essential object, for by what common measure shall we calculate them?—how many lashes are equivalent to how many days of imprisonment? This is a matter of fancy upon which no two men will agree.

Imprisonment moreover has the decided advantage of not inflaming the vindictive feelings, or giving the sanction of the law to revolting cruelties. Who can doubt that barbarous punishments tend to barbarize the people which inflicts them?

I might suggest many other considerations in favor of adopting imprisonment as the only kind of punishment, did the limits of a note permit it. It must be confessed however that imprisonment has been fitted to serve for that purpose, only by reason of those vast improvements lately introduced into prison-discipline, of which Bentham next to *Howard* deserves the credit. See the treatise entitled *Panoptique*, compiled by Dumont from the writings of Bentham.—*Translator.*

and uncertain. In England, whipping is usual for such thefts as juries, by a humane perjury, declare to be below the value of a shilling. This punishment is a revenue to the executioner. If the delinquent suffers, it is only because he has no money wherewith to purchase the impunity of a mock infliction.

INDELIBLE PUNISHMENTS. Indelible afflictive punishments, taken separately, are not capable of graduation. The mildest of them has a very high degree of severity. Some, such as branding, only disfigure the person; others take away the use of some limb; others consist in mutilations, as the loss of the nose, the ears, the feet, or the hands. Mutilation of the organs which are necessary for labor ought not to be inflicted upon common offences, such as those which spring from want, as theft, smuggling, &c. What can the offenders do after being maimed? If the state maintains them, the punishment becomes too expensive; if they are left to themselves, it is the same as condemning them to despair and death. Penal mutilations have two inconveniences: they are irremissible, and they are apt to be confounded with natural accidents. There is no apparent difference between him who has had an arm cut off for a crime, and him who has lost an arm in the service of his country. An artificial and evident brand ought always to be added, to be the certificate of offence and the safeguard of misfortune. These punishments might be suppressed altogether; and if used at all, it should only be for some very rare offences where they have the recommendation of analogy.

Indelible brands are a powerful means, of which a bad use has been made. Among offenders convicted of theft, or of furtive concealment, many have only yielded to a transient temptation, and might return to virtue, if the nature of the punishment had not corrupted them. In such cases, there should be no indelible brand, no infamous punishment. That would be, to take away the hope of re-establishing

their reputation, and redeeming a moment of error. If an indelible brand is stamped upon counterfeiters, for example, it is a sign which excites distrust of their honesty, but which does not deprive them of the means of livelihood. Despised as rogues, they will still be employed as ingenious workmen. But if a man is branded for a first theft, what will become of him? Who will employ him? What would it avail him to be honest? He is compelled to be a knave.

An indelible brand is only useful to mark a dangerous offender, who will cease to be dangerous provided he is known, or to secure the execution of another punishment. When the offence is infamous, branding ought to accompany perpetual imprisonment, to prevent the flight of the prisoner. It binds him like a chain, for it makes the prison his asylum, and he would be worse off out of it than in it. To make these marks permanent and distinguishable, they should be imprinted by colored powders pricked into the skin, and not with a hot iron.

IGNOMINIOUS PUNISHMENTS. Infamy is one of the most salutary ingredients in penal pharmacy; but ideas upon this subject are very confused, and the means employed very imperfect. According to the notion of the lawyers, it would seem that infamy was an homogeneous thing, indivisible, an absolute and invariable quantity. If it were so, the employment of this punishment would be almost always impolitic and unjust; for it is equally applied to very unequal offences, and to some offences which ought not to be visited with it at all. Infamy, well managed, is very susceptible of graduation. It is, in a moral view, what defilement is in a physical. It is one thing to have a spot on one's clothes, and quite another to be covered with mud.

Loss of honor is another phrase in common use, but not less deceptive. It includes two false suppositions: one, that honor is a good of which all men possess a certain share; the other, that it is entirely in the power of the law, and

can be taken away at pleasure. The term *dishonor*, which differs from infamy in not excluding the idea of more or less, would be more appropriate.

Infamy, as it is commonly employed, bears rather upon the criminal, than the crime. If it bore upon the offence, its effect would be more certain, more durable, and more efficacious. It might then be proportioned to the nature of the case. But in order to attain that end, it is necessary that a particular kind of dishonor should be found for every kind of offence.

All this cannot be effected, except by a new apparatus of justice; inscriptions, emblems, dresses, pictural representations; signs which speak to the eyes, which strike the imagination through the senses, which form associations not to be effaced. It is thus that public indignation, which is but too apt to be directed against the laws and the judges, may be concentrated upon the offender and the offence. The legislator should not disdain to borrow from the theatre imposing shows and representations. To surround the criminal with symbols of his offence, would not be, as some may incline to represent it, a vain display of power, a ridiculous parody; it would be an instructive exhibition, which would announce the moral objects of punishment, and would render justice more respectable by showing it, even in the sad function of punishment, aiming rather to impress a great lesson, than to satisfy a spirit of vengeance.

The *pillory*, used in England, is of all punishments the most unequal and unmanageable. The delinquent is abandoned to the caprice of individuals, and this singular infliction is sometimes a triumph, and sometimes it is death. An author was condemned to it, some years since, for what is called a *libel*. The platform upon which he was placed became a kind of lyceum; and the whole time passed away in compliments between him and the spectators. In 1760, a bookseller was put in the pillory for having sold some im-

pious or seditious work. A subscription was opened for him, while he was still standing in it, and soon amounted to upwards of an hundred guineas. What an affront to the law! Lately, a man condemned to the same punishment for a lascivious offence, was murdered by the populace under the eyes of the police, who did not even attempt to defend him. Mr. Burke had the spirit to denounce this abuse in the House of Commons. "The man who undergoes a punishment," he said, "is still under the protection of the law, and ought not to be abandoned as a prey to ferocity." The orator was applauded, but the abuse remains; yet a simple iron grating to inclose the criminal would prevent all such acts of barbarity.

CHRONIC PUNISHMENTS. Chronic punishments, such as banishment and imprisonment, are adapted to many offences, but they demand a particular attention to the circumstances which affect individual sensibility. Banishment would be an infliction in the highest degree unequal if it were decreed without exception. Its severity depends upon the condition and the fortune of those who undergo it. Some have no reason to be attached to their country; others would be overwhelmed with despair at the idea of leaving their property and their home. Some have families; others have no such ties. One would be deprived of every resource if compelled to leave his country; to another, banishment would be a lucky escape from his creditors. Age and sex make a great difference. Much latitude must be allowed to the judge, who can be directed only by general instructions.

The English, before the independence of America, were in the habit of transporting to the colonies a numerous class of offenders. For some, this transportation was slavery; for others, a party of pleasure. A rogue who had a mind to travel, was a fool if he did not commit some offence to ensure himself an outfit and a free passage. The more industrious of the convicts gained property and a home in the

colonies. Those who knew nothing except how to steal, not being able to exercise their art with any success in a country of which they did not know even the geography, soon ended their career on the gallows. Once condemned and transported, their lot was unknown. Though they died of disease or famine, nobody cared. Thus the whole effect of example was lost; and the principal end of punishment was wholly neglected. The transportation to Botany Bay, which is now in use, answers its end no better. It has all the faults which a punishment can have, and none of the qualities which it ought to have.

If an establishment in a distant country were offered to the citizens, on condition of attaining it by a violation of the laws, what absurdity! what madness! But transportation must present itself to many wretches as an advantageous offer, of which they can take advantage only by committing an offence. Thus the law, instead of counterbalancing the temptation, adds, in many cases, to its force.

As to *imprisonment*, it is impossible to give any opinion with respect to that punishment, until all that concerns the structure and the internal government of prisons has been determined with the greatest exactitude. Prisons, with the exception of a small number, include every imaginable means of infecting both body and mind. Consider merely the state of forced idleness to which the prisoners are reduced, and this punishment is excessively expensive. Want of exercise enervates and enfeebles their faculties, and deprives their organs of suppleness and elasticity; despoiled, at the same time, of their characters and of their habits of labor, they are no sooner out of prison, than starvation drives them to commit offences. Subject to the subaltern despotism of men, who for the most part are depraved by the constant spectacle of crime and the habit of tyranny, these wretches may be delivered up to a thousand unknown sufferings, which aggravate them against society, and which

harden them to the sense of punishment. In a moral point of view, an ordinary prison is a school, in which wickedness is taught by surer means than can ever be employed for the inculcation of virtue. Weariness, revenge, and want preside over these academies of crime. All the inmates raise themselves to the level of the worst; the most ferocious inspires the others with his ferocity; the most cunning teaches his cunning to all the rest; the most debauched inculcates his licentiousness. All possible defilements of the heart and the imagination become the solace of their despair. United by a common interest, they assist each other in throwing off the yoke of shame. Upon the ruins of social honor, is built a new honor, composed of falsehood, fearlessness under disgrace, forgetfulness of the future, and hostility to mankind; and thus it is that unfortunates, who might have been restored to virtue and to happiness, reach the heroic point of wickedness, the sublimity of crime.

A convict, after having finished his term of imprisonment, ought not to be restored to society without precautions and without trial. Suddenly to transfer him from a state of surveillance and captivity to unlimited freedom, to abandon him to all the temptations of isolation and want, and to desires pricked on by long privation, is a piece of carelessness and inhumanity, which ought at length to attract the attention of legislators. At London, when the hulks in the Thames are emptied, the malefactors at that jubilee of crime rush into the city like wolves, who after a long fast have succeeded in entering a sheep-fold, and until all these plunderers have been apprehended for new offences, there is no security upon the highways, no safety in the streets of the metropolis.

PECUNIARY PUNISHMENTS. These inflictions have the triple advantage of being susceptible of graduation, of fulfilling the end of punishment, and of serving as an indemnity to the injured party. But it must be recollected that a

pecuniary punishment, if the sum is fixed, is in the highest degree unequal. This consideration, so obviously true, has been neglected by all legislators. Fines have been determined without any regard to the profit of the offence; to its evil; or to the wealth of the offender. Everybody recollects the story of that insolent young Roman, who amused himself by lashing all the passers-by, while a slave of his at the same time offered them a coin, fixed by the laws of the Twelve Tables, as the fine for that offence.

Pecuniary punishments should always be regulated by the fortune of the offender. The relative amount of the fine should be fixed, not its absolute amount; for such an offence, such a part of the offender's fortune;—with such modifications, however, as would meet the difficulties liable to attend a literal execution of this rule.

PUNISHMENTS SIMPLY RESTRICTIVE. There is nothing in penal legislation more ingenious than *banishment from the presence of the injured party*. This punishment is suggested by the old French law, and some traces of it may be found in the Danish code. With some improvements, it would offer an excellent remedy for offences growing out of individual hostilities, from which the public in general has nothing to fear. This punishment affords a triumph to the oppressed over the oppressor, and re-establishes, in the mildest manner, the preponderance of injured innocence over insolent force. Besides, it prevents the renewal of quarrels, and takes away from the aggressor the power of doing harm. But to put in operation a means so closely connected with honor, requires a scrupulous attention to the condition of individuals.

CAPITAL PUNISHMENTS. The more attention one gives to the punishment of death, the more he will be inclined to adopt the opinion of Beccaria, that it ought to be disused. This subject is so ably discussed in his book, that to treat it, after him, is a work that may well be dispensed with.

Those who wish to see, at a single glance, all that can be said for and against it, have only to turn back to the chapter containing the table of qualities desirable in a punishment.

Whence originated the prodigal fury with which the punishment of death has been inflicted? It is the effect of resentment, which at first inclines to the greatest rigor; and of an imbecility of soul which finds in the rapid destruction of convicts, the great advantage of having no further occasion to concern one's self about them. Death!—always death!—It requires neither the meditations of genius, nor resistance to the passions. It is only to yield one's self to them, and we are carried at once to that fatal term.

Is it said that death is necessary to take from an assassin the power of reiterating his offence? For the same reason then we ought to destroy the frantic and the mad, from whom society has everything to fear. If we can guard against these, why not against assassins? Is it said that death is the only punishment which can outweigh certain temptations to commit homicide? These temptations can only arise from hostility or cupidity; and do not these passions, from their very nature, dread humiliation, want, and captivity more than death?

I should astonish the reader, were I to expose to him the penal code of a nation, celebrated for its humanity and its enlightenment. We should expect to find in it the most exact proportion between offences and punishments; but in fact, that proportion is continually outraged or forgotten, and the punishment of death is lavished upon the most trifling offences. The mildness of the national character is in contradiction to the laws, and as might be expected, it is that which triumphs; the laws are eluded; pardons are multiplied; offences are overlooked; testimony is excluded; and juries, to avoid an excess of severity, often fall into excess of indulgence. Thence results a system of penal law, inco-

herent, contradictory, uniting violence to weakness, dependent on the humor of a judge, varying from circuit to circuit, sometimes sanguinary, sometimes null.

English law-makers have not yet adopted imprisonment joined to labor,—a sort of punishment good in so many respects. Instead of compulsive occupation, they reduce their prisoners to complete idleness. Is this by design? No; it is doubtless by habit. Things have been found upon that footing; it has been disapproved, but has not been changed. There needs pecuniary advances, vigilance, and sustained attention, to combine imprisonment with labor; none of these are needed to shut up a man, and leave him to himself.

CHAPTER X.

Of the pardoning power.

WHAT punishment lacks in certainty, must be made up in severity. The less certain a punishment is, the severer it must be; the more certain it is, the less it need be severe.

What shall be said of a power created for the very purpose of making punishment uncertain? Such however is the direct consequence of a power to pardon.

In the species, as in the individual, the age of passion precedes that of reason. Anger and vengeance have dictated the earliest penal laws. When these barbarous enactments, founded upon caprices and antipathies, begin to shock an enlightened public, the power of pardoning offers a safeguard against the sanguinary rigor of the laws, and becomes, so to speak, a comparative good; and nobody

inquires whether this pretended remedy is not, in fact, a new evil.

How many eulogiums have been bestowed upon clemency! It has been repeated a thousand times that it is the first virtue of a sovereign. Doubtless, if the crime be only an attack upon the sovereign's self-love; if the question be of a satire upon him or his favorites; the moderation of a prince is meritorious, the pardon which he grants is a triumph over himself. But when the question is of an offence against society, a pardon is not an act of clemency; it is a mere piece of partiality.

In cases where punishment would do more evil than good, as after seditions, conspiracies, and public disorders, the power of pardoning is not only useful, it is necessary. These cases being foreseen and pointed out in a good legislative system, pardon applied to them is not a violation, it is an execution of the law. But pardons without motive, effects of the favor or the facility of a prince, impeach either the laws or the government; the laws, of cruelty to individuals; or the government, of cruelty to the public. Reason, justice and humanity must be wanting somewhere; for reason is never in contradiction with itself; justice cannot destroy with one hand what it has done with the other; humanity cannot require that punishments should be established for the protection of innocence, and that pardons should be granted for the encouragement of crime.

The power of pardoning, it has been said, is the noblest prerogative of sovereignty. But may not that prerogative sometimes turn to the disadvantage of him by whom it is exercised? If instead of gaining for the prince a more constant affection on the part of his subjects, it exposes him to caprices of judgment, to clamors and to libels; if he can neither yield to solicitations without being suspected of feebleness, nor show himself inexorable without being accused of severity, where then is the splendor of this dangerous

right? It would seem that a just and humane prince must often dread the exposure to this combat between public and private virtues.

Homicide ought at least to make an exception. He who has the right to pardon that offence, is master of the life of every citizen.*

To sum up. If the laws are too severe, the power of pardoning is a necessary corrective; but that corrective is itself an evil. Make good laws, and there will be no need of a magic wand which has the power to annul them. If the punishment is necessary, it ought not to be remitted; if it is not necessary, the convict should not be sentenced to undergo it.

* To prevent the abuse of this power, it would suffice to require that its exercise should be accompanied by an exposition of motives. Where capital punishments are in use, it would be better to preserve the power of pardoning, even without restrictions, than to abolish it entirely.

PART FOURTH.

INDIRECT MEANS OF PREVENTING OFFENCES.

INTRODUCTION.

IN all the sciences there are branches which have been cultivated more tardily than others, because they demand a longer series of observations, and meditations more profound. It is thus that mathematics have their transcendental or higher branch, that is, a new science, as it were, above ordinary science.

The same distinction, to a certain extent, may be applied to the art of legislation. What means shall be adopted to prevent injurious actions? The first answer which presents itself to everybody, is this: *Forbid those actions; punish them.* This method of combatting offences being the most simple and the first adopted, every other method of arriving at the same end, is, so to speak, a refinement of the art, and its transcendental branch.

That branch consists in devising a course of legislative acts adapted to *prevent* offences; in acting principally upon the inclinations of men, in order to turn them from evil, and

to impress upon them the direction most useful to themselves and to others.

The first method, that of combatting offences by punishments, constitutes *direct legislation*.

The second method, that of combatting offences by *preventive means*, constitutes a branch of legislation which may be called *indirect*.

The sovereign acts *directly* against offences when he prohibits them individually under special penalties. He acts *indirectly*, when he takes precautions to prevent them.

By direct legislation, the evil is attacked in front. Indirect legislation attacks it obliquely. In the first case, the legislator declares open war against the enemy, points him out, pursues him, meets him foot to foot, and carries his defences sword in hand. In the second case, he does not announce his whole design; he works under ground; he procures intelligence; he seeks to prevent hostile enterprises, and to keep still in his alliance those who may have formed secret intentions against him.

Speculative writers upon politics have had glimpses of this art; but in speaking of this second branch of legislation, they do not evince any clear idea of it. The first branch has been a long time reduced to system, the good part of it as well as the bad. The second branch has never been thoroughly examined; nobody has undertaken to treat it with method; to arrange it; to classify it; in one word, to master it, in its whole extent. It is yet a new subject.

Writers who have composed political romances, tolerate direct legislation as a necessary evil; it is a choice of evils to which they submit, but as to which they never express a very lively interest. But when they come to speak about the means of preventing offences, of rendering men better, of perfecting morals, their imagination grows warm, their hopes are excited; one would suppose they were about to produce the great secret, and that the human

race was going to receive a new form. It is because we have a more magnificent idea of objects in proportion as they are less familiar, and because the imagination has a loftier flight amid vague projects, which have never been subjected to the limits of analysis. *Major e longinquo reverentia*,—the greater distance, the greater reverence;—this is a saying as applicable to ideas as to persons. A detailed examination will reduce all these indefinite hopes to the just dimensions of the possible; and if in the process we lose fictitious treasures, we shall be well indemnified by the certainty of what remains.

To distinguish exactly what appertains to these two branches, it is necessary to begin by forming a just idea of direct legislation.

It proceeds, or ought to proceed, in this way:—

1st. The choice of acts to be erected into offences.

2d. The description of each offence, as murder, theft, peculation, &c.

3d. An exposition of the reasons for attributing to these acts the quality of offences; reasons which ought to be deduced from the single principle of utility, and consequently to be consistent with themselves.

4th. The assigning of a competent punishment for each offence.

5th. An exposition of the reasons which justify these punishments.

The penal system, though it be made as perfect as possible, is defective in several respects. 1st. The evil must exist before the remedy can be applied. The remedy consists in the application of punishment, and punishment cannot be applied till offence is committed. Every new instance of punishment inflicted, is an additional proof that punishment lacks efficacy, and leaves behind it a certain degree of danger and alarm. 2d. Punishment itself is an evil, though necessary to prevent greater evils. Penal justice, in

the whole course of its operation, can only be a series of evils; evils arising from the threats and constraint of the law; evils arising from the prosecution of the accused before it is possible to distinguish innocence from guilt; evils growing out of the infliction of judicial sentences; evils from the unavoidable consequences which result to the innocent. 3d. The penal system is not able to reach many injurious actions, which escape justice, either by their frequency, the facility of concealing them, by the difficulty of defining them, or finally by some vicious turn of public opinion by which they are favored. Penal law can operate only within certain limits, and its power extends only to palpable acts, susceptible of manifest proof.

This imperfection of the penal system has caused new expedients to be sought for to supply its deficiencies. These expedients have for their object the prevention of offences, either by preventing the acquisition of the *knowledge* necessary to their commission, or by taking away the *power* or the *will* to commit them. The most numerous class of these means relates to the art of directing the inclinations by weakening the seductive motives which excite to evil, and by strengthening the tutelary motives which impel to good.

Indirect means then are those which, without having the character of punishments, act upon man physically or morally, to dispose him to obey the laws, to shield him from temptations, to govern him by his inclinations and his knowledge.

These indirect means not only have a great advantage on the side of mildness; but they succeed in a multitude of cases in which direct means will not answer. All modern historians have remarked how much the abuses of the Catholic church have diminished since the establishment of the Protestant religion. What popes and councils could not do by their decrees, a fortunate rivalry has accomplished without difficulty; and scandals which would afford to hos-

tile sects a matter of triumph, have been carefully avoided. The indirect means of free competition among religions has more power to restrain and reform the clergy than all positive laws.

Let us take another example from political economy. Attempts have been made to reduce by law the price of merchandise, and particularly the interest of money. It is true that high prices are an evil only in comparison with some good of which they prevent the enjoyment; but such an evil as they are, there is reason for seeking to diminish it. To effect that purpose, a multitude of restrictive laws have been devised, a fixed tariff of prices, a legal rate of interest. And what has been the consequence? These regulations have always been eluded; punishments have been multiplied; and the evil, instead of being diminished, has become greater. The only efficacious means is an *indirect* one, which few governments have had the wisdom to employ. To grant all merchants and capitalists a free right of competition, to entrust to them the business of making war upon each other, of underbidding each other, and of attracting purchasers by the offer of more advantageous terms,—such is this means. Free competition amounts to the same thing as the grant of a reward to him who furnishes merchandise of the best kind at the lowest price. This immediate and natural reward, which a multitude of competitors flatter themselves with the hope of obtaining, acts with more efficacy than a distant punishment which every one expects to escape.

Before entering upon the exposition of these indirect means, it should be observed that the classification here employed is, to a certain extent, arbitrary, and that several of them may be properly arranged under different heads. To distinguish them invariably, one from the other, would require us to enter upon a metaphysical analysis, very subtle and very fatiguing. It is enough for the present purpose,

that all indirect means may be placed under one or the other of the heads proposed, and that the attention of the legislator is directed to the principal sources whence they may be derived.

There is one more preliminary remark of essential importance. Among the variety of means about to be explained, there is none which is recommended as especially fit for any particular government, and still less for all government in general. The special advantage of each measure considered by itself, will be indicated under its proper head; but each may have relative inconveniences, which it is impossible to determine without knowing the circumstances of the particular case. It ought to be well understood, that the object here proposed, is not to advise the adoption of such or such a measure, but simply to bring it into view, and to recommend it to the attention of those whose province it is to judge of its applicability.

CHAPTER I.

Means of taking away the physical power to do harm.

WHEN the will, the knowledge, and the power necessary to the performance of an act, concur, that act is of necessity performed. *Inclination, knowledge, power*, these then are the three points at which it is necessary to apply the influence of law, in order to determine the conduct of men. These three words contain in the abstract the sum and substance of all that can be done by legislation, direct or indirect.

I begin with *power*, because means in this respect are more simple and more limited, and because, in those cases

in which we can succeed in taking away the power to do harm, we have accomplished everything. Success is certain.

Power may be distinguished into two kinds: 1st. *Internal* power, that which depends upon the intrinsic faculties of the individual; 2d. *External* power, that which depends upon persons and things external to the individual, but the aid of which he must have, in order to act.

As to internal power, that which depends upon the faculties of the individual, it is scarcely possible to deprive a man of it with advantage. The power of doing evil is inseparable from the power of doing good. With his hands cut off, a man cannot steal, but neither can he work.

Besides, these privative means are so severe, that they cannot be employed except upon criminals already convicted. Imprisonment is the only one of them that can be justified, in certain cases, to prevent an apprehended offence.

The legislator will find greater resources for the prevention of offences by turning his attention to the material objects which aid their commission.

There are cases in which the power of doing harm may be taken away, by excluding what Tacitus calls *irritamenta malorum*, irritations to evil,—the subjects, the instruments of offence. In such cases, the policy of the legislator may be compared to that of a nurse; iron bars at the windows, grates around the fire, the care of keeping sharp and dangerous instruments from the hands of children, are means of the same kind, as the prohibition to sell and to make, tools for the fabrication of false money, venefic drugs, arms easy to be concealed, dice or other instruments of prohibited games, and the prohibition to make or to have certain nets for the chase or other instruments for trapping wild game.

Mahomet, not trusting to the restraining power of reason, wished to take away from men the power of abusing strong

drinks; and if we consider the climate of warm countries, where wine renders men furious rather than stupid, we shall find perhaps that the total prohibition is a milder method of procedure than a permission which produces a numerous class of offences and consequently of punishments.

Imposts upon spirituous liquors fulfil, in part, the same end. In proportion as the price is raised above the capacity of the most numerous class to purchase, they are deprived of the means of giving themselves up to intemperance.

Sumptuary laws, inasmuch as they prohibit the introduction of certain articles which are objects of jealousy to the legislator, may be referred to this head. It is this which has rendered so famous the legislation of Sparta; the precious metals were banished; strangers were excluded; travelling was not permitted.

At Geneva, there was a prohibition to wear diamonds, and the number of horses which an individual might keep, was limited.*

There might be mentioned under this head, many English statutes relative to the sale of spirituous liquors. It is prohibited to expose them to sale in the open air. A license must be obtained, and paid for, &c. The prohibition to open certain places of amusement upon Sunday appertains to this head.

To the same class belong the measures adopted to destroy libels, seditious writings, obscene figures exposed in the streets, and to prevent the printing and publication of works thought to have a pernicious tendency.

The ancient police laws of Paris forbade a servant to wear a sword, or even to carry a cane or staff. This perhaps was a simple distinction of rank; perhaps it was a measure of security.

* To cite these usages is not to propose them as models. They are cited to show under what class such laws ought to be arranged.

Where a particular class of the people is oppressed by the sovereign power, prudence requires that they should be forbidden to carry arms. The greater injury becomes a justification for the smaller injury. The Philistines obliged the Jews to come to them every time they wanted to sharpen their axes and scythes. In China, the fabrication and the sale of arms is reserved exclusively to the Tartar-Chinese.

By a statute of George III., all persons, except traders, are forbidden to keep in their houses more than fifty pounds' weight of gunpowder, and traders are not allowed to have more than two hundred pounds' weight on hand at one time. The reason assigned is, the danger of explosions. In the statutes relating to high roads and turnpikes, the number of carriage horses is limited to eight, with an exception in favor of certain transportations, and of artillery and munitions of war, for the service of the king. The reason assigned is, the preservation of the roads.

Whether any of these measures, and others of the same sort, have a political object behind the reasons assigned for them, that is what I do not pretend to say; but it is certain that such expedients may operate to take away the means of revolt, and to diminish facilities for smuggling.

Among the expedients of this sort, I know none more happy or more simple than that commonly used in England to render difficult the theft of bank-notes. When it is necessary to send them by a messenger or the post, they are cut into two parts, which are sent separately. The theft of half a bank-note would be useless, and the difficulty of stealing the two parts, one after the other, is so great, that the offence is almost impossible.

There are professions for the exercise of which proofs of capacity are required. There are others which the laws render incompatible with each other. In England, many offices of justice are incompatible with the profession of an

attorney; it is feared that the right hand might be secretly laboring for the left.

Persons who contract with the administration for the supply of commissary stores, and the provisioning of the fleet, cannot have a seat in parliament. These persons may be defaulters, and be subject to parliamentary investigation; it is not proper, therefore, that they should be members. But there are stronger reasons yet for this exclusion, derived from the danger of increasing ministerial influence.

CHAPTER II.

Prohibition of acquiring knowledge which may be turned to a bad purpose.

I MENTION this kind of policy only to condemn it. It has produced the censorship of the press; it has produced the inquisition; and wherever it is employed, it will always produce the brutalization of mankind.

I propose here to show, 1st, that the diffusion of knowledge is not injurious on the whole, the offences of refinement being less fatal than those of ignorance; 2d, that the most advantageous method of combatting the evil which may result from a limited degree of knowledge, is, to augment its quantity.

In the first place, the diffusion of knowledge is not injurious on the whole. Some writers have thought, or seemed to think, that the less men know, the better off they will be; that the less enlightened they are, the less acquaintance they will have with the objects that serve as motives to evil, or as means of committing it. It is not surprising that fanatics have entertained this opinion, since there is a natural and constant rivalry between the knowledge of things real,

useful, and intelligible, and the knowledge of things unintelligible, imaginary, and useless. But these notions about the dangers of knowledge are sufficiently common among the mass of mankind. The age of gold, that is, the age of ignorance, is spoken of with regret. To put in a clear light the error upon which these notions rest, there needs a more precise method of estimating the evil of an offence, than any hitherto employed.

It is not astonishing that offences of refinement are more odious than offences of ignorance, that is, of brutal violence. In determining the greatness of offences, the principle of antipathy has been more followed than the principle of utility. Antipathy gives more attention to the apparent depravity of character indicated by the offence, than to any thing else. This, in the eyes of passion, is the *salient point* of the action, in comparison with which the strict examination of utility always appears too cool. Now the more knowledge and refinement an offence indicates, the more proof there is of reflection on the part of the offender, and of depravity in his moral disposition. But the evil of an offence, the sole object which the principle of utility regards, is not determined by depravity of character alone; it depends immediately upon the sufferings of the persons who are affected by the offence, and upon the alarm which it excites in the community; and in the sum of evil, the depravity which the culprit manifests is not an essential circumstance, but merely an aggravation.

The greatest offences are those for which the smallest degree of knowledge is sufficient; the most ignorant individual always knows enough to commit them. Inundation is a graver crime than house-firing; house-firing than homicide; homicide than robbery; robbery than pilfering. This proposition may be demonstrated by an arithmetical process, by an inventory of the items of evil in each case, by a comparison of the greatness of each individual suffering,

and of the number of individuals who are made to suffer. But how much knowledge is required to enable a man to commit these offences? The most atrocious of all, demands only a degree of intelligence possessed by the most barbarous, the most savage of men.

Robbery is worse than seduction or adultery; but robbery is most frequent in times of barbarism, seduction and adultery in those of refinement.

The dissemination of knowledge has not increased the number of offences, nor even the facility of committing them; it has only diversified the means of their perpetration. And how? By gradually substituting less injurious means in the place of those which are more injurious.

Is a new method of theft invented? The inventor profits for a time by his discovery; but presently his secret is found out, and people are on their guard. It then becomes necessary to have recourse to some new means, which has its turn, like the first, and passes by in the same way. All this is still but theft, not so bad as highway robbery, which itself is not so bad as plundering committed by armed bands.* Why? Because the confidence every one has in his own prudence and his own sagacity, prevents him from being so much alarmed by theft as by robbery.

Let it be granted however that bad men abuse every-

* That is, on the supposition that the damage of the offence is the same; for there is a point of view in which theft is worse than robbery, since one may possess himself of a greater sum of money by fraud than by robbing on the highway.

For proofs of the superiority of modern manners over ancient times, see *Hume's* Essay on Population. For proofs of their superiority over the manners of the middle ages, see *Voltaire's* General History; *Hume's* History of England; *Robertson's* Introduction to Charles V.; *Barrington's* Observations upon English Statutes, and *Chastellux*, in his treatise upon Public Happiness, a work happily conceived but not well executed.

thing ; that the more they know, the more means they have of doing evil ; what follows ?

If the good and the bad composed two distinct races like the white and black, the one might be enlightened and the other kept in ignorance. But since it is impossible to discriminate between them, and especially when we consider the frequent alternation of good and evil in the same individual, all must be subjected to the same rule. General light, or general darkness ; there is no middle course.

However, the very evil complained of, carries with it its own cure. Knowledge cannot give advantage to the bad, except so far as they have the exclusive possession of it. A snare which is known, ceases to be a snare. The most ignorant tribes have known how to poison the tips of their arrows, but it is only nations well instructed who have become acquainted with all poisons, and have known how to oppose them by antidotes.

All men have the capacity to commit offences ; but only enlightened men are able to discover laws which can prevent them. The more ignorant a man is, the more he is inclined to separate his private interest from the interest of his fellows. The more enlightened he is, the more clearly will he perceive the connection between his private interest and the interest of the whole.

Look through history ; the most barbarous ages present an assemblage of all offences, offences of cunning as well as offences of violence. Barbarism, though it has some vices peculiar to itself, seems not to exclude vices of any kind. At what epoch were false titles and forged grants most multiplied ? When the clergy alone knew how to read ; when through the superiority of their knowledge they regarded men almost as we regard horses, animals which we could not subdue to the bit, if their intellectual faculties were equal to ours. Why was recourse had, during the same period, to judicial duels, to trials by fire and water, and to all those

strange means called *judgments of God*? Because, during that infancy of reason, there were no principles known, by which to distinguish truth from falsehood.

Compare the results in states in which the publication of ideas has been restrained, and in those where freedom of thought and of speech has been permitted. You have on the one side, Spain, Portugal, Italy; on the other, England, Holland, North America. Where is the most happiness? Where the best morals? Where the most crimes? Where is society most agreeable and most secure.

Too many praises have been lavished upon institutions, the founders of which made knowledge a monopoly. Such were the priests in ancient Egypt, the Bramins of Hindostan, the Jesuits in Paraguay. If their conduct merits praise, it is only in relation to the interests of those persons who have administered these forms of government, not as regards the interest of those who have been subject to them. It may be admitted that the people have been quiet and docile under these theocracies; but have they been happy? It is not credible that they have been; unless an abject servitude, vain terrors, useless obligations, macerations, painful observances, saddening opinions, are no obstacles to happiness.

These governments have not so much attained their end by maintaining natural ignorance, as by spreading prejudices, and propagating errors. The chiefs themselves have always ended by becoming the victims of this narrow and pusillanimous policy. States retained in a constant inferiority, by institutions opposed to every kind of progress, become the prey of nations who have acquired a relative superiority. States grown old in an infancy, which has been prolonged by their tutors, that they might the more easily govern, have always offered an easy conquest; and once subjected, have passed with little or no resistance from one master to another.

But it is said we do not pretend to keep men in ignorance ; all governments perceive the necessity of knowledge ; what they are afraid of, is, the liberty of the press. They do not oppose the publication of scientific treatises ; but is it not reasonable that they should oppose the spread of immoral or seditious writings, the evil effects of which cannot be prevented, if they are once allowed to circulate ? Punishing a guilty author may act as a preventive to those who might incline to imitate him ; but to prevent the publication of bad books by the institution of the censorship, is to check the evil at its source.

The liberty of the press has its inconveniences ; nevertheless, the evils which result from it are not to be compared to those of a censorship.

Where will you find that rare genius, that superior intelligence, that mortal, accessible to all truths, and inaccessible to any passion, to whom can be entrusted this supreme dictatorship over all the productions of the human mind ? Do you suppose that a Locke, a Leibnitz, or a Newton, would have had the presumption to undertake it ? And what is this power which you are forced to confer upon inferior men ? It is a power which by a singular necessity combines in its exercise all the causes of partiality, and all the characteristics of injustice. What is a censor ? He is an interested judge, a sole judge, an arbitrary judge, who proceeds in secret, condemns without a hearing, and decides without appeal. Secrecy of procedure, that greatest of abuses, is absolutely essential. If a book were publicly examined, it would be publishing the book, in order to know if it ought to be published.

As to the evil which results from a censorship, it is impossible to measure it, because it is impossible to tell where it ends. It is nothing less than the danger of stopping the whole progress of the human mind in all its paths. Every new and important truth must of necessity have

many enemies, for the single reason that it is new and important. Is it to be presumed that the censor will belong to that class, infinitely the smaller, which elevates itself above established prejudices? And though he should have that uncommon strength of mind, will he have the courage to endanger himself on account of discoveries of which he will not share the glory? There is but one sure course for him to take; to proscribe everything which rises above common ideas, to draw his pen through everything elevated. He risks nothing by prohibition, but everything by permission. In doubtful cases, it will not be he that suffers; it will be, Truth.

If the advance of the human mind had depended upon the good-will of those in authority, where should we be to-day? Religion, legislation, morals, the physical sciences, all would be in darkness. But it is not necessary to dwell upon so common an argument.

The true censorship is that of an enlightened public, which discountenances false and dangerous opinions, and encourages useful discoveries. In a free country, the audacity of a libel does not save it from general contempt; but by a contradiction easy to be explained, the indulgence of the public in this respect is always in proportion to the rigor of the government.

CHAPTER III.

Indirect means of preventing the wish to commit offences.

WE have seen that legislation can only operate by influencing the power, the knowledge, and the will. We have spoken of the indirect means of taking away the power

to do injury ; we have shown that the policy of preventing men from acquiring information, does more harm than good. All the indirect means then which we can use with advantage, must be employed in directing the inclinations of men, in putting into operation the rules of a logic hitherto but little known, *the logic of the will*, a logic which, as Horace has so well expressed it, seems often to be opposition to that of the *understanding* :—

*Videa meliora
Proboque, et deteriora sequor.*

I see the better
And approve it ; and the worse I follow.

The means about to be presented are of a nature to put a stop in many cases to this interior discord ; to diminish that contrariety among motives, which often owes its existence to want of address on the part of the legislator, to an opposition which he has himself created between the natural sanction and the political sanction, between the moral sanction and the religious sanction. If he could make all these powers concur towards the same end, all the faculties of man would be in harmony, and the will to do evil would not exist. In cases where this end cannot be attained, it is necessary, at all events, that the force of the tutelary motives should exceed that of the seductive motives.

The indirect means by which the will can be influenced, may be illustrated under the form of political or moral problems, of which the solution may be shown by various examples :

Problem first. To change the course of dangerous desires, and to direct the inclinations towards amusements conformable to the public interest.

Second. To arrange so that a given desire may be satisfied without injury, or with the least possible injury.

Third. To avoid furnishing encouragements to crime.

Fourth. To increase responsibility in proportion as temptation increases.

Fifth. To diminish the sensibility to temptation.

Sixth. To strengthen the impression of punishments upon the imagination.

Seventh. To facilitate knowledge of the fact of an offence.

Eighth. To prevent an offence by giving to many persons an immediate interest to prevent it.

Ninth. To facilitate the means of recognising and finding individuals.

Tenth. To increase the difficulty of escape.

Eleventh. To diminish the uncertainty of prosecutions and punishments.

Twelfth. To prohibit accessory offences, in order to prevent the principal offence.

After these means, of which the object is special, others more general will be pointed out, such as the culture of benevolence, the culture of honor, the employment of the impulse of religion, and the use to be made of the power of instruction, and of education.

CHAPTER IV.

To change the course of dangerous desires, and to direct the inclinations towards amusements conformable to the public interest.

THE object of direct legislation, is, to combat pernicious desires by prohibitions and punishments directed against the injurious acts to which those desires give birth. The object of indirect legislation, is, to counteract their influence

by increasing the force of less dangerous desires, capable of entering into rivalry with them.

There are two objects to be considered—What are the desires which it is an object to weaken? By what means can that end be obtained?

Pernicious desires are of three classes: 1st. Malevolent passions; 2d. The appetite for strong drinks; 3d. Idleness.

The means of weakening these desires may be reduced to three heads: 1st, to encourage honest inclinations; 2d, to avoid forcing men into idleness; 3d, to favor the consumption of non-inebriating liquors, in preference to those of an intoxicating quality.

Some persons may be surprised that the catalogue of vicious inclinations is so limited; but they should recollect that the human heart has no passions absolutely bad. There is none which does not stand in need of guidance; and at the same time none which ought to be eradicated. When the angel Gabriel prepared the prophet Mahomet for his divine mission, he plucked from his heart a black spot which contained the seed of evil. Unfortunately this operation cannot be practised upon the hearts of ordinary men. The seeds of good and the seeds of evil are inseparably mixed. The inclinations are governed by motives; but all pains and all pleasures are motives; pains to be avoided, pleasures to be pursued. Now all these motives may produce all sort of effects, from the best to the worst. They are trees which bear wholesome fruits or poisons, according to exposure, according to the care of the gardener, according to the wind that blows, or the temperature of the day. The purest benevolence, confining itself too exclusively to a single subject, or mistaken in its means, may produce great evils. Attachment to one's self, though occasionally it becomes hurtful, is constantly necessary; and in spite of their deformity, the malevolent passions are at least useful as means of defence, as safeguards against the invasion of

personal interest. We ought not then to attempt rooting out any affections of the human heart, since there is none which does not play its part in the system of utility. We should confine ourselves to the operation of these affections in detail, according to the direction which they take, and the effects which they are likely to produce. A useful balance may be established between these inclinations, by strengthening those which are apt to be too weak, and by weakening those which are too strong. It is thus that the cultivator directs the course of waters in such a manner that his grounds suffer neither from overflow, nor from drought.

The passion for inebriating liquors is, properly speaking, the only one that can be extirpated without doing any injury; for the irascible passions, as I have said, are a necessary stimulant in cases when persons are obliged to protect themselves, and to repel the attacks of an enemy. The love of repose is not injurious in itself; indolence however is an evil, inasmuch as it favors the ascendancy of the hurtful passions. However, these three desires may be looked upon as equally in need of being repressed. It is hardly to be feared that we can have too great success against the inclination to idleness, or that the vindictive passions can be reduced below the point of utility.

The first expedient, as I have said, is, to encourage innocent amusements. It is a branch of that science so complicated and so ill-defined, which consists in advancing civilization. The state of barbarism differs from civilization by two characteristic traits: 1st, the force of the *irascible* appetites; 2d, the small number of objects of enjoyment offered to the *concupiscent* appetites.*

* This distinction of the schoolmen is sufficiently complete. To the first class belong the pleasures of malevolence; to the second, all other pleasures.

The occupations of a savage after he has supplied himself with physical necessities, the only ones he knows, are soon described. The pursuit of revenge; the pleasure of drunkenness if he has the means; sleep; or perfect indolence; such is the sum total of his resources. Each of these inclinations is favorable to the development and to the action of the other. Resentment finds easy access to a mind unoccupied; idleness leads to drunkenness; and drunkenness produces quarrels, which nourish and multiply resentments. The pleasures of love, not being mingled with the sentimental refinements which embellish and increase them, seem not to play a great part in the life of the savage, and go but a little ways towards filling up the intervals of exertion.

Under a regular government, the necessity of vengeance is suppressed by legal protection, and the pleasure of giving one's self up to it, is counteracted by the fear of punishment; the power of indolence is enfeebled; but the love of strong liquors is not diminished. A nation of savages, and a nation of hunters, are convertible expressions. The life of the hunter, as well as that of the fisherman, provided they know how to preserve the game they take, affords long intervals of idleness; while in a civilized state, the mass of the community is composed of laborers and artisans, who have scarcely the leisure necessary for sleep and relaxation. But the misfortune is, that the passion for strong drink can be satisfied in the midst of a most laborious life, and that it trenches upon the hours allotted to repose. In the lowest conditions, poverty is a restraint upon it; but artisans whose labor is better paid, can make great sacrifices to this fatal taste, and the opulent classes may devote all their time to it. Thus we see, in ages of barbarism, that the upper classes have divided their whole life between war; the chase, which is the image of war; the animal functions; and long repasts, of which drunkenness was the greatest

attraction. Such is the whole history of a great proprietor, a great feudal lord of the middle ages. The privilege of this noble warrior or of this noble hunter, extended into the midst of a more civilized society the occupations and the character of a savage.

This being so, every innocent amusement which human art can invent, is useful under a double point of view: 1st, for the very pleasure which results from it; 2d, from its tendency to weaken the dangerous inclinations above described. By innocent amusements must be understood all those which cannot be proved to be injurious. Their introduction being favorable to the happiness of society, it is the duty of the legislator to encourage them, or at least, to put no obstacle in their way. They will be enumerated here; first, those which are esteemed the most gross, and afterwards those which suppose more refinement.

1. The introduction of a variety of aliments, and the progress of the art of gardening, applied to the production of nutritious vegetables.

2. The introduction of non-inebriating liquors, of which tea and coffee are the principal. These two articles, which superficial minds will be astonished to see figuring in a catalogue of moral objects, are so much the more useful, since they come into direct competition with inebriating liquors.

3. Progress in all that constitutes elegance, whether in dress, furniture, the embellishment of grounds, &c.

4. The invention of plays and pastimes, whether athletic or sedentary, among which games of cards hold a distinguished rank. Games of hazard should alone be excluded. These tranquil sports have brought the sexes together, have diminished ennui, that malady peculiar to the human race, especially to the opulent class and to the old.

5. The cultivation of music.

6. Theatres, assemblies, public amusements.*

7. The cultivation of the arts and sciences, and of literature.

When these different means of enjoyment are placed in opposition to the means necessary to provide for subsistence, they are called objects of luxury; but if their tendency be such as is above suggested, luxury, singular as it may appear, is rather a source of virtue than of vice.

This branch of policy has not been entirely neglected; but it has been cultivated rather with political than with moral views. The object has rather been to render the people tranquil and submissive to the government, than to render the citizens more united among themselves, more happy, more industrious, more virtuous.

The sports of the circus, among the Romans, formed one of the principal objects of the government's attention. It was not only a means of conciliating the affections of the people, but also of drawing off their thoughts from public affairs.

Cromwell, whose ascetic principles did not allow him this resource, had no other means to occupy the public mind but to engage the nation in foreign wars.

At Venice, a government excessively jealous of its authority showed the greatest indulgence to pleasures.

The processions and other religious fêtes of Catholic countries, fulfil, in part, the same object as the games of the circus.

All these institutions have been considered by political writers as so many means of alleviating the yoke of power, of turning the public attention towards agreeable objects,

* "I heard M. d'Argenson say, that when he was lieutenant of police, there were more irregularities and debaucheries committed in Paris, during the fifteen days of Lent, when the theatres were shut, than during four months of the season when they were open."—*Memoirs of Pollnitz*, vol. III. p. 312.

and preventing it from being occupied with public affairs. This effect, though it was not the object of their establishment, has caused them to obtain more favor after being established.

Peter the Great made use of a higher and more generous policy. The manners of the Russians, their proneness to intoxication excepted, were rather Asiatic than European. Peter I. wishing to moderate their grossness, and to temper their ferocity, employed expedients perhaps a little too direct. He used all possible encouragements, and even had recourse to violence, in order to introduce European dress, and European spectacles, assemblies and arts. To lead his subjects to imitate the other nations of Europe, was, in other words, to civilize them. But he encountered the greatest resistance to all these innovations. Envy, jealousy, contempt, and a multitude of anti-social passions, opposed this assimilation with foreign rivals. These passions no longer recognised their objects, when visible marks of distinction were effaced. In taking from his subjects the exterior by which they were distinguished, he took from them, so to speak, the pretext and the aliment of a hateful rivalry. He associated them with the great republic of Europe; and they had everything to gain by that association.

The rigid observation of Sunday, such as prevails in Scotland, in England, and in some parts of Germany, is a violation of this policy. The act of parliament upon this subject, passed in 1781, seems more appropriate to the times of Cromwell than our own. It prohibits people from every kind of Sunday amusement, except sensual pleasures, drunkenness and debauchery. It was in the name of good morals that a law so contrary to good morals was enacted. Sunday becomes by this kind of rigor an institution in honor of idleness, and profitable to all the vices.

Two suppositions are necessary to justify such a law: one, that amusements, innocent six days in the week, change

their nature, and become mischievous on the seventh; the other, that idleness, the mother of all the vices, is the safeguard of religion. I do not know what to make of these ideas; let the theologians expound them.*

If a revealed law is in contradiction to morality, it ought not to be listened to. We have more certain proofs of the political effects of an institution, than we can have of the truth of a religious history, founded upon events out of the course of nature. In one case we have the testimony of our own senses; in the other case we must rely upon the testimony of others, a testimony transmitted from hand to hand, and weakened by every transmission which alters more or less its primitive traits.

But this contradiction does not exist. This rigorous observance of Sunday has no foundation in the Gospel; it is even contrary to its text, and its positive examples. The judicious Fenelon, whom no one will accuse of having misunderstood the spirit of Christian morality, rebuked the indiscreet severity of his curates, and was unwilling that the people of his diocese should be forbidden to indulge on Sundays, after the exercises of religion were over, in dances and rustic sports.

I find fault not with a day for the suspension of ordinary labors, nor with a day devoted in part to religious worship; but with the absurdity of converting into offences, during

* The chaplain of Newgate takes great care to have it inserted in the Biography of Malefactors, as their own confession, that the commencement of their career was the *violation* of the Sabbath. I believe he would be nearer the truth, if he said that they began their career by *observing* the Sabbath—observing it, that is, in a particular way. Not knowing what to do with their time and their money, what other resource have they but the tavern? Drunkenness renders them quarrelsome and stupid, destroys their health, their aptitude for labor, and their habits of economy, and throws them into bad company. Thus they are prepared to enter upon the career of crime.

that day, the most necessary labors of the field, and the public exercise of the most harmless amusements.

To deprive the people one day in the week of pleasures acknowledged to be innocent, is to take away a portion of their happiness; for if happiness is not composed of pleasures, of what is it composed? How is it possible to justify the severity of the legislator, who, without necessity, takes away from the laboring classes those little enjoyments which soften their hard lot, and who forces them into gloominess or vice, under pretext of religion?

There are two ways of doing injury to mankind, one, the introduction of pains, the other, the exclusion of pleasures. If one of these ways deserves to be condemned, how can the other be worthy of praise? Both are acts of tyranny; for in what does tyranny consist, if not in this? It is only effects which are here spoken of; no doubt good is intended; but it is easier to reason vaguely, than to go to the bottom of a matter; to float here and there between folly and wisdom, than to persevere in one or the other; to follow the current of prejudice, than to resist its torrent. However good the intention may be, it is certain that the tendency of this ascetic practice, is hurtful and immoral.

Happy the people which is seen to elevate itself above gross and brutal vices, to cultivate elegance of manners, the pleasures of society, the embellishment of gardens, the fine arts, the sciences, public amusements, the exercises of the understanding! Religions which inspire gloom, governments which render men distrustful, and which keep them apart, contain the germ of the greatest vices, and the most injurious passions.

CHAPTER V.

To satisfy certain desires without injury, or with the least possible injury.

DESIRES, both those of which we have spoken, and those of which we are about to speak, are susceptible of being satisfied in different ways, and upon different conditions, through all the degrees of the moral scale, from innocence up to the highest point of criminality. That these desires may be satisfied without injury, is the first object to be accomplished; but if this object is unattainable, the second object is, to render their satisfaction less injurious to the community than would be the violation of a law. If even this second end is unattainable, it then becomes an object to arrange things in such a way, that the individual, placed by his desires between two offences, may be inclined to choose that which is the least injurious. This last object seems humble; it is a kind of composition with vice; it is, as it were, haggling with it, and beating it down to the lowest possible rate.

Let us examine how these several points can be attained, in the case of three kinds of imperious desires,—1st, vengeance; 2d, want; 3d, the sexual passion.

SECTION I.

There are two means of satisfying the vindictive appetites without harm: 1st, to provide legal redress for every kind of personal injury; 2d, to establish some competent satisfaction for injuries which affect the point of honor.

Failing these means, there is only one expedient to satisfy these vindictive appetites with the least harm, and that is, by showing indulgence to duelling.

1. *To provide legal redress for all kinds of injuries.*

The vices and the virtues of mankind depend very much upon the circumstances of society. Hospitality, it has been observed, is most practised where it is most necessary. It is the same with vengeance. In the state of nature, the fear of private revenge is the only restraint upon force, the only safeguard against the violence of the passions. It corresponds to the fear of punishment in a state where laws are established. Every improvement in the administration of justice tends to diminish the force of the vindictive appetites, and to prevent acts of private animosity.

The principal interest in view, in cases of legal redress, is, the interest of the injured party. But even the offender finds an advantage in this arrangement. Leave a man to revenge himself, and his vengeance knows no limits. Grant him what, upon a cool examination, you regard as a competent satisfaction, and at the same time forbid him to go further, and he will rather accept what you give him without risk or hazard, than expose himself to the judgment of the law, by attempting to obtain by his own hand a greater satisfaction. This then is an accessory benefit which results from providing a legal redress. Reprisals are prevented. Covered with the buckler of justice, the transgressor, after his offence, finds himself in a state of comparative security, under the protection of the law.

It is sufficiently evident that the better provision there is for legal redress, the less powerful will be the motive which excites the injured party to procure it for himself. If every pain which a man is exposed to suffer by the conduct of another, were instantly followed by what he regarded as an equivalent pleasure, the irascible appetite would not exist. This supposition is evidently exaggerated beyond any thing that can possibly be accomplished. But exaggerated as it is, it includes truth enough to show that every amelioration

in this branch of justice, tends to diminish the force of the vindictive passions.

Hume has observed, in speaking of the barbarous ages of English history, that the great difficulty was, to engage the injured party to receive satisfaction; and that the laws respecting satisfaction aimed as much at restraining resentment as at securing a certain indulgence to it.

More yet. Establish a legal punishment for an injury, and you give room for generosity; you create a virtue. To pardon an injury when the law offers a satisfaction, is to gain a kind of superiority over your enemy, by the obligation you impose upon him. Such a pardon cannot be attributed to weakness. The motive is above suspicion.

2. *To provide competent redress for those particular injuries which attack the point of honor.* Injuries of this kind demand a more particular attention, inasmuch as they have a more marked tendency to provoke the vindictive passions. (See Chap. XIV.)

In this respect, the laws of France have long been superior to those of other nations.

English jurisprudence is eminently defective upon this point. It does not recognise the existence of such a thing as honor. It has no means of measuring a corporal insult, except by the dimensions of the wound. It does not suspect that there is any other evil in the loss of reputation, except the loss of money which may be the consequence of it. It considers money as the remedy for all evils, the palliative for all affronts, the equivalent for all insults. He who has not received a pecuniary compensation has received nothing, he who has been paid in money can ask nothing more. There is no other reparation of any kind. But the grossness of barbarous ages ought not to be a reproach to the present generation. These laws were established before the feelings of honor were developed. Honor exists in the tribunal of

public opinion, and its decrees are pronounced with a peculiar force.

Still it cannot be doubted that the silence of the law has a bad effect. An Englishman cannot travel in France without remarking that the feeling of honor, and the contempt for money, descend, so to speak, much further among the inferior classes in France, than in England. This difference is especially remarkable in the army. The sentiment of glory, the pride of disinterestedness, are everywhere to be found among the private soldiers; and they would think the brilliancy of a good action tarnished, if they received a reward for it. A sword of honor is the highest recompense.

3. *To show indulgence to duelling.* When offended persons will not be content with the satisfaction offered by the laws, it is necessary to show indulgence to duelling. Where the duel is established, poisoning and assassination are seldom heard of. The comparatively slight evil which results from that practice, is like a premium of insurance, by which a nation guarantees itself against the grave evil of those two crimes. The duel becomes a preservative of politeness and peace. The fear of being obliged to give, or to receive, a challenge, extinguishes quarrels in the bud. The Greeks and Romans, we are told, attained a high pitch of glory, without having known the duel. So much the worse for them; their sentiment of glory did not oppose itself either to poison or the dagger. In the political dissensions of Athens, one half the citizens plotted the destruction of the other half. Observe what passes in England and in Ireland, and compare it with the dissensions of Greece and Rome. Clodius and Milo, according to our practice, would have fought a duel; according to the Roman practice, they formed mutual projects of assassination, and he who killed his adversary did but anticipate him.

In the island of Malta, duelling had become a kind of

rage, and almost a civil war. One of the grand masters made such severe laws against it, and caused them to be so rigorously executed, that duelling ceased; but it was only to give place to a crime which united cowardice to cruelty. Assassination, hitherto unknown among the knights, became so common, that the duel was presently regretted, and finally it was expressly tolerated in a fixed place, and at certain hours. The result was such as was expected. An honorable career being opened to revenge, clandestine means resumed a character of infamy.

Duels are less common in Italy than in France and England; poisonings and assassinations much more so.

In France, the laws against duelling were severe; but means were found to elude them.

In England, the laws confound duelling and murder; but juries do not confound them; they acquit, or what amounts to the same thing, they bring in a verdict of manslaughter. The people are more correctly guided by good sense, than the lawyers are by their science. Would it not be better that the remedy should be according to law, instead of being subversive of it?

SECTION II.

We come now to *indigence*; and here we have to consider both the interest of the poor themselves, and that of the community.

A man in need of the means of subsistence, is pushed by the most irresistible motives to commit all the offences by which he can supply his wants. Where this stimulus exists, it is useless to combat it by the fear of punishment; there are few punishments which can be greater than starvation; and making allowance for uncertainty and distance, there are none which can appear so great. The only sure means of protection against the effects of indigence,

consists, in furnishing necessaries to those who are in need of them.

In this point of view, the indigent may be distributed into four classes: 1st, the industrious poor, those who ask only to labor in order to live; 2d, idle mendicants, those who had rather trust to a precarious charity than live by work; 3d, suspected persons, those who have been arrested for some offence, but discharged for want of proof, and upon whose character a blot remains, which prevents them from finding employment; 4th, convicts, who have finished their term of imprisonment, and who have been set at liberty. These different classes ought not to be treated in the same way; and in establishments for the benefit of the poor, particular care ought to be taken to separate the suspected from the innocent. One rotten sheep, says the proverb, is enough to infect a whole flock.

All which the poor can be made to earn by their labor, is not only a profit to the community, it is a gain to themselves. Not only is life to be sustained, but time is to be filled up. Humanity requires that occupations should be found for the deaf, the blind, the dumb, the maimed, the impotent, the infirm. The wages of idleness are never so sweet as the reward of industry.

If a man has been put upon trial for an alleged offence of indigence, though he should be acquitted, he ought to be required to give an account of his means of subsistence, at least for the last preceding six months. If they were honest, this inquiry can do him no harm; if they were not honest, he ought to suffer the consequences.

Women labor under particular disadvantages, as respects facility of finding occupation, especially those of a condition a little above ordinary labor. Men having more activity, more liberty, perhaps more dexterity, have possessed themselves even of those employments the best fitted for the female sex, and which are almost indecent in the hands of

a man. Men sell children's toys, keep fashionable shops, and make women's shoes, women's stays, and women's dresses. Men even perform the office of midwives. There is reason to doubt whether the injustice of custom might not be redressed by the law, and whether women should not be put in possession of these means of subsistence to the exclusion of men. This would be an indirect means of preventing prostitution, by securing to women suitable occupations.

With respect to the treatment of the poor, no universal measure can be proposed. Local and national circumstances must control particular arrangements. In Scotland, with the exception of some large towns, the government does not concern itself with the care of the poor. In England, the tax on their account amounts to more than three millions sterling.* Still the condition of the poor is better in Scotland than in England. The object is better accomplished by custom than by law. In spite of the inconveniences of the English system, it cannot be suddenly abandoned; otherwise half the poor would perish before the necessary habits of benevolence and frugality had taken root. In Scotland, the influence of the clergy is very salutary. Having but a moderate salary and no tithes, the ministers are known and respected by their parishioners. In England, the clergy being rich and having tithes, the rector is often in a quarrel with his flock, and knows but little about them.

In Scotland, Ireland and France, the poor are moderate in their wants. At Naples, the climate saves the expense of fire, of lodging, and almost of dress. In the East Indies, dress is hardly necessary except for decency. In Scotland, cleanliness excepted, domestic economy is good in all

* It has since much increased, and in some years has exceeded eight millions.—*Translator.*

respects. In Holland, it is as good as it can be. In England, wants are greater than elsewhere, and economy is perhaps upon a worse footing than in any country in the world.

The surest means is, not to wait for indigence, but to prevent it. The greatest service which can be rendered to the laboring classes, is the establishment of banks, in which the poor may be induced, by the double attraction of security and profit, to deposit their little savings.

SECTION III.

We come now to that class of desires for which it is not easy to find any neuter name, any name which does not present some accessory idea of blame or praise, but especially of blame. The reason is evident. The ascetics have never been able to satisfy themselves with degrading and criminating the desires to which nature has entrusted the perpetuity of the species. Poetry, on the other hand, has protested against these usurpations, and has delighted in embellishing the images of pleasure and of love,—a laudable object, when it has respected decency and morals. It may be observed, however, that these inclinations naturally have strength enough, and that there is no need of exciting them by exaggerated and seducing pictures.

As this desire is satisfied in marriage, not only without prejudice to society, but advantageously for it, the first object of the legislator in this respect ought to be, to facilitate marriage; that is, to put no obstacle in its way not absolutely necessary.

In the same spirit, divorce ought to be authorized, under suitable restrictions. Instead of a marriage broken in fact, and which subsists only in appearance, divorce naturally leads to a real marriage. *Separations*, permitted in countries where

marriages are indissoluble, have the inconvenience either of condemning individuals to the privations of celibacy, or of leading them into illicit connections.

But if we are willing to speak upon this delicate subject, in good faith, and with a frankness more modest in fact than any hypocritical reserve, we shall acknowledge at once that there is an age at which man has attained the development of his senses, though his faculties are not yet mature enough for the management of affairs, or the government of a family. This is true, especially among the upper classes of society. Among the poor, the necessity of labor diverts the desires of love, and retards their development; a more frugal diet and a simpler kind of life keep the senses and the imagination longer quiet. Besides, the poor can hardly buy the favors of the other sex, except by the sacrifice of liberty.

In addition to the young, not yet marriageable in a moral point of view, how many men there are unable to burden themselves with the support and the cares of a family. On the one side, domestics, soldiers, sailors, living in a state of dependence, and often having no fixed dwelling; on the other, men of a more elevated rank, who are waiting for a fortune or an establishment;—here is a very numerous class cut off from marriage, and reduced to a forced celibacy.

The first means which presents itself to diminish this evil, is to legitimate contracts for a limited time. This means has great inconveniences; it is a fact, however, that concubinage actually exists in all societies where there is a great disproportion in fortunes. By prohibiting these arrangements they are not prevented; they are only rendered criminal, and made disgraceful. Those who dare to avow them, proclaim their contempt for the laws and for morals; those who conceal them, are exposed to suffer a pain of self-reproach in proportion to their moral sensibility.

According to the common way of thinking, the idea of

virtue is associated with this contract when its duration is indefinite, and the idea of vice when its duration is limited. Legislators have followed this opinion; they have forbidden contracts for a year, which they allow for life. The same action, criminal in the first case, is innocent in the second. What is to be thought of this difference? Can the duration of the engagement change the quality of an act which equally grows out of it, whether the engagement be for a longer or a shorter time?

But though marriage for a limited period be innocent in itself, it does not follow that it ought to be so honorable as a permanent marriage, to the woman who contracts it. Indeed she never would obtain the same respect with a woman married for life. The first idea which would present itself with respect to her would be,—“If this woman had been as worthy as others, she would have been able to obtain conditions which others have obtained. This precarious arrangement is a sign of inferiority, either in rank or merit.”

What good would result from authorizing this kind of contracts? It would save the law, by which they are now forbidden, from being broken and despised. It would preserve the women who enter into such contracts from a humiliation, which having degraded them in their own esteem, leads almost always to utter worthlessness. Besides, it would give publicity to the birth of children, and would secure for them a father's care.

In Germany, what are called *left-handed* marriages are generally established. The object is, to reconcile domestic happiness with family pride. The woman acquires in this way some of the privileges of a wife; but neither she nor her children are entitled to the name or the rank of the husband. These marriages were forbidden by the code Frederic. However, the king reserved the right of granting particular dispensations.

The idea now proposed is not at all conformable to common opinions ; let it be observed, however, that it is proposed not as good in itself, but as a means of alleviating an existing evil. In countries where manners are so simple and where fortunes are so equal that this expedient is not needed, it would be absurd to introduce it.

With the same apology, I shall proceed to speak of a yet graver disorder, of an evil which exists particularly in great cities, and which also springs from inequality of fortune, and from the combination of all those causes which produce celibacy. That evil is, prostitution.

There are countries where the laws tolerate it ; there are others, such as England, where it is strictly prohibited. But though prohibited, it is as common, and as publicly exercised as can be imagined, because the government does not dare to suppress it, and because the public would not approve such a display of authority. Prostitution thus nominally forbidden, is as common as if there were no law against it, and much more mischievous.

The infamy of prostitution is not solely the work of the law. There would always be a degree of shame attached to that condition, even though the political sanction remained neuter. The condition of a courtesan is a condition of dependence and servitude ; her resources are precarious, and indigence and famine always threaten to overwhelm her. Her very name is associated with evils distressing to the imagination, for courtesans are unjustly considered as the causes of disorders of which they are only the victims. There is no need to say with what sentiments they are regarded by *honest* women. The most virtuous may lament their miseries, but all agree in despising them. Nobody, in their behalf, attempts defence or excuse. It is natural that they should be crushed by the weight of public opinion. They have never thought of forming a combination, which might counterbalance this public contempt ; and though they

wished it, they could not effect it. If the interest of a common defence should unite them, they would soon be divided by rivalry and want. The person, as well as the name of a public woman, is an object of hatred and disdain to her fellows. This is perhaps the only employment publicly despised by the very persons who publicly profess it. Self-love, with the most singular inconsistency, seeks as it were to shake off the recollection of its own misfortunes; each unhappy creature strives to forget what she is, or to earn an exception for herself, by severity towards her fellows.

Kept mistresses are regarded as almost equally infamous with public women. The reason is plain; they do not yet belong to that class, but they are always on the eve of falling into it. Still, the longer a female has lived with the same man, the further is she removed from a state of degradation, and the nearer she approaches to the condition of a married woman. The longer the connection has endured, the more difficult it seems to break it, and the greater is its prospect of perpetuity.

The result of these observations is, that the remedy, as far as there can be one, is to be found in the evil itself. The more this condition is a natural object of contempt, the less it is necessary for the law to brand it. It carries along with it a natural punishment; a punishment already too severe, if we consider all the reasons for pitying this unhappy class, the victims of social inequality, and always so near to despair. How few of these women have embraced this profession knowingly and by choice! How few would go on, if they could quit it; if they could pass out of this circle of disgrace and misery; if they were not repelled from every business upon which they might attempt to enter! How many have been precipitated into it by the error of a moment; by the inexperience of youth; by the corruption of their parents; by the crime of a seducer; by an inexorable severity towards a first fault; almost all by destitution and

misery! If opinion is tyrannical and unjust, ought the legislator to exasperate that injustice, ought he to convert himself into an instrument of tyranny?

And what is the effect of these laws? They only serve to increase the corruption of which these unhappy women are accused. They drive them into drunkenness in search of a momentary oblivion of misery; they render them insensible to the restraints of shame, by exhausting upon misfortune the disgrace which ought to be reserved for real crimes. Finally, they prevent those precautions which might alleviate the inconveniences of this disorder, were it tolerated by the laws. All these evils which the laws so lavishly dispense, are a price which folly pays to obtain an imaginary good, which after all is not obtained, and never will be.

The empress queen of Hungary undertook to extirpate this evil, and labored at it with a laudable perseverance worthy of a better cause. What followed? Corruption spread itself through public and private life; the marriage bed was violated; the seat of justice was corrupted. Adultery gained all that libertinage lost. Magistrates made traffic of connivance. Fraud, partiality, oppression, extortion spread themselves through the country; and the evil it was desired to abolish, driven to conceal itself, became so much the more dangerous.

Among the Greeks, this profession was permitted, and sometimes even encouraged; but the parents themselves were not allowed to traffic in the honor of their daughters. Among the Romans, during what are called the best times of the republic, the law was silent on this subject. The saying of Cato to a young man, whom he met coming out of a brothel, is a proof of it. Cato was not a person to encourage violations of the law.

In the metropolis of the Christian world, this vocation is

freely exercised.* This fact was doubtless one reason for the excessive rigor of the Protestants.

At Venice, under the republic, the profession of a courtesan was publicly authorized.

In the capital of Holland, houses of this nature receive a license from the magistrate.

Retif of Brittany published an ingenious work, entitled *The Pornograph*, in which he proposed that government should establish an institution, subject to certain rules, for the reception and government of public women.

In some respects, the toleration of this evil in great cities is useful ; its prohibition amounts to nothing, and has certain inconveniences besides.

The asylum at London for penitent prostitutes is a very excellent institution ; but those who regard prostitution with absolute rigor, are not very consistent in approving of that charity. If it reforms some, it encourages others. Is not the hospital at Chelsea an encouragement to soldiers, and that at Greenwich to sailors ?

It would be well to institute an establishment for selling annuities to these women to begin at a certain age ; and the arrangement should be adapted to the nature of this sad profession, in which the time of harvest is necessarily short, but of which the profits are sometimes considerable.

The spirit of economy is formed from small beginnings, and goes on always increasing. A sum too inconsiderable to offer a resource as actual capital, might furnish a considerable annuity, at a distant period.

Upon points of morals, as to which there are contested questions, it is well to consult the laws of different nations. It is a kind of mental travelling. In the course of such an exercise, we are able to disengage ourselves from local and

* This has ceased to be the case, but it remains to be seen whether severity on this point will be an advantage to morals.

national prejudices, by passing in review the usages of other communities.

CHAPTER VI.

To avoid furnishing encouragements to crime.

To say that government ought not to give rewards to crime, that it ought not to weaken the moral nor the religious sanction, in cases where they are useful, is a maxim which seems too simple to stand in need of proof. Yet it is often forgotten; and I might give striking examples of it; but the more obvious they are, the less need there is to point them out. It will be better to dwell upon those cases in which this maxim is more covertly violated.

I. INJURIOUS DETENTION OF PROPERTY. If the law suffers a man who unjustly detains the property of another to gain by delay of restitution, the law becomes an accomplice in the wrong. The cases in which the English law is defective in this respect, are innumerable. In many cases, a debtor has only to refuse payment till he dies, and he will escape the debt altogether; in many others, he can, by delay, escape the payment of interest; and he can always retain the amount for a longer or shorter period, and thus compel his creditor to submit to a forced loan, at the ordinary rate of interest.

A few simple regulations would suffice to cut off these temptations to injustice: 1st. So far as landed property is liable for debts, the death of either party should make no difference. 2d. Interest should run from the moment the obligation commences. 3d. The obligation should commence, not from the liquidation of damages, but from the moment of the damage. 4th. This interest should be higher than the ordinary rate. How happens it that means

so simple have never been adopted? Those who ask this question do not know the power of habit, of indolence, of indifference to the public good; they are ignorant of the bigotry of lawyers, and of the strength of personal interest, and the professional spirit.

II. UNLAWFUL DESTRUCTION. When a man insures his property against some calamity, if the value insured exceeds the real value, it is his interest, in a certain sense, to bring on the calamitous event; to set fire to his house if it is insured against fire; to sink his vessel if it is insured against the dangers of the seas. The law then which authorizes these contracts, may be considered as furnishing a motive for the perpetration of these offences. Does it follow then that the law ought not to sanction them? Not at all; but only that it ought to command or suggest to the assurers, precautions best adapted to the prevention of these abuses, without being so restrictive as to interfere with the business: such as preliminary inquiries; certificates of the real value of the property insured; in case of loss, the testimony of some respectable persons to the character and honesty of the party insured; in doubtful cases, an inspection of the property insured, &c.

III. TREASON. If the insurance of vessels belonging to a hostile nation is permitted, the state may be exposed to two dangers: 1st, the commerce of the hostile nation, which is one of the sources of its power, is facilitated; 2d, the insurer, to protect himself against a loss, may give secret information to the enemy of movements made by the fleets and cruisers of his own nation. As regards the first of these inconveniences; it is not an evil, unless the enemy cannot obtain insurance elsewhere, or if he can employ his capital with the same profit in some other branch of industry. As to the second inconvenience; it is absolutely nothing, unless the insurer is led to give information to the enemy which otherwise money could not buy, and unless

his facility of giving this information is so great as to transcend the infamy and the risk of treason.

On the other hand, the advantage to the nation that assures, is certain. In this kind of traffic it has been found that the balance of profit, during a given time, is in favor of the assurers; that is, taking the losses and gains together, they receive more in premiums than they pay out in indemnities. It is then a lucrative branch of commerce, and may be considered as a tax levied upon the enemy.

IV. PECULATION. In making a bargain with architects and contractors, it is quite common to give them so much per cent. upon the amount of their expenditures. This mode of payment, which seems natural enough, opens the door to peculation, and to peculation of the most destructive kind; since while the speculator makes a little profit, the employer must suffer a great loss. This danger is at its highest point in the case of public works, where nobody has a particular interest to prevent waste, and where many persons may find an interest in conniving at it.

One remedy would be, to fix the expense by estimation, and to say to the contractor, "So far you shall have your percentage, but beyond that, you shall have nothing. If you reduce the expense below the estimate, you shall still have the same profit."

V. ABUSE OF PUBLIC TRUSTS. If a public man who has it in his power to contribute towards war or peace, possesses an employment of which the emoluments are more considerable in war than in peace, he has an interest to exert his power for the prolongation of war. If these emoluments increase in proportion to the expense, he has an additional interest that the war should be conducted with the greatest possible prodigality. Exactly the opposite state of things should be aimed at.

VI. OFFENCES OF EVERY KIND. When an individual makes a bet on the affirmative side of a future event, he

has an interest in the happening of that event, proportioned to the amount of the bet. If the event is one of those things prohibited by law, he then has an interest to commit an offence. He is even stimulated by a double force, the one partaking of the nature of reward, the other of the nature of punishment; a reward to be received in case the event happens; a punishment to be experienced in the opposite case. It is as if he had been suborned by the promise of a sum of money on one side, and as if he had made an engagement under a formal penalty on the other.*

If then all kinds of bets, without distinction, were acknowledged to be valid, venality of every kind would receive the sanction of the laws, and liberty would be given to everybody to enlist accomplices for all sorts of offences. On the other side, if all bets, without restriction, were prohibited, insurances, so useful to commerce, and such a resource against a multitude of calamities, would not be lawful; for insurance is nothing but a sort of bet.

The middle course seems the best. In all cases in which bets may become instruments of mischief without answering any useful object, prohibit them absolutely. In cases like insurance, in which they may be useful, admit them; but leave it to the judge to make necessary exceptions, when it shall appear that they have been only a cover to subornation.

* In the *Adventures of a Guinea*, there is a bet made between the wife of a clergyman and the wife of a minister, that the clergyman would not be an archbishop. It is easy to imagine which was the gainer.

CHAPTER VII.

To increase responsibility in proportion as temptation increases.

THIS precaution relates principally to public employments. The more of fortune or honors those who exercise such employments have to lose, the stronger hold we have upon them. Their salary is a means of responsibility. In case of misconduct, the loss of this salary is a punishment which they cannot escape, though they may avoid every other. This means is specially useful in employments which relate to the handling of public money. If you cannot insure the honesty of a cashier in any other way, make his appointments rise something above the interest of the greatest sum which is entrusted to him. This excess of salary is like a premium paid for an insurance against his dishonesty. He has more to lose in becoming a rogue than by remaining honest.

Birth, honors, family connections, religion, may become so many means of responsibility, so many pledges for the good conduct of individuals. There are cases in which legislators have not chosen to trust bachelors; they have regarded a wife and children as hostages given to one's country.

CHAPTER VIII.

To diminish the sensibility to temptation.

IN the preceding chapter the question was, to discover precautions against dishonesty; in this, the object is, to avoid the diminution of probity through the exposure of

honest men to the influence of seductive motives too strong for their virtue.

First, of salaries; for money, according to the manner of its application, may serve as a poison or an antidote.

Apart from any regard to the happiness of individuals, the interest of the public service requires, that the persons employed in it should be above the pressure of want, especially in all those employments which afford an opportunity of acquisition by injurious means. The greatest abuses have been produced in Russia, throughout the whole administration, by the insufficiency of salaries. When men, under the pressure of want, abuse their power, become greedy, extortioners and robbers, the blame ought to be shared between them and the government, which has spread this snare for their honesty. Placed between the necessity of living, and the impossibility of living honestly, they are led to look upon extortion as a lawful supplement to their pay, tacitly authorized by those who employ them.

Will it be putting them beyond the reach of need to supply their physical wants? No. If there is not a certain proportion between the dignity with which a man is clothed, and his means of sustaining it, he is in a state of suffering and privation, because he cannot do what is expected of him, nor keep upon a level with that class with whom he is called to associate. In one word, wants increase with honors, and what is relatively necessary, varies with condition. Place a man in an elevated rank without giving him wherewith to maintain himself, and what is the consequence? His dignity will furnish motives to do evil, and his power will give him the means.

Charles II. being too much fettered by the economy of parliament, sold himself to Louis XIV., who offered to supply his profusion. The hope of escaping the embarrassments into which he was plunged, drove him, like any other bankrupt, into criminal schemes. This miserable

parsimony cost the English two wars, and a peace yet more fatal. It is not easy to tell what sum would have been sufficient to operate as an antiseptic upon a prince so corrupt ; but this example is enough to show, that the civil list of the English king, which appears exorbitant to vulgar calculators, tends in fact to promote the general security. Besides, by that intimate alliance which exists between riches and power, everything which augments the magnificence of dignity, gives it additional force ; and royal pomp, under this point of view, may be compared to those architectural ornaments, which serve also to support and strengthen the edifice.

This great rule of diminishing as much as possible the sensibility to temptation, has been remarkably violated in the Catholic church. To impose celibacy upon priests, and at the same time to entrust them with the most delicate functions in the examination of consciences, and the direction of families, is to place them in a violent situation, between the misery of observing a useless law, and the disgrace of violating it.

When Gregory VII., in a council held at Rome, established the rule that married clerks, or those having concubines, should no longer be permitted to say mass, they uttered cries of indignation, they accused him of heresy, and according to the historians of those times, they declared—“If he persists, we had rather renounce the priesthood than our wives ; let him find angels to govern the churches.”—(*Hist. of France, by the Abbe Milot*, vol. i. Reign of Henry I.) In our times, the government of France desired to make the marriage of priests lawful ; but by this time there were no men to be found among them ; they were all angels.

CHAPTER IX.

To strengthen the impression of punishment upon the imagination.

It is the real punishment which does all the evil; it is the apparent punishment which does all the good. We ought then as much as possible to diminish the former, and to augment the latter. Humanity, in this case, consists in the appearance of cruelty.

Speak to the eyes, if you wish to move the heart. The precept is as old as Horace, and the experience which dictated it, was much older. Every one feels its force and strives to take advantage of it; the comedian, the charlatan, the orator, the priest, all know how to turn it to their purpose. Render your punishments exemplary; give to the attendant ceremonies a sort of mournful pomp. Call to your aid all the imitative arts; and let the exhibitions of these important procedures, be among the first to strike the eyes of childhood.

A scaffold spread with black, that livery of woe; the officers of justice in mourning; the executioner covered by a mask, which may serve to increase the terror of the beholders, and at the same time to conceal him from a misplaced indignation; emblems of his crime placed upon the head of the criminal, so that the witnesses of his sufferings may be informed of the offence that has produced them;—such are a part of the decorations proper to these tragedies of the law. Let all the persons in this terrible drama move in a solemn procession; let a grave and religious music prepare the hearts of the auditors for the important lesson they are going to receive. The judge should not think it beneath him to preside at this public scene, so that its sombre dignity may be consecrated by the minister of the law.

Instruction is not to be rejected even though it come from an enemy. The Secret Tribunal, the Inquisition, the Star Chamber—I consult them all; I examine every means; I consider all that has been done; I prize a diamond though it be picked from a dung-hill. Because assassins use a pistol to commit murders, shall I not employ it in my own defence?

The emblematic robes of the inquisition may be usefully applied to criminal justice. An incendiary clothed in a robe of pictured flames, would offer to every eye the image of his crime, and the indignation of the spectator would be fixed, by the image of the offence.

A system of punishments accompanied by emblems appropriate as far as possible to each offence, would have an additional advantage. It would furnish allusions to poetry, to eloquence, to dramatic authors, to ordinary conversation. The ideas thence derived would be re-echoed, if I may be allowed the expression, by a thousand objects, and would be scattered on all sides.

The Catholic priests have known how to derive from this source the greatest aids to the efficacy of their religious opinions. I remember having seen at Gravelines a striking exhibition. A priest showed the people a picture, which exhibited a multitude of wretches in the midst of flames, and one of them making signs for a drop of water, by showing his burning tongue. It was a day of public prayers for souls in purgatory. It is clear that such an exhibition was less fitted to inspire a horror of crime than a horror of poverty. The moral was, that one ought at all events to have the wherewithal to pay for a mass; for where money expiates every sin, the sin of poverty is the greatest, the only one without remedy.

The methods of punishment which prevail in England form a perfect contrast to everything that can inspire respect. A capital execution has no solemnity; the pillory is some-

times a scene of buffoonery, sometimes an exhibition of popular cruelty, a game of chance, in which the sufferer is exposed to the caprices of the multitude, and the accidents of the moment. The severity of a public whipping, depends upon the money given to the executioner; branding in the hand, according to the understanding between the convict and the officer, is sometimes inflicted with a cold iron, and sometimes with a hot one; if it be done with a hot iron, the branding is often confined to a slice of bacon interposed between the branding-iron and the criminal's skin. To keep up the farce, while the meat is smoking and burning, the supposed sufferer puts forth loud cries of agony and pain. The spectators who understand the whole game, only laugh at this parody on the law.

It may perhaps be said,—for all questions have two sides,—that these real representations, these terrible scenes of penal justice, would spread fright among the people, and would make dangerous impressions. I do not think so. If they presented to the dishonest the idea of danger, to the honest they would offer only the idea of security. When eternal punishments are loudly threatened, when the flames of hell are frightfully decreed for kinds of offences indefinite and undefinable, the imagination may be so excited that madness is the consequence. We suppose, on the contrary, a manifest offence, a proved offence, an offence of which everybody can avoid the commission, so that the terror of punishment cannot be excited to a dangerous degree. However, we must avoid producing false and odious associations.

In the first edition of the code Theresa, the portrait of the empress was surrounded with medallions representing gibbets, wheels, and other instruments of torture and punishment. What a blunder, to offer the image of the sovereign with these hideous emblems, like the head of Medusa shaking her serpents! This scandalous frontispiece was suppressed; but a print was allowed to remain, which repre-

sented all the instruments of torture—a picture of bad omen, which no one could look at without saying to himself, “Even though innocent, to these evils am I exposed!” But if an abridgment of the penal code were accompanied by pictures representing the characteristic punishments attached to each crime, it would be an imposing commentary, a sensible and speaking image of the law. The reader would say, “If I am guilty, this must I suffer!” In legislation, a single shade sometimes distinguishes good from evil.

CHAPTER X.

To facilitate knowledge of the fact of an offence.

In penal cases, there are two points as to which the judge must be certain, before he can perform his office: the fact of an offence, and the person of the offender. These two points being known, his information is complete. In different cases, there are different proportions of obscurity as to these two points; sometimes the first is most obscure, sometimes the second. Let us consider, in the first place, the fact of an offence, and the means which may facilitate its discovery.

I. *To require proofs of title to be in writing.* It is only by writing that testimony can be rendered permanent and authentic. Verbal transactions, unless they are of the most simple kind, will be subject to innumerable disputes. Mahomet himself has recommended to his followers to observe this precaution. It is almost the only passage of the Koran which has a glimmer of common sense.

II. *To enrol upon the face of title deeds the names of the witnesses.* It is one thing to require witnesses to the execution of a deed; and another thing to require that their pres-

ence be noticed, attested and registered upon the face of the deed. A third step is, to add the circumstances which will enable the witnesses to be found, if they are needed.

In the attestation of deeds, it will be useful to observe the following precautions: 1st. To prefer a large number of witnesses to a small number; this will diminish the danger of falsehood, and give a chance of finding some of them, if they are needed. 2d. To prefer married persons to bachelors; heads of families to servants; persons who have a public character to individuals less distinguished; young or middle-aged men to the old and infirm; persons who are known, to strangers. 3d. When the deed is composed of many sheets, each sheet ought to be signed by the witnesses; if there are corrections and erasures, a separate list ought to be made of them, which list ought to be attested; the lines ought to be counted, and their number on each page marked. 4th. Let each witness add to his name in full, his description, place of abode, age, &c. 5th. Let the time and place at which the deed is executed be minutely specified; the time, not only by the day, month, and year, but also by the hour; the place by the district, parish, even the house, and the name of the present occupant. This circumstance is an excellent preventive against forgery. A man would hardly dare venture upon such an enterprise, when he must be sure of so many details before fabricating a false date; and if he dared attempt it, he would be much more easily discovered. 6th. All numbers ought to be written out in letters, especially dates and sums, except in matters of account, where it is sufficient to write the sum total in letters, and except also when the same date or sum often recur in the same deed. The reason of this precaution is, that figures, unless they are written very carefully, are apt to be taken one for another, and besides, it is easy to alter them, and the least alteration may have very considerable influence. A sum of hundreds is easily changed into a sum of thousands. 7th. The for-

malities to be observed in the execution of a deed, ought to be printed upon the margin of the sheet of paper or parchment upon which it is written.

Should these formalities be left to the discretion of individuals, as a means of security required by prudence, or should they be regulated by law? Some of them should be required, and others should be optional; a latitude should be left to the judge in favor of those cases in which it is not possible to fulfil them. It may happen that a deed is to be made in a place where the prescribed kind of paper is not to be had, where a sufficient number of witnesses cannot be found, &c. In such cases, the deed may be declared valid provisionally, and until the requisite formalities can be fulfilled.

A greater latitude ought to be allowed in testaments than in deeds between the living. Death does not wait for an attorney nor for witnesses; and making a will is a business which men are apt to procrastinate to a time when they have neither leisure nor capacity for precision and exactness. On the other hand, precautions are most requisite in this sort of deeds, because they are most exposed to forgery. In case of a deed between the living, the party to whom it is falsely ascribed may still be alive and able to contradict it; in case of a testament, there is no such chance.

Many details are necessary to explain the forms which ought to be established, and the exceptions which should be made; I shall only observe that I do not know of any formality, even the most simple, the omission of which ought to render a will absolutely invalid.

If instructions upon this subject were published by the government, even without being made necessary, everybody would be inclined to observe them, since in case of deeds executed in good faith, every one desires to ensure himself all possible securities. The omission of these formalities would then become a vehement suspicion of fraud, unless it

could be clearly seen that it ought to be attributed either to ignorance, or to circumstances which rendered their observance impossible.

III. *To establish registrations for the authentication of titles.* Why ought deeds to be registered? What deeds ought to be registered? Ought the registry to be secret or public? Ought the registration to be optional, or should its omission be visited by a penalty?

Registers are useful, 1st, against acts of forgery; 2d, against acts of falsification; 3d, against accidents, as the loss or destruction of originals; 4th, against a double alienation of the same property to different purchasers.

For the first and last of these objects, a simple abstract might suffice; for the second, an exact copy would be needed; for the third, an extract would be sufficient, but an entire copy would be much better.

Against forgery, the registration would only be useful, by being obligatory; the deed being null when not recorded, with a latitude for accidental cases. This advantage would result, that after the expiration of the time allowed for registration, the forgery of a deed which, according to its date, ought to be registered, would be of no avail. It amounts to limiting to a short period the time within which a fraud of this nature can be committed, with a possibility of success; and at a period so near that of the supposed act, proofs of the fraud could be easily obtained.

So too when the registration is intended to prevent double alienations, it should be obligatory, under pain of nullity. Without a clause to that effect, the registration would hardly take place, since neither party would have an interest in it. In fact the seller has an interest the other way. If he is honest, he may have a repugnance to its being known that he has sold or encumbered his property; if he is a rogue, he may desire the opportunity of selling it twice over.

Testaments are the kind of deeds most apt to be forged. The surest protection against this fraud, is, to require them, under pain of nullity, to be registered during the life of the testator. It may be objected that this would put a dying man at the mercy of those who surround him in his last moments, since he would no longer have the power to reward or to punish; but this objection might be obviated by giving him the right to dispose of a tenth part of his property by a codicil.

What deeds ought to be registered?

All in which third persons are interested, and which are important enough to justify this precaution.

In what cases should the registry be secret or public?

Deeds between the living in which third persons are interested, hypothecations, and marriage settlements ought to be public. Testaments ought to be inviolably secret during the life of the testator. Deeds, such as indentures of apprenticeship and marriage settlements, which do not affect lands, might be kept secret with the reserve of communicating them to such persons as have a special title to examine their provisions.

The registry office might be divided into departments, secret and public, optional and obligatory. Optional registrations would be frequent if the price were moderate. It is an act of prudence to preserve copies against accidents, and where could copies be more securely lodged than in an office of this sort?

The necessity of registering mortgages of landed property would be a kind of restraint upon prodigality. A man could not borrow money upon his estate, to be spent upon mere pleasures, without some degree of shame. This consideration, so favorable to the measure, has been regarded as an objection against it, and in fact has prevented its adoption.

The law of many countries has adopted this system of

registration to a greater or less extent. The French law seems to have hit upon a medium tolerably just.

In England the law varies. In the counties of Middlesex and York, there are offices of registry, established in the reign of queen Anne, of which the principal object is, to prevent double alienations, and the good effects are such, that the value of lands is higher in these counties than elsewhere. How does it happen that after so many years of an experience so decisive, this law has not yet been made general?

Ireland enjoys this benefit, but the registry is left to the free choice of individuals. It has been established in Scotland. There, testaments must be registered before the death of the testator. In the county of Middlesex, the registry is not obligatory till after the death of the testator.

IV. *Method of preventing falsifications.* There is an expedient which, in some respects, may take the place of registration. A particular sort of paper or parchment being required for the deed in question, those who sell it by retail may be forbidden to furnish it without endorsing upon it the day and the year of the sale, and the names of the seller and purchaser. The distribution of this paper might be limited to a certain number of persons, of whom a list should be kept. Their books would be true registers, and after their death might be deposited in an office. This precaution would prevent the forgery of deeds of any kind, pretending to be of a distant date.

It would be an additional restraint, if the paper were required to be of the same date with the deed. The date of the paper might be marked in its tissue, in the same way as the name of the maker. In that case, a paper-maker must be a party to every forgery.

V. *Institutions for the registry of events on which titles depend.* There is no need of dwelling upon the plain necessity of preserving evidence of births and interments.

A prohibition to inter the dead without a previous inspection by a police officer, is a general precaution against assassinations. It is singular that in England, marriages, instead of being recorded, were for so long a time abandoned to the mere notoriety of a transient ceremony. The only reason that can be given, is the simplicity of this contract, which is the same for all, except in particular dispositions relative to fortune. Fortunately, under the reign of William III., marriages, which serve as the foundation for so many titles, presented themselves as fit objects for a tax. It thus became necessary to have them registered. The tax has been suppressed, but the register remains. But even now the security of rights which depend upon these events, is not so certain nor so universal as it ought to be. There is but one copy of the registration. The register of each parish ought to be transcribed in a more general office. In the marriage act of George II., either through intolerance or negligence, the advantage of registration was denied to Quakers and Jews.*

VI. *To put people on their guard against offences.*

1. *Against poisoning.*

By giving instructions respecting the different substances which operate as poisons, with the means of detecting them, and the methods of preventing their effects. If these instructions were spread among the multitude without discrimination, they might do more harm than good. This is one of those peculiar cases in which knowledge is more dangerous than useful. The means of employing poisons are surer than the means of counteracting them. The middle course would be, to limit the circulation of these instructions to the class of persons who could make a good use of them, and whose condition, character, and education fur-

* A new registry act has lately been enacted by the British parliament, which puts this matter on a better footing.—*Translator.*

nished a guarantee against the danger of abuse ; such are the parish clergy and the practitioners of medicine. With this view, the instructions ought to be in the Latin language, which these persons are supposed to understand.

But as regards those poisons which present themselves without being sought for, and which ignorance may administer innocently, the knowledge of them should be rendered as familiar as possible. There must be a strange depravity in the character of a people, if hemlock, which is so easily mistaken for parsley, and copper, which is so apt to be dissolved in vessels of which the tinning is worn, do not oftener operate as poisons by accident than by design. In these cases, however dangerous knowledge may be, there is more to hope than to fear from it.

2. Against false weights and measures.

By furnishing instructions relative to false weights and measures, and the methods of deception in the employment of true ones, such as scales with unequal arms, measures with double bottoms, &c. Such knowledge cannot be too widely diffused. Every shop ought to have a copy of these instructions pasted up in plain sight, as a pledge of fair dealing.

3. Against frauds in money.

By instructions to teach people to distinguish good money from bad. If a particular kind of false coin makes its appearance, the government ought to give notice of it in the most public manner. At Vienna, the officers of the mint always give notice of counterfeit coins the moment they appear ; but the Austrian coinage is upon so good a footing that such attempts are rare.

4. Against impostures of mendicants.

Some counterfeit diseases, although they are in perfect health ; others inflict upon themselves some slight wound to aid them in counterfeiting the appearance of the most disgusting maladies ; others get up false stories of fires and

shipwrecks by which they pretend to have suffered ; others borrow or steal children, whom they make the instruments of their trade. But these instructions ought to be accompanied by a preface, lest the knowledge of so many impostures should harden the heart, and make it indifferent to real miseries. In a country with a well-regulated police, an individual who displays the aspect of misery ought never to be neglected, nor left to himself ; it should be the duty of the first person who meets him to consign him to the hands of public charity. Instructions of this kind would prove more amusing to the people than tracts of religious controversy.

5. Against theft, pilfering, methods of obtaining by false pretences.

By furnishing instructions which explain all the arts employed by thieves and swindlers. There are many books upon this subject, the materials of which have been supplied by criminals who had repented, or who hoped to purchase pardon by their confessions. These compilations are miserable affairs ; but useful extracts might be made from them. One of the best is, the *Discoveries and Revelations of Poulter*, otherwise *Baxter*, of which sixteen editions were published in twenty-six years,—a fact which shows how wide a circulation might be obtained for an authentic book of this kind, authorized by the government. The tone which might be given to such a work, would make it an excellent moral lesson, and at the same time a book of amusement.

6. Against religious impostures.

By furnishing instructions respecting offences committed by the aid of a superstitious belief in the power and malice of spiritual agents. These offences are too numerous,—but they are trifles in comparison with the legal persecutions which have derived their origin from the same source. There is hardly a nation in Christendom which cannot

reproach itself with a multitude of bloody tragedies occasioned by the belief in witchcraft. Histories of offences committed by these means, would furnish a very instructive subject for homilies which might be read in the churches; but as to the errors of governments and magistrates, it were needless to give to them a sad publicity. The opinions of so many respectable and honest judges who have been so miserably duped by superstitions of this sort, would be more likely to confirm the people in error than to disabuse them of it. It is much to be desired that the witch of Endor could be got rid of. I do not know what evils this Jewish Canidia may have caused in Palestine, but she has produced frightful ones throughout Europe. The wisest theologians find great objections against that history, at least when taken in its literal and vulgar sense.

The English law has the honor of being the first expressly to reject from its penal code the pretended crime of witchcraft. In the code Theresa, though compiled in 1773, that pretended offence makes a considerable figure.

VII. *To publish tables of prices as a check to mercantile extortion.* If the exaction of an exorbitant price cannot properly be treated as an offence, and be subjected to a punishment, it may at least be regarded as an evil which it will be useful to put a stop to, if it can be done without producing a greater evil. As direct punishments are not admissible for this object, indirect means must be employed. Fortunately this is a kind of offence of which the evil, instead of being augmented, is diminished by increasing the number of offenders; and it therefore should be the object of the law to increase the number as much as possible. Such an article is sold very dear; the profit made from it, is exorbitant; spread abroad this information, and sellers will flock in from all sides, and by the mere effect of competition, the price will fall.

Usury may be placed under the head of mercantile extor-

tion. To lend money, is selling a sum of money in hand, for a sum of money to be paid at a future day, at a time determined or undetermined, depending or not upon certain events, and reimbursable all at once, or in parts, &c. By forbidding usury, and making the transaction unlawful, and so increasing the risk, of course, you augment the price.

VIII. *Publication of the fees of office.* Almost always fees are allowed in the departments of government for services rendered; these fees are a part of the salaries of the officers. As an artisan sells his labor as dear as he can, so does a public officer. Competition, and the facility of going to another market, restrain this disposition within its just limits as respects ordinary labor; but there is no competition in a public office; the right of selling this particular kind of labor becomes a monopoly in the hands of the officers. Leave the price to the discretion of the seller, and it will presently have no other limits except those which are prescribed by the wants of the purchaser. Fees of office ought to be strictly limited by law; otherwise, the extortions which will take place ought to be imputed less to the rapacity of the officers, than to the negligence of the legislator.

IX. *Publication of accounts in which the nation is interested.* When accounts are rendered at a fixed time, before a limited number of auditors, chosen perhaps by the influence of the accountant himself, and where nobody is called in specially to examine them, the greatest errors may pass without being seen, or without being corrected. But when accounts are published, neither witnesses, commentators, nor judges will be wanting.

Each item is examined. Was this article necessary? Was it really needed, or was it only a pretext for expense? Is the public served as cheaply as individuals? Has not some contractor obtained an advantage at the expense of the state? Has no secret advantage been granted to a favorite? Has nothing been given under false pretences? Have not

manoeuvres been used to prevent competition? Is not something kept back in the accounts? There are a hundred other questions of a similar kind, which never can be answered in a satisfactory manner, except by a publication of the accounts. In a particular committee, some may want integrity, and others may want knowledge; a mind slow in its operations passes over what it does not understand, for fear of betraying its want of quickness; a lively understanding will not subject itself to the study of details; each leaves to the rest the fatigues of examination. But all the deficiencies of a small body will be made up by the body of the people. In that heterogeneous and discordant mass, the worst principles have their use as well as the best; envy, hatred, malice, perform the task of public spirit; and these very passions, by reason of their activity and their perseverance, are the better adapted to scrutinize all parties, and to make the strictest and most exact examination.

There seem to be but two grounds of exception, one relating to the expense of publication, the other in regard to services of a kind which ought to remain secret. It would be useless to publish the accounts of a little parish, because the originals would be accessible to all those who wished to examine them; and if accounts of sums employed in secret service were published, you would no longer be able to obtain information of the designs of your enemies.

X. *Uniformity of weights and measures.* Weights indicate the quantity of matter, measures the quantity of space. Their uses are, 1st, the satisfaction of individuals; 2d, the termination of disputes; 3d, the prevention of frauds.

To establish uniformity in this respect throughout a single state, has been the object of many sovereigns. To find a common and universal measure for all nations, has been an object of research for many philosophers, and at length the French government has taken it in hand. This is a service truly honorable; for what is there rarer or greater,

than to see a government laboring at one of the foundations essential to the union of the human race!

A uniformity of weights and measures, under the same government, and among a people who have, in other respects, the same language, is a thing, the utility of which may be made apparent without any great depth of reasoning. A measure of which one does not know the value, is the same as no measure. If the measures of two cities differ either in name or quantity, the commerce of individuals is exposed to great mistakes or great difficulties. In this respect, these cities are strangers to each other. The nominal price of two articles may be the same, but if the measures are different, the real prices are different. Constant attention is necessary, and distrust interrupts the course of business; errors slip into transactions where good faith was intended, and fraud conceals itself under deceptive names.

There are two means of introducing uniformity. The first is, to establish standard measures by public authority, to distribute them throughout the country, and to forbid the use of any other; the second is, to establish such standards, and to leave the care of their adoption to the public convenience. I do not know any example in which the first of these methods has been followed; the second was practised with success by the archduke Leopold in Tuscany.

In England, there are not less than thirty acts of parliament upon this subject, and a thousand more may be made in the same style, without success. 1st. The clauses which enforce conformity to the standard are not sufficiently binding. 2d. There is no provision for the manufacture and distribution of standards;—a few have been scattered here and there, and the thing has been left to chance.

A beginning should be made by furnishing each community with a legal standard; a penalty might be imposed upon every workman who made weights and measures not

conformed to that standard; and finally, all contracts according to other weights and measures might be declared null and void. But this last means would not be necessary; the two first would suffice.

Between different nations, the want of uniformity in this respect cannot produce so many mistakes, because the mere difference of language puts every one upon his guard. However, there results from it much embarrassment to commerce; and fraud, favored by mystery, often prevails over the ignorance of purchasers.

An inconvenience less extensive, but not less important, is felt in medicine. If weights are not exactly the same, especially for substances where the smallest quantities are essential, the pharmacopœia of one country can hardly serve for another, and may expose practitioners to fatal errors. This is a considerable obstacle to the free communication of science; and the same inconvenience is felt in other arts of which the success depends upon delicate proportions.

XI. *Establishment of standards of quality.* It would be necessary to go very much into details, to mention all that governments might do for the establishment of the fittest *criteria* of the quality and value of a multitude of objects, which are susceptible of different tests. The touch-stone is an imperfect test of the quality and value of mixed metallic compositions of gold and silver. The hydrometer is a certain test, since identity of quality, and identity of specific gravity, always go together.

Falsifications the most important to be known, are those which may prove injurious to health; such as the mixture of chalk and burnt bones with flour; lead employed to remove the acidity of wine, or arsenic to refine it. Chemistry affords the means of discovering all these adulterations; but much knowledge is needed for its application.

The interference of governments with these matters should be limited to three points: 1st. To encourage the

discovery of means of proof, in cases where they are wanting. 2d. Spreading knowledge of these discoveries among the people. 3d. Defining the duties of those officers of government to whom functions of this sort are entrusted.

XII. *To establish brands or marks attesting the quantity or quality of articles which ought to conform to a certain standard.* These marks are declarations or certificates under an abridged form. In these documents, five points are to be considered:—1st. Their object. 2d. The person whose attestation they bear. 3d. The extent and the details of the information they contain. 4th. The distinctness and intelligibility of the mark. 5th. Its permanence and indestructibility.

The usefulness of these authentic attestations cannot be doubted. They are successfully employed for the following purposes :

1. To give certainty to the rights of property. We may trust to the prudence of individuals to make use of this precaution in what concerns themselves ; but as far as relates to public property, or to objects in deposit, it should be made an affair of the law. Thus in England, everything that appertains to the royal marine bears a particular mark, which the mercantile marine is not allowed to use. In the royal arsenals the imprint of an arrow is made use of, and a peculiar thread is twisted into the tissue of the cordage, which individuals are not permitted to employ.

2. To assure the quantity and quality of mercantile articles for the benefit of purchasers. Thus by the English statutes marks are affixed to a great number of objects, as leather, bread, tin, silver ware, woollen clothes, stockings, and many other articles of trade.

3. To assure the payment of taxes. If the article subject to the tax has not the mark in question, it is a

proof that the tax has not been paid. Examples are innumerable.

4. To insure obedience to laws which prohibit importation.

CHAPTER XI.

To prevent offences by giving to many persons an interest to prevent them.

I SHALL cite a particular example, which may be referred to the preceding head as well as to this; for an offence is prevented either by increasing the difficulty of concealing it, or by giving to many persons an immediate interest to prevent it.

The carriage of the mails in England had always been deficient in expedition and punctuality. The postmen loitered by the way, as their own convenience or profit required; the innkeepers never hastened their departure. All these delays were so many little offences, that is, violations of established rules. What remedy could be applied? Watchfulness soon grew weary; penalties were gradually relaxed; informations, always odious or embarrassing, became rare; and abuses suspended for a moment, presently regained their ordinary course.

A very simple means was hit upon, which required neither law, nor penalty, nor information, and which was all the better for not requiring them.

This means consisted in combining two establishments, which hitherto had been separate, the transportation of the mails and the carriage of travellers. The success of this project was complete; the celerity of the post was doubled; and travellers were better served. This is worth the trouble of being analyzed.

The travellers who accompany the postman are so many inspectors of his conduct; he cannot escape their observation; while he is excited by their praises, and by the reward he expects from them, he cannot be ignorant that if he loses time, these travellers will have good reason to complain, and that they can inform against him without odium, or the reputation of doing it for pay. Such are the advantages of this little combination! Witnesses to the least fault; the motive of reward substituted for that of punishment; economy of informations and prosecutions; the occasions of punishment rendered rare, and the two services, by their union, made more convenient, more prompt, and more economical!

I offer this happy idea of Mr. Palmer as a study in legislation. It is necessary to meditate upon what has been successfully accomplished in one kind, to learn how to conquer difficulties in another. By investigating the cause of success in particular cases, we may rise to general rules.

CHAPTER XII.

To facilitate the means of recognising and finding individuals.

THE greater part of offences are committed only by reason of the great hope which the offenders entertain of remaining unknown. Everything which augments the facility of recognising men, and of finding them, adds to general security.

This is one of the reasons why very little is to be apprehended on the part of those who have a fixed abode, property, and a family. The danger is from those who by their

indigence, or their independence of all ties, may easily conceal their proceedings from the eye of justice.

Registers of the population, in which are inscribed the dwelling, age, sex, profession, and the marriage or celibacy of individuals, are the first materials of a good police.

The magistrate ought to be authorized to demand an account from every suspected person of his means of livelihood, and to send to a place of security those who cannot prove either industry or income.

There are two things to be observed on this subject. The rules of police ought not to be so minute and particular as to expose the citizens frequently to break them, nor should they be rendered vexatious by imposing numerous and troublesome restraints. Precautions, necessary at certain times of danger or trouble, ought not to be prolonged into a season of quiet, as the regimen proper for sickness ought not to be kept up after the health is restored. The second observation is, to avoid shocking the national spirit. One nation could not endure the police of another. In the capital of China, every one is obliged to wear his name upon his dress. This measure will appear useful, indifferent, or tyrannical, according to the turn of national prejudices.

Characteristic dresses have a relation to this end. Those which distinguish the sexes, are a means of police as mild as it is salutary. Those which serve to distinguish soldiers, sailors, and the clergy, have more than one object, but their chief end is, subordination. In the English universities, the pupils have a particular dress, which is no restraint, except when they wish to transgress some rule. In charity-schools the pupils are made to wear a uniform, and even a numbered ticket.

It is inconvenient that the surnames of individuals should be upon so irregular a footing. These distinctions, invented in the infancy of societies, to answer the wants of a hamlet, fulfil their object but imperfectly in a great nation. Many

inconveniences arise from this confusion of names. The greatest of all is, that the testimony which depends upon a name is very vague; suspicion is cast upon a multitude of persons; and the danger of innocence may become the protection of guilt.

A new system of nomenclature might easily be devised, so that each individual in a nation should have a peculiar name, borne by no one but himself. In the actual state of things, the embarrassments of a change would perhaps exceed its advantages; but it might be well to prevent this disorder in a growing colony.

It is a common usage among English sailors to trace their family and baptismal name upon the wrist, in distinct and indelible characters. It is done that they may be recognised in case of shipwreck. If it were possible for such a practice to become universal, it would furnish a new aid to morals, a new power to the laws, an almost infallible precaution against a multitude of offences, especially all kinds of fraud, for the success of which a certain degree of confidence is necessary. Who are you? Who am I dealing with? There would be no room for prevarication in the answer to this important question.

This means, by reason of its very energy, would favor personal liberty, by permitting the rigors of procedure to be relaxed. Imprisonment, where it has no object except securing the person, would be less often necessary, if men were thus held as it were by an invisible chain.

Doubtless there are plausible objections. In the course of the French revolution, how many persons owed their safety to a disguise which an imprint of this nature would have rendered impossible! Public opinion in its actual state opposes an insurmountable obstacle to this institution; but patience and address may change opinion; especially were a beginning made by some great examples. If it were the custom to print marks upon the foreheads of the great, an

idea of power and of honor would be associated with them. The women in the islands of the South Sea submit to a painful operation in printing certain figures upon the skin, to which an idea of beauty is attached. The imprint is made by a multitude of punctures which penetrate to the quick, and into which colored powders are rubbed.

CHAPTER XIII.

To increase the difficulty of escape.

THESE means depend very much upon the geographical situation of a country, and upon natural and artificial barriers. In Russia, the sparseness of the population, the severity of the climate, the difficulty of communications, give a power to justice, of which it would hardly be thought capable in so extensive a country.

At Petersburg and Riga, passports cannot be obtained, unless the intention of departure has been several times advertised in the gazettes. This precaution against fraudulent debtors adds to the security of commerce.

Everything which increases the facility of transmitting and spreading intelligence, may be referred to this head.

CHAPTER XIV.

To diminish the uncertainty of prosecutions and punishments.

I do not intend to enter here upon the vast subject of procedure; that will be the subject, not of a chapter, but of a

separate work. I confine myself to two or three general observations.

If an offence has been committed, it is for the interest of society that the magistrate to whose cognizance it belongs, should be informed of it; and informed in such a manner as to be authorized to inflict a punishment. If it be alleged that an offence has been committed, it is the interest of society that the truth or falsehood of that allegation be subjected to proofs. Therefore the rules of testimony and the forms of procedure ought to be such as, on the one hand, to admit every true information, and on the other, to exclude every false information, that is, everything which is more likely to mislead than to enlighten.

Nature has placed before us a model of procedure. Consider what passes in the domestic tribunal; examine the conduct of the father of a family towards his children, his domestics, of which he is the head. We shall find there the original features of justice, which can no longer be recognised, after they have been disfigured by men, incapable of discerning the truth, or interested to disguise it. A good judge is only a good father, acting upon a much larger scale. The means which are adapted to guide a father in the search after truth, ought equally to be good for a judge. It is this model of procedure upon which justice began, and from which it ought never to have departed.

It is true that a confidence may be felt in the father of a family which cannot be felt in a judge, because a judge has not the same motives of affection, and may be perverted by personal interest. But this only proves that in case of a judge, it is necessary to take precautions against partiality and corruption which are not needed in the domestic tribunal. It does not prove that the forms of procedure or the rules of testimony ought to be different.

The English law admits the following principles:

1. That no one ought to be a witness in his own case,

2. That no one should be received as his own accuser.
3. That the testimony of persons interested in a cause ought not to be taken.
4. That hearsay evidence ought never to be admitted.
5. That no one ought to be put on trial a second time, for the same offence.

It is not my intention to discuss here these rules of testimony, to which may be applied that description,—*penitus toto divisos orbe Britannos*,—Britain wholly separate from the rest of the world. In a treatise on procedure in general, a proper place will be found to inquire, whether the English jurisprudence, superior in some respects to that of all nations, owes its superiority to these maxims, or whether they are not the principal cause of that weakness in the executive power of justice, whence there results in England an ineffective police, and such frequency of offences.

All I shall say here, is, that every precaution, which is not absolutely necessary for the protection of innocence, affords a dangerous lurking-place to crime. What maxims of procedure can be more dangerous than those which put justice in opposition to itself, and which establish a kind of incompatibility between its duties? When it is said, for example, that it is better that an hundred of the guilty should escape than that one innocent person should perish, a dilemma is supposed which does not exist; the security of innocence may be complete without favoring the impunity of crime; indeed it can only be complete on that condition; for every culprit who escapes, threatens the public security; and so far from being a protection to innocence, such an escape exposes innocence to become the victim of a new offence. To acquit a criminal is to commit by his hands all the offences of which he is afterwards guilty.

The difficulty of proceeding against offences is a great cause of feebleness in the executive power of justice, and of impunity to crime. When the law is clear, when the judge

is appealed to immediately after the supposed offence, the function of accuser is almost confounded with that of a witness. When the offence is committed under the eye of the judge, there are, so to speak, but two persons necessary in the drama, the judge and the delinquent. It is distance of time and place which separate the function of the witness from that of the judge. But it may happen that all the witnesses of the facts cannot be suddenly collected, or that the offence is not discovered till long after its commission; or that the accused alleges facts in his defence which it requires time to verify; all these causes may bring on delays. Delays give occasion to incidents which produce new delays. The process of justice becomes complicated, and in order to follow out this chain of operations without confusion or negligence, it is necessary to entrust its management to a particular person. Hence results the function of an accuser. The accuser may either be one of the witnesses, or a person interested in the affair, or a public officer specially appointed for that purpose.

The judicial functions have often been divided, so that the judge who receives the testimony while it is recent, has not the right to decide; but is obliged to send the affair to another judge, who, unless the evidence were thus collected, would have no leisure to attend to it, till the proofs were half effaced. There have been established, in most countries, a great number of useless formalities, and it has become necessary to create officers to attend to those formalities. The system of procedure is so complicated, that it has become an abstruse science; he who wishes to prosecute an offence, is obliged to put himself into the hands of an attorney, and the attorney himself cannot go on without the aid of another man of the law of a superior class, who directs him by his counsels and who speaks for him.

To these disadvantages, two others must be added:—

1st. Legislators, by a strange piece of self-contradiction,

have often closed all access to the tribunals against those who have the most need of their assistance, by subjecting proceedings at law to taxes, the effect of which is little considered.

2d. There is a public disfavor attached to all those who lend their aid, in quality of accusers, to the execution of the laws; a stupid and pernicious prejudice, which legislators have often had the weakness to encourage, without ever having made the slightest effort to subdue it.

It is easy to see the consequence of this accumulation of delays and discouragements. The laws are not executed. If a man could address the judge at once, and tell what he has seen, the expense to which this procedure would subject him, would be but a trifle. In proportion to the number of intermediate steps which he is obliged to take, his expenses are increased. When to this we add, loss of time, vexations, and the uncertainty of succeeding, it is astonishing that men can be found bold enough to engage in such a pursuit. There are but few; and there would be still fewer, if those who adventure in this lottery knew, as well as the lawyers, what it will cost, and how many chances there are of failure.

These difficulties would vanish by the mere institution of a public accuser, clothed with the character of a magistrate, who should conduct all prosecutions at the public expense. Informers who expected pay, would require but a moderate compensation. A hundred gratuitous accusers would present themselves to one who would demand pay for his services.* Every law being put into force, would manifest its good or bad effects; the wheat would be winnowed from the chaff. Good laws would be appreciated;

* The smallest expense of a prosecution in an English court of justice, is twenty-eight pounds sterling,—a sum almost sufficient for the yearly subsistence of a common family. This sum comes out of the pocket of the prosecutor. Under such a system, it is almost a miracle that there are any prosecutions.

bad laws would be repealed. Informers, animated by public spirit, and rejecting all pecuniary reward, would be heard with due respect and confidence ; and delinquents could no longer escape the punishment of their offences by a bargain with the prosecutor.

It is true that in England, in all grave cases, the accuser is forbidden to make a compromise with the accused, without the permission of the court ; but although this prohibition were universal, what possibility is there of its observance in cases where it is the interest of both parties to elude it ?

CHAPTER XV.

To prohibit accessory offences in order to prevent the principal offence.

Acts which are related to a pernicious event as causes, may be considered in relation to the *principal offence*, as *accessory offences*.

The principal offence being well determined, there may be distinguished as many accessory offences as there are acts which may serve as preparations for the principal offence, and which manifest on the part of those who perform them, an intention of committing it. Now the more distinctly these preparatory acts are pointed out and prohibited, the more chances there are of preventing the principal offence. If the offender is not stopped at the first step, he may be at the second, or the third. It is thus that a vigilant legislator, like a skilful general, takes care to reconnoitre all the exterior posts of the enemy, in order to interrupt his enterprises. Along all the defiles and all the passes, he stretches a chain of works, diversified according

to circumstances, but connected together in such a way that the enemy finds at each step new dangers and new obstacles.

If we consider the practice of legislators we shall find none who have labored systematically upon this plan, and none who have not followed it to a certain extent.

Offences of the chase, for example, have been divided into many accessory offences, according to the nature of the game, or the kinds of nets or instruments necessary to take it. Smuggling has been attacked, by prohibiting many preparatory acts. Counterfeiting has been attacked in the same manner.

I shall give some other examples of what might be done in this way against homicide and other corporal injuries.

The prohibition to carry arms only useful for attack, and easy to be concealed. It is said that an instrument is made in Holland in the form of a needle, which is shot through a tube, and which inflicts a mortal wound. The manufacture, the sale, the possession of these instruments ought to be forbidden, as accessory to murder.

Ought pocket-pistols, such as English highwaymen use, to be prohibited? The utility of such a prohibition is problematical. Of all methods of robbery, that which makes use of fire-arms is least dangerous to the person attacked. In such a case, the mere threat is usually sufficient to accomplish the object. The robber who began with shooting, would not only commit an act of useless cruelty, he would disarm himself; while by reserving his fire, he stands on the defensive. He who uses a club or a sword, has not the same motive to abstain from striking; and one blow becomes the motive for a second, in order to deprive the victim of power to pursue.

The prohibition to sell poisons demands a catalogue of poisonous substances. The sale of them cannot be abso-

lutely prohibited ;* all that can be done is, to regulate it, to subject it to precautions, to require that the seller should know the purchaser, that he has witnesses of the sale, that he enters it in a separate book ; and still, some latitude must be left for unexpected cases. These rules, to be complete, demand many details. Would their advantages counterbalance the embarrassments they would produce ? That depends upon the manners and habits of a people. If poisoning is a frequent offence, it will be necessary to take these indirect precautions. They would have been proper in ancient Rome.

Accessory offences may be distinguished into four classes.

The first class imply a formed intention to commit the principal offence. Offences of this kind are comprehended under the general name of attempts, preparations.

The second class do not imply a criminal intention actually formed, but place the individual in a situation in which there is reason to fear that he may presently conceive a criminal design. Such are gaming, prodigality, and idleness, when poverty is added to it. Cruelty towards animals is an incentive to cruelty towards men, &c.

Accessory offences of the third class do not imply any criminal intention, actual or probable, but only accidentally possible. Offences of this kind are created by those regulations of police intended to prevent calamities. When, for example, the sale of certain poisons or the sale of gunpowder is forbidden, the violation of these rules, separate from any criminal intention, is an offence of this third class.

The fourth class is composed of presumed offences, that is, of acts which are considered as proofs of an offence. They may be called *evidentiary offences* ; acts injurious or otherwise in themselves, but furnishing a presumption of an

* Taken in a certain dose, every active medicine is a poison.

offence committed. By an English statute, the concealment by the mother of the birth of an illegitimate child, is punished as murder, because such conduct is regarded as a sure proof of infanticide. By another statute, it is a capital crime for men to meet together armed and disguised, because this is supposed to be a proof of a formed design to offer violent resistance to the officers of the customs. By another statute, it is an offence to have stolen goods in possession without being able to render a satisfactory account how they were obtained; because this circumstance is regarded as proof of participation in the theft. By another statute, it is an offence to obliterate the marks upon shipwrecked property, because such an act indicates intention of theft.

These offences, founded upon presumptions, suppose two things: 1st, distrust of the system of procedure; 2d, distrust of the wisdom of the judge. The English legislature, fearing that juries, too prone to lenity, would not see in these presumptions a certain proof of guilt, has thought fit to erect the act which furnishes the presumption into a second offence, an offence distinct from every other. In those countries in which a perfect confidence is placed in the tribunals, these acts may be arranged under their proper head, and be considered merely as presumptions, from which the court is to draw such inferences as the circumstances warrant.

In relation to accessory offences, it is essential to lay down three rules by way of *memento* to the legislator.

1. Whenever a principal offence is created, all preparatory acts and simple attempts ought also to be prohibited, ordinarily under a less penalty than the principal offence. This rule is general, and the exceptions ought to be founded upon particular reasons.

2. To the description of the principal offence, there ought to be appended a description of all accessory, preliminary,

and concomitant offences, which are susceptible of a specific description.

3. In the description of these accessory offences, care must be taken not to impose too many restraints, not to entrench too far upon individual liberty; not to expose innocence to danger by conclusions too precipitate. The description of an offence of this kind would be almost always dangerous, if it did not include a clause leaving power to the judge to estimate the degree of presumption to be derived from it. In that case, creating an accessory offence is pretty much the same thing as suggesting the fact in question to the judge, by way of instruction, as an indicative circumstance; but not authorizing him to draw any conclusion from it, if he see any special reason to regard the indication as inconclusive.

If the punishment of a preliminary offence, or of an offence begun but not finished, were the same with that of the principal or complete offence, without allowing anything for the possibility of repentance or a prudent stopping short, the delinquent, perceiving that he had already incurred the whole danger by the simple attempt, would feel himself at liberty to consummate the offence without incurring any further risk.

CHAPTER XVI.

The culture of Benevolence.

THE sentiment of benevolence is distinct from the love of reputation. Each may act without the other. This sentiment may originate in an instinctive principle, the gift of nature; but in a great measure, it is the produce of culture, the fruit of education. Where is the greater amount of benevolence to be found, among the English or

the Iroquois, in the infancy of society, or its maturity? If the sentiment of benevolence be susceptible of increase, and that it is, cannot be doubted, that increase is to be obtained by the aid of another principle of the human heart, the love of reputation. When the moralist paints benevolence with the most amiable features, and selfishness, hardness of heart, in the most odious colors, at what does he aim? He seeks to unite to the purely social principle of benevolence, the demi-personal and demi-social principle of reputation. He seeks to combine them; to give them the same direction; to strengthen them one by the other. If his efforts are crowned with success, to which of these two principles ought he to ascribe the honor? Neither to the one nor to the other, exclusively, but to their reciprocal concourse; to the sentiment of benevolence as the immediate cause; to the love of reputation as the remote cause. He who yields with pleasure to the mild promptings of the social principle, knows not, and does not desire to know, that it is a less noble principle to which his benevolence owes its impulse. Such is the disdainful delicacy of the better element of our nature; it is unwilling to owe its birth to anything but to itself; it blushes at every foreign association.

There are two objects for the legislator: 1st, to give new force to the sentiment of benevolence; 2d, to regulate its application according to the principle of utility.

1. The legislator who wishes to inspire a people with humanity, ought himself to give the first example of it. Let him show the utmost respect not only for the lives of men, but for all the circumstances which have an influence upon their sensibility. Sanguinary laws have a tendency to render men cruel, by fear, by imitation, and by fostering a spirit of revenge. Mild laws humanize the manners of a nation; the spirit of the government is reproduced among the citizens.

The legislator ought to forbid everything that serves as

an incitement to cruelty. The barbarous gladiatorial shows introduced at Rome, in the latter times of the republic, contributed, without doubt, to inspire that ferocity of spirit which the Romans displayed in their civil wars. Will a people accustomed to despise human life in their sports, respect it in the rage of passion?

It is proper, for the same reason, to forbid every kind of cruelty to animals, whether by way of amusement, or for the gratification of gluttony. Cock-fights and bull-fights, the chase of the hare and the fox, fishing, and other amusements of the same kind, necessarily suppose a want of reflection, or a want of humanity; since these sports inflict upon sensitive beings the most lively sufferings, and the most lingering and painful death that can be imagined. Men must be permitted to kill animals; but they should be forbidden to torment them. Artificial death may be rendered less painful than natural death, by simple processes, well worth the trouble of being studied, and of becoming an object of police. Why should the law refuse its protection to any sensitive being? A time will come when humanity will spread its mantle over everything that breathes. The lot of slaves has begun to excite pity; we shall end by softening the lot of the animals which labor for us and supply our wants.

I do not know whether the Chinese legislators, in establishing their minute ceremonials, have had for their object the cultivation of benevolence, or only the maintenance of peace and subordination. In China, politeness is a kind of worship or ritual, the great object of education, and the principal science. The bodily movements of the Chinese, always regulated, always prescribed by etiquette, are almost as uniform as those of a regiment which goes through the manual exercise. This pantomime of benevolence may be destitute of reality, as a devotion loaded with minute observances may have little to do with morals. So much

restraint does not seem to accord well with the human heart; and such demonstrations of respect do not confer any obligation, because they have no merit.

There are principles of antipathy, which are sometimes so interlaced with the political constitutions of states, that it is very difficult to extirpate them. There are hostile religions which excite their partisans to hate and to persecute each other; hereditary feuds between hostile families; privileges of rank which erect insurmountable barriers between the citizens; results of conquest, where the conquerors have not been able to mix and incorporate themselves with the conquered people; animosities founded upon ancient wrongs; the rule of factions which rise with a victory, and fall with a defeat. In this unfortunate condition of things, hearts are oftener united by hatred than by love. Men must be freed from fear and oppression, before they can be taught to love each other. The destruction of prejudices which make men hostile, is one of the greatest services that can be rendered to morals.

Mungo Park, in his African travels, has represented the blacks in a most interesting point of view; their simplicity, the strength of their domestic affections, the picture of their innocent manners, has increased the public interest in their favor.

Satirical writers weaken this sentiment. After reading Voltaire, does one feel favorably disposed towards the Jews? If that author's benevolence had not been eclipsed by his prejudices, while exposing the degradations to which the Jews are subjected, he would have explained by that very fact the less favorable traits of their character, and would have exhibited the remedy by the side of the evil.

The most dangerous assaults upon benevolence have been made by exclusive religions, having incommunicable rights, inspiring intolerance, and representing unbelievers as infidels, the enemies of God.

In England, better than elsewhere, is understood the art of exciting beneficence by the publicity which is given to it. Is it wished to establish a charitable institution which requires many contributors?—a committee of the most active and distinguished benefactors is appointed; the amount of contributions is announced in the newspapers; and the names of the subscribers are printed from day to day. This publicity answers two ends. Its immediate object is, to guarantee the receipt and employment of the funds; but it is also a bait to vanity by which benevolence gains.

In charitable societies all the annual subscribers are named directors; the control they exercise, the little state they form, interest them in their office. They love to follow up the good they have done and to enjoy the power which it confers. The benefactors being thus brought into contact with the unfortunate, misery being thus placed before their eyes, benevolence is strengthened and confirmed; it grows cool by the removal of the object, but warms again by its presence.

There are more of these benevolent societies in London than there ever were convents in Paris.

Many of these charities have particular objects: the blind, orphans, the maimed, widows, sailors, the children of clergymen. Each individual is more touched by one kind of misery than by another, and his sympathy almost always depends upon some personal circumstance. Of course there is much art in diversifying charities, in separating them into many branches, in order that every kind of sensibility may be made available, and that none may be lost.

It is astonishing that more advantage has not been taken of the disposition of women, among whom the sentiment of pity is stronger than among men. Before the revolution, there were two institutions in France well adapted to this end: the *Daughters of Charity*, who devoted themselves to the service of the hospitals, and the *Society of Maternal*

Charity, at Paris, composed of married ladies, who visited poor women in their pregnancy, and aided them in the care of their infants.

2. The sentiment of benevolence is liable to deviate from the principle of general utility. It cannot be set right except by instruction. Command and force do not avail. Men must be persuaded, enlightened, taught little by little, to distinguish the different degrees of utility, and to proportion their benevolence to the extent of its object. The best model is traced by Fenelon, in that sentence which paints his heart: "I prefer my family to myself, my country to my family, mankind to my country."

It should be the object of public instruction to direct the affections of the citizens towards the end of utility; to repress vagaries of benevolence; and to make each individual perceive how the general interest involves his own. Men should be taught to blush at that spirit of family, at that spirit of caste, at that spirit of party, sect or profession, which militates against the love of country; and at that unjust patriotism which glories in the hatred of other nations. They should be dissuaded from assuming, through a misplaced pity, the advocacy of deserters, smugglers, and other delinquents who sin against the state. They should be disabused of that false notion that there is any humanity in favoring the escape of a criminal, in lending impunity to crime, in encouraging mendicity to the prejudice of industry. The attempt should be made to give to all their sentiments of benevolence the most advantageous proportion, by pointing out the littleness and the danger of those caprices, antipathies, and momentary attachments, which incline the balance against general utility and permanent interests.

The more men become enlightened, the more they will contract a spirit of general benevolence, because the progress of enlightenment makes it evident that the interests of men are oftener harmonious than discordant. In commerce,

nations not well informed treat each other as rivals, who cannot rise except upon each other's ruins. The work of Adam Smith is a treatise upon universal benevolence, because it shows that commerce is equally advantageous to all parties; that each party profits in its own way, according to its natural means; and that nations are partners, not rivals, in the great social enterprise.

CHAPTER XVII.

Employment of the motive of honor, or the popular sanction.

It should be the object of the legislator to increase the force of this motive, and to regulate its application.

The force of public opinion is in the compound ratio of its extent and its intensity. Its extent is measured by the number of suffrages; its intensity by the degree of blame or of approbation.

There are many means of increasing the power of opinion so far as concerns its extent: the principal are, liberty of the press, and publicity in all proceedings in which the nation is interested; publicity of the tribunals; publicity of accounts; publicity of state consultations when secrecy is not required for some particular reason. An enlightened public, the depository of the laws and of the archives of honor, and administrator of the moral sanction, forms a supreme tribunal, which decides upon all cases and all persons. By publicity in affairs, this tribunal is enabled to collect proofs and to form a judgment; by the liberty of the press, it is enabled to pronounce its judgment and to cause it to be executed.

There are also a number of means for increasing the in-

tensity of the power of opinion ; such as punishments which bear some character of ignominy, or rewards of which the principal object is, honor to those who receive them.

There is an art of guiding opinion, without the public suspecting how it is led. It consists in arranging things so that the act which you wish to prevent cannot be performed without first doing something else, which popular opinion condemns already. If it be desired, for example, to secure the payment of an impost, you may exact from him whose duty it is to pay, a certificate or an oath that he has paid.

To take a false oath, to fabricate a false certificate, under whatever pretence, are offences which the public is prepared beforehand to stamp with disapprobation. So that here we discover a sure means of rendering an offence infamous, which without this addition would not be so.

Sometimes a mere change in the name of a thing is enough to change the sentiments of a nation. The Romans abhorred the name of *king*, but they could put up with the titles of *dictator* and *emperor*. Cromwell did not succeed in seating himself upon the throne of England, but under the name of *protector*, he enjoyed more than kingly authority. Peter I. of Russia abdicated the title of *despot* for himself, and he ordered that the slaves of the nobles should henceforth be called only *subjects*.

If the people were philosophers, this expedient would not answer ; but on this point philosophers are as weak as the people. What deception in the words *liberty* and *equality* ! What contradictions between that *luxury* which all condemn, and that *public prosperity* which all admire !

The legislator ought to beware how he strengthens public opinion in cases where it is in opposition to the principle of utility. For this reason he ought to efface from the laws every vestige of those pretended offences of heresy and witchcraft, lest he give a legal foundation to superstitious

notions. If he does not dare to attack errors, too generally diffused, at least, he ought not to furnish them with a new sanction.

It is very difficult to employ the motive of honor as a means to aid the enforcement of the laws. Pecuniary rewards paid to informers, have failed of their object. The motive of gain has been opposed by that of shame; and the law, instead of increasing its power, has weakened itself by offering an inducement condemned by public opinion. Persons are afraid of the suspicion of acting from a mean motive. Rewards not well selected, repulse, instead of attracting, and deprive the law of much gratuitous assistance.

The most powerful means of producing an important revolution in public opinion, is, to strike the mind of the people by some great example. Thus Peter the Great himself, gradually passing through all the gradations of rank, taught his nobility, by his own example, to bear the yoke of military subordination. Thus Catherine II. surmounted the popular prejudice against inoculation, by trying it, not upon criminals, but on herself.

CHAPTER XVIII.

Employment of the motive of religion.

THE culture of religion has two objects: 1st, to increase the power of that sanction; 2d, to give that power a proper direction. If its direction be bad, it is plain that the less power that sanction has, the less evil it will do. With respect then to religion, the first thing to be examined is, its tendency; the search for means to augment its power, is but a secondary object.

Its tendency ought to be conformable to the plan of utility. As a sanction, it is composed of punishments and rewards. Its punishments ought to be attached to those acts which are injurious to society, and to such acts alone. Its rewards ought to be promised to acts the tendency of which is advantageous to society, and to no acts beside. This ought to be its fundamental dogma.

The only means to judge of its tendency, is, to consider it solely in its relation to the good of political society. Every other part of it is indifferent; and whatever is indifferent in religious belief, is liable to become pernicious.

Every article of faith is of necessity injurious, so soon as the legislator, in order to favor its adoption, resorts to coercive motives, to motives derived from the fear of punishment. The persons whom he wishes to influence may be considered as forming three classes: those who are already of the same opinion with the legislator; those who reject that opinion; those who neither adopt, nor reject it.

For those who conform voluntarily, a coercive law is not necessary; for non-conformists it is useless, as is proved by the very fact of their non-conformity; it does not fulfil its purpose.

When a man has formed his opinion, can punishments make him change it? The very question is an insult to common sense. Punishments have rather a contrary effect; they rather serve to confirm one's opinion than to shake it; partly because the employment of constraint is a tacit avowal that arguments are wanting; partly because recourse to violent means produces an aversion to opinions so sustained. Punishment never can oblige a man to believe, but only to pretend that he believes.

Those who, through conviction or the pride of honor, refuse to pretend a belief they do not feel, are exposed to the evil of punishment, that is, to persecution; for what is called *persecution* is an evil which is not compensated by

any advantage; it is a pure loss; and though administered by the hand of the magistrate, it is precisely the same in nature, but much severer in degree, than if it had been the work of an ordinary malefactor.

Those persons, less strong-minded, and less noble, who escape by a false declaration, yield to threats, and to the immediate danger which presses them; but the momentary punishments thus avoided, turn into a punishment of conscience, if they have any scruples, and into a punishment of contempt upon the part of society, which cannot endure the baseness of such hypocritical retractions.

In such a state of things, what happens? A portion of the citizens must accustom themselves to disregard the opinions of another part, in order to be at peace with themselves. There springs up an art of making subtle distinctions between innocent falsehoods, and criminal falsehoods; there is established a class of privileged lies, permitted as a defence against tyranny,—a set of perjuries which are esteemed innocent, and false signatures considered as mere formalities. In the midst of these subtilities, respect for truth disappears; the limits of good and evil are confounded; a train of less pardonable falsehoods is introduced under cover of those already described; the tribunal of opinion is divided; the judges who compose it do not follow the same law; they do not clearly know what degree of dissimulation they ought to condemn, or what they ought to excuse. The votes are scattered and contradictory, and the moral sanction having no longer a uniform regulator, grows weak, and loses its influence. Thus the legislator who imposes religious tests becomes the corrupter of the nation. He sacrifices virtue to religion,—though religion itself is a good only so far as it is the auxiliary of virtue.

The third class of the community, according to the division above stated, comprises those persons, who, at the establishment of the penal law for the regulation of belief,

had yet no settled opinion one way or the other. With respect to these, it is likely that the law may have an influence upon the formation of their opinions. Seeing danger upon one side, and security upon the other, it is natural that they should examine the arguments in favor of an opinion which the law condemns, with a degree of fear and aversion, that they will not feel for the arguments which support the favored opinion. The arguments which we desire to find true, make a more lively impression than those which we hope to find false; and thus a man comes to believe, or rather not to reject, not to disbelieve a proposition which he would not have adopted had his inclinations been left free. In this last case, the evil, though not so great as in the two former, does not cease to be an evil. It may happen, but it does not always happen, that the judgment yields entirely to the affections; and even though it should so happen, though the belief should be as strong as it can be, if fear enters at all into the motives of that belief, the mind is never perfectly tranquil. There remains a secret dread that what is believed to-day may be disbelieved to-morrow. The conviction of a clear moral truth is never shaken; but belief in a mere dogma is always more or less wavering. Thence arises that impatience towards those who attack it. Examination and discussion are dreaded by men who feel the ground shaking under their feet. It will not do to allow any alterations in a building which lacks a foundation. The understanding is enfeebled; the mind seeks only for perfect repose in a sort of blind credulity; it collects together all the errors which have any affinity with its own; it fears to explain itself clearly as to the possible and impossible, and seeks to confound all their limits. It delights in all sorts of sophistries, in everything that shackles the human understanding, in everything which seems to show that no certain dependence can be placed upon reason. It acquires an inclination, an unhappy dexterity for rejecting evidence; for

giving weight to half proofs; for hearing but one side; for evading the decisions of reason. In one word, according to this system, it is necessary to put a bandage about the eyes, lest we be wounded by the light of day.

Thus every penal means employed to augment the power of religion, acts as an indirect means against that essential part of morals, which consists in respect for truth, and respect for public opinion. All enlightened minds now hold this doctrine; but there are very few states which have yet adopted it. Violent persecutions have ceased, but moderate persecutions still exist, civil penalties, political incapacities, menacing laws, a precarious toleration;—a humiliating situation for large classes of men, who owe their tranquillity only to a tacit indulgence, to a continued pardon.

To form a clear idea of the advantage which the legislator may derive from augmenting the force of the religious sanction, it is necessary to distinguish three cases: 1st, that in which it is entirely under his control; 2d, that in which other persons share the influence with him; 3d, that in which it depends upon some foreign personage. In this last case, the sovereignty is really divided between two magistrates, the spiritual, as he is called, and the temporal. The temporal sovereign is in perpetual danger of seeing his authority disputed or snatched away by his rival, and everything he does for the augmentation of the religious sanction, will produce a diminution of his own power. We find in history a picture of the effects which result from such a struggle. The temporal magistrate commands such or such an action; the spiritual magistrate forbids it. Whichsoever side the citizens take, they are punished by the one, or by the other; proscribed, or damned; they are placed between the fear of the gallows, and the dread of hell-fire.

In Protestant countries, the clergy are essentially subordinate to the political power. Dogmas do not depend upon the prince, but those do who interpret the dogmas. Now the

right of interpretation is pretty much the same thing with the right of promulgation. Thus in Protestant countries, religion is easily modelled, according to the plans of political authority. Married priests are more like citizens; they do not form a phalanx which can become formidable; they have neither the power of the confessional, nor that of absolution.

But if we consider only facts, whether in Catholic or Protestant countries, religion, it must be admitted, has had too great a share in the misfortunes of mankind. It seems to have been oftener the enemy, than the instrument of civil government. The moral sanction never has more power than when it agrees with utility; but unfortunately, the religious sanction appears to have most power in the very cases where it is most opposite to utility. The inefficacy of religion, so far as relates to the promotion of political good, is the ceaseless subject of declamations on the part of those who have the greatest interest to exaggerate its good effects. Not powerful enough to produce good, its power of doing evil has always been too great. It was the moral sanction which animated Codrus, Regulus, the Russells, and the Sidneys. It was the religious sanction which made Philip II. the scourge of the Low Countries, Mary the tyrant of England, and Charles IX. the butcher of France.

The common solution of this difficulty is, to attribute all the good to religion, and all the evil to superstition. But this distinction, in this sense, is purely verbal. The thing itself is not changed because a man chooses to describe it, in one case, by the word religion, and by the word superstition, in another. The motive which acts upon the mind, is precisely the same in both cases. It is always the fear of evil and the hope of good, on the part of an all-powerful Being, of whom different ideas are entertained. In speaking of the conduct of the same man, upon the same occasion, some attribute to religion what others ascribe to superstition.

Another observation as trivial as the first, and as weak as it is trivial, is the remark so often repeated, that it is not just to argue against the *use* of a thing from its *abuse*, and that the best instruments do the most harm, when misemployed. The futility of this argument is obvious; it consists in calling the good effects of a thing, its *use*, and in stigmatizing the bad effects, as its abuse. To say that you ought not to argue from the abuse of a thing against its use, is to say, that in making a just appreciation of the tendency of a cause, you ought to consider only the good, and not the evil it produces. The instruments of good, wrongly employed, may often become instruments of evil; that is true; but the principal characteristic of perfection in an instrument, is, not to be liable to be so misemployed. The most efficacious ingredients in medicine may be converted into poisons; I admit it; but those which are dangerous are not so good, upon the whole, as those which answer the same purpose, if such there are, without being liable to the same abuses. Mercury and opium are very useful; bread and water are still more so.

I have spoken without evasion, and with perfect freedom. I have elsewhere explained the utility of religion, but I cannot here omit to observe that it tends more and more to disengage itself from futile and pernicious dogmas, and to reconcile itself to sound morals and sound politics. Irreligion, on the other hand, has been manifested in our day, under the most hideous forms of absurdity, of immorality, and of persecution. This experience is enough to show all well-disposed minds towards what end they ought to direct their efforts. But if the government should act too openly in favor of this salutary direction, it would fail of its end. It is freedom of inquiry which has corrected the errors of the ages of ignorance, and brought back religion towards its true object. Freedom of inquiry will complete the purification of religion, and its reconciliation with public utility.

This is not the place to examine all the services which religion may render, either as a consolation to the woes inseparable from humanity; or as moral instruction best adapted to the most numerous class of society; or finally as a means of exciting beneficence, and of producing acts of devoted virtue, which perhaps could hardly be obtained by the power of mere earthly motives.

The principal employment of religion, in civil and penal legislation, is, to give a new degree of force to *oaths*, an additional support to confidence.

An oath includes two different ties, one religious, the other moral; one obligatory upon all, the other, obligatory upon those only who have a certain set of opinions. The same formula which, in case of perjury, purports to expose the offender to religious penalties, exposes him, at the same time, to legal punishments and to public contempt. The religious obligation is the striking part; but the main force of the oath depends upon the moral tie. The influence of the first is partial, that of the second is universal. It would be a great piece of imprudence to make use of the former and to neglect the latter.

There are cases in which oaths have a very great power; those, namely, in which they act in concert with public opinion, or have the support of the popular sanction. There are other cases in which their power is very small; those, namely, in which they are in opposition to public opinion, or are merely unsupported by it. Such are custom-house oaths, and those exacted from the pupils at certain universities.

It is the interest of a legislator, not less than of a military chief, to know the true state of the forces under his command. To avoid seeing the weak part, because the sight of that weak part gives little satisfaction, is pusillanimity. If the feebleness of oaths, so far as the religious obligation is concerned, has been fully made known, it is the fault of

those who place the greatest reliance on this means. The abuse they have made of it, the prodigality with which they have employed it, has betrayed the little efficacy which it has in itself, distinct from the sanction of honor.

The power of oaths is necessarily enfeebled, when they are made to bear upon belief, upon opinions. Why? Because, in such cases, it is impossible to detect perjury, and because human reason, always afloat, always subject to variations, cannot bind itself for the future. Can I be certain that my belief to-day will be my belief ten years hence? These oaths are an advantage given to unscrupulous men over those who have a greater sensibility of conscience.

Oaths become degraded when they are used for puerile purposes; when they are employed for purposes as to which there is a general understanding to violate them; and still more, when they are required in cases in which justice and humanity excuse, and perhaps applaud, their violation.

The human mind, almost always opposed to tyranny, perceives confusedly that the Deity, on account of his very perfections, cannot ratify unjust or frivolous laws. Man in fact, by imposing an oath, wishes to exercise an authority over God himself; man decrees a punishment, and the Supreme Judge is called upon to execute it. Deny this supposition, and there is an end to the religious force of an oath.

It is very astonishing that in England, among a people otherwise prudent and religious, this powerful means has been almost ruined by the trivial and indecent use that has been made of it.

To show how far habit may deprave moral opinions upon some points, I shall cite a passage extracted from Lord Kaims, a judge of the court of session in Scotland, in a work upon education:—

“Custom-house oaths, at present, go for nothing; not because men are growing more immoral, but because no one

attaches any importance to them. The duty upon French wines is the same in Scotland as in England; but as we are not rich enough to pay it, a tacit permission to pay upon French wines the same duty as upon Spanish wines, is found more advantageous to the revenue than the rigor of the law. However, before the duty is paid, an oath must be taken that the French wines are Spanish wines. Such oaths in their origin were criminal, because they were a fraud upon the public; but at present, the oath is only a matter of form, and does not imply any credit given or received; it is a mere manner of speaking, like the compliments of common civility, *your humble servant*, &c. And in fact we see merchants who gain a livelihood by these oaths, and who are trusted without scruple in the most important affairs."

What shall we think when a moralist and a judge holds language like this? The Quakers have raised a simple affirmation to the dignity of an oath; a magistrate degrades an oath into a mere formality; the oath implies no credit, given or received. Then why take it? Why exact it? For what does this farce serve? Is religion then the meanest of objects? If it is, why pay so dear for it? What an absurdity to maintain a clergy at so great an expense, to preach the sacredness of oaths, and to have judges and legislators who turn them into ridicule!

CHAPTER XIX.

Use to be made of the power of Instruction

INSTRUCTION does not form a separate subject; but this title will enable us to bring under one head a number of detached observations.

Government ought not to do everything by force; it is only the body which submits to that; nothing but wisdom can extend its empire over the mind. When a government orders, it but gives its subjects an artificial interest to obey; when it enlightens, it gives them an interior motive, the influence of which they cannot evade. The best method of instruction is the simple publication of facts, but sometimes it is advisable to aid the public in forming a judgment upon those facts.

When measures of government, excellent in themselves, are seen to fail through the opposition of an ignorant people, we feel an immediate irritation against the stupidity of the multitude, and a disinclination to trouble ourselves further with the promotion of the public good. But when we come to reflect, when we observe that this opposition was easy to be foreseen, and that government, with the habitual pride of authority, had taken no precautions to prepare the minds of the people, to dissipate prejudices, to conciliate confidence, our indignation ought to be transferred from a people ignorant and deceived, to its disdainful and despotic rulers.

Experience has proved, contrary to the general anticipation, that *newspapers* are one of the best means of directing opinion, of quieting its feverish movements, and of dissipating those falsehoods and concocted rumors by which the enemies of government aim to accomplish their evil designs. By means of these papers, instruction descends from the government to the people, and remounts from the people to the government; the more liberty the press enjoys, the easier it is to ascertain the current of opinion, so as to act with certainty.

To form an adequate idea of their utility, it is necessary to go back to the times when newspapers did not exist, and to consider the scenes of imposture, political and religious, which were played off with success, in countries where the people could not read. The last of these personators of

royalty was Pugatcheff. Would it have been possible in our times to play such a part in France or in England? Would not the imposture be unmasked as soon as it was announced? There are offences which are not even attempted among enlightened nations; the ease of detecting impostures prevents their existence.

There are many other snares from which the government can protect the people, by public instructions. How many frauds are practised in commerce, in the arts, in the price or quality of goods, which it would be easy to put an end to by exposing them! How many dangerous remedies, or rather true poisons, are impudently sold by empirics, as marvellous secrets, as to which it would be easy to disabuse the most credulous, by making known their composition! How many mischievous opinions, errors fatal or absurd, which might be extinguished at their birth, by enlightening public opinion! When the folly of animal magnetism, having seduced the idle coteries of Paris, began to spread throughout Europe, a report of the Academy of Sciences, by the mere force of truth, marked Mesmer as a charlatan, and left him no disciples except a few incurable fools, whose admiration completed his disgrace. If you wish to cure an ignorant and superstitious people, send as missionaries into the cities and the country, jugglers and wonder-workers, and let them begin with astonishing the people, by producing the most singular phenomena, and end by enlightening them. Those who are best acquainted with natural magic, are least likely to be duped by magicians. I could wish that the miracle of St. Januarius were repeated at Naples in all the public places, and were even made a plaything for children.

The principal sort of instruction which governments owe to the people, is knowledge of the laws. How can we require laws to be obeyed, when they are not even known? How can they be known, unless they are published under

the simplest forms, so that each individual may read for himself, the enactments which are to regulate his conduct ?

The legislator may exercise an influence over public opinion, by causing to be compiled a body of political morals, analogous to the body of laws, and divided in the same manner into a general and particular codes. The most delicate questions relative to each profession might be explained. It would not be necessary to confine the work to mere didactic lessons ; by intermingling a judicious selection of historical anecdotes, it might be made a book of amusement for persons of all ages.

To compose such moral codes, would be dictating, as it were, the judgments of public opinion upon these different questions of politics and morals. In the same spirit, there might be added to these moral codes a list of popular prejudices, to which should be subjoined the considerations which prove their fallacy.

If sovereign power has ever appeared before men with dignity, it was in the *Instructions*, published by Catherine II., for a code of laws. Let us consider for a moment this unique example, distinct from the remembrance of an ambitious reign. It is impossible to see without admiration a woman descending from the car of victory to civilize so many semi-barbarous tribes, and to offer them the finest maxims of philosophy, sanctioned by the approval of an empress. Superior to the vanity of composing this work herself, she borrowed the best that could be found in the writings of the wise men of the age ; but by adding the weight of her authority, she lent to those writers more than she borrowed. She seemed to say to her subjects, " You owe me the more confidence, since I have taken into my council the ablest men of the times ; and I do not fear to call upon those masters of truth and virtue to hold me up to shame before the face of the world, if I dare to act unworthily." In the same spirit she divided among her

courtiers the labors of legislation ; and if she was often in contradiction with herself, like Tiberius, who was weary of the servitude of the senate, and yet would have punished an effort at liberty, still these solemn engagements, contracted in the face of the whole world, were like limits voluntarily put to her power, which she seldom dared to transcend.

CHAPTER XX.

Use to be made of the power of Education.

EDUCATION may be considered as the government of a domestic magistrate.

The analogies between a family and a state, are of a nature to strike at the first glance ; but the *differences* are not less obvious, and are equally deserving of attention.

1. Domestic government needs to be more active, more vigilant, more occupied with details, than civil government. Without an attention always vigilant, families could not subsist.

Civil authority cannot do better than to trust the management of personal interests to the prudence of individuals, who always understand them better than the magistrate ; but the head of a family must be constantly aiding the inexperience of those submitted to his care.

Here it is that the censorship can be exercised,—a policy which we have condemned in civil government. The domestic governor may protect those subject to his authority, from knowledge which may do them harm ; he can watch over their social intercourse and their studies ; he can accelerate or retard the progress of their enlightenment, according to circumstances.

2. This continual exercise of power, which would be liable to so many abuses in a state, is much less so in a family; for the father and mother have a natural affection for their children, far stronger than that of the civil magistrate for those whom he governs. On their part, indulgence is generally the prompting of nature; while severity is the effect of reflection.

3. Domestic government can employ punishments in many cases where the civil authority cannot; for the head of a family deals with individuals, while the legislator can only act upon classes. The one proceeds upon certainties, the other upon presumptions. A certain astronomer may be capable perhaps of resolving the problem of longitude, but can the civil magistrate know it? Can he command this discovery, and punish him for not making it? But a particular instructor will be likely to know whether a given problem of elementary geometry is level to the capacity of his pupil. Though idleness assume the mask of incapacity, the instructor will hardly be deceived; in such cases the magistrate is sure to be deceived.

It is the same with most of the vices. The public magistrate cannot repress them, because if he attempted it, he must have spies in every family. The private magistrate, having under his eye and his immediate control those with whose conduct he is charged, can arrest the beginning of those vices, of which the laws can punish only the last excesses.

4. It is especially as regards the power of rewarding, that these two governments differ. All the amusements, all the wants of the young, may be made to assume a remuneratory character, by granting them on certain conditions, after certain performances. In the Isle of Minorca, the dinners of the boys depended upon their skill in shooting the bow; and the honor of eating at the public table was the price allotted at Lacedemon to the warlike virtues of

the young. No civil government is rich enough to do much by rewards ; no father is so poor as not to possess an inexhaustible fund of them.

The legislator ought nevertheless to pay particular attention to youth, that season of lively and durable impressions, in order to direct the course of the inclinations towards those tastes most conformable to the public interest.

In Russia, means as powerful, as they are well devised, have been employed to engage the young nobility to enter into the army. The good effects that have resulted in consequence, to the military service, are even less than those which have been felt in a civil point of view. The young nobles are accustomed to order, to vigilance, to subordination. They are obliged to quit their estates, where they exercise a corrupting dominion over slaves, and to show themselves on a greater theatre, where they have equals and superiors. The necessity of mingling with others produces the desire of pleasing ; the mixture of men of different races diminishes reciprocal prejudice, and the pride of birth is compelled to bend before the gradations of the service. An unlimited domestic despotism such as that of Russia was, cannot but be improved by being changed into a military government, which has its limits. In the actual circumstances of that empire, it would have been difficult to find a general means of education which would have answered more useful purposes.

But when education is considered as an indirect means of preventing offences, an essential reform is evidently needed. The class most neglected ought to become the principal object of its cares. The less the parents are capable of discharging their duty in this respect, the more necessary it is that the government should make up for their deficiencies. Not only should attention be given to orphans left in indigence, but also to children whose parents are not of a character to be trusted ; to those who have

already committed some offence; and to those who, being destitute of protectors and resources, are a prey to all the seductions of want. These classes, so absolutely neglected in the greater number of states, become, in consequence, the pupils of crime.

A man of rare beneficence, the Chevalier Paulet, created at Paris an institution for more than two hundred children, whom he took from among the very poorest class. His plan rested upon four principles: To offer the pupils many objects of study and of labor, and to leave them the greatest possible latitude of taste; to employ them in mutual instruction, by offering to the scholar, as the highest reward of proficiency, the honor of becoming in his turn a master; to employ them in all the domestic services of the establishment, for the double purpose of instruction and economy; to govern them by means of themselves, by putting each pupil under the inspection of an older one, in a way to render them securities for each other. In this establishment, everything breathed an appearance of freedom and gaiety; there was no punishment except compulsive idleness, and a change of dress.* The more advanced pupils were as much interested in the general success as the founder himself; and the whole was going on prosperously, when the revolution, amid the general overthrow, swallowed up also this little colony.

A greater extent might be given to institutions of this kind, and their expensiveness might be diminished, either by teaching a great number of trades, or by retaining the pupils till the age of eighteen or twenty, so that their labor might contribute to discharge the expense of their education,

* The common punishments were called, one, the *little idleness*, and the other, the *great idleness*. What could be more ingenious than to give to punishments the very name and character of a vice? It is obvious what a salutary association of ideas this was calculated to produce.

and to aid in that of the younger pupils. Schools upon this plan, instead of being an expense to the state, might become lucrative enterprises. But the pupils themselves should be interested in the labor, by allowing them a fair rate of wages, to be paid them at leaving the school.

CHAPTER XXI.

General precautions against abuses of authority.

LET us consider some of the means which a government may employ, to prevent abuses of authority on the part of those to whom it entrusts portions of its power.

Constitutional law has its direct and its indirect legislation. Its direct legislation consists in the establishment of certain magistracies among which all the political power is divided. That subject is not included in this treatise. Its indirect legislation consists in general precautions, of which the object is, to prevent misconduct, incapacity, or malversations among those who hold principal or subordinate stations in the administration.

A complete enumeration of these indirect means will not be attempted. It will be enough to direct attention towards this object, and thus to restrain the enthusiasm of certain political writers, who, from having got sight of one or two of these means, have flattered themselves that they have perfected a science, of which in fact they have hardly drawn the outlines.

I. *The division of power into different branches.* Every division of power is a refinement suggested by experience. The most natural plan, the first that presents itself, is, to place the whole administration in the hands of a single person. Command upon one side, and obedience upon the

other, is a kind of contract of which the terms are easily arranged, when he who is to govern has no associate. Among all the nations of the East, the fabric of government has continued to preserve its primitive structure. The monarchic power descends without division, stage by stage, from the highest to the lowest, from the great Mogul to the simple Havildar.

When the king of Siam heard the Dutch ambassador speak of an aristocratic government, he burst into laughter at the idea of such an absurdity.

It is enough merely to mention this principal means. To examine into how many branches the government ought to be divided, and which of all the possible divisions is the one that merits the preference, would be to compose a treatise upon constitutional law. I shall only remark, that this division ought not to result in separate and independent powers; for that would bring on a state of anarchy. Some supreme authority, superior to all, must always be acknowledged, which does not receive law, but which gives it, and which has power over the very rules that regulate its own mode of action.

II. *The distribution of particular branches of power among several co-participators.* In the provinces of Russia, previous to the regulations of Catherine II., all the different branches of power, military, fiscal, and judicial, were entrusted to a single body, a single council. So far, the constitution of these subordinate governments sufficiently resembled the form of oriental despotism; but the power of the governor was somewhat limited by the powers of the council, and in this respect, the form approached to that of an aristocracy. At present, the judicial power is separated into many branches, and each branch is divided among many judges, who exercise their functions conjointly. A law has been established of the nature of the English *habeas corpus*, for the protection of individuals against arbitrary

imprisonment, and a governor has no more power of doing harm, than a governor of Barbadoes or Jamaica.

The advantages of this division are principally these:—

1st. It diminishes the danger to be apprehended from precipitation.

2d. It diminishes the danger to be apprehended from ignorance.

3d. It diminishes the danger to be apprehended from want of probity.

This last advantage, however, can hardly be attained except where the number of co-participators is very great,—so great, that it will be difficult to separate the interests of the majority of them from the interests of the people at large.

The division of powers has also disadvantages, since it introduces delays and foments disputes which may produce the dissolution of the established government. The evil of delays may be obviated by graduating the division, according as the functions to which it is applied, admit of more or less deliberation. In this point of view the legislative power and the military power form the two extremes; the first, admitting the greatest deliberation; the second, demanding the greatest celerity. As to the dissolution of the government, that is an evil only upon one or the other of two suppositions: 1st, that the new government is worse than the old one; or 2d, that the transition from one to the other is marked by calamities and civil wars.

The greatest danger arising from plurality, whether in a tribunal or an administrative council, is, the diminution of responsibility. A numerous body can count upon a sort of deference on the part of the public, and allows itself to commit wrongs, which an individual administrator would not dare to perpetrate. Where so many share in the act, the odium of it is shifted from one to another, and rests nowhere. All did it; no one avows it. If the cen-

sure of the public is excited, the more numerous the censured body is, the more it fortifies itself against external opinion, the more it tends to form a state within a state, a little community which has its own particular spirit, and which protects by its applauses those of its members who encounter the reproaches of the public.

Unity in all cases in which it is possible, that is, in all cases which do not demand a concentration of knowledge and a concurrence of wills, as in a legislative body,—unity is advantageous, because it puts the whole responsibility, whether legal or moral, upon the head of an individual. He does not share the honor of his actions with anybody, and he bears the whole burden of the blame; he sees himself alone against all, having no other support but the integrity of his conduct, no other defence but the general esteem. Though he were not honest by inclination, he would become so, as it were, in spite of himself, by means of a position, in which his interest is inseparable from his duty.

Besides, unity in subordinate employments is a certain means of discovering in a short time the real capacity of individuals. A narrow and unsound judgment may conceal itself a long while, amid a numerous company; but if it acts alone, and upon a public theatre, its insufficiency is soon unmasked. Men of moderate or small talents, always ready to solicit places where they can take refuge under the wing of some able assistant, would be afraid to expose themselves to a dangerous career, in which they would soon betray their want of ability.

But there are some cases in which it is possible to unite the advantages of a collective body with the responsibility of a single person.

In subordinate councils, there is always an individual who presides, and upon whom the principal confidence rests. Let him have associates, in order that he may profit by their advice, and that there may be witnesses against him, in case

he abuses his trust. But these purposes do not require that his associates should be equal to him in authority, nor even that they should have the right of voting. It is only necessary that the chief should be obliged to communicate to them all that he intends to do, and that each councillor should make a declaration in writing touching each administrative act, expressing an approval of it or a disapproval. This communication ought generally to take place before the issue of orders for carrying his designs into execution; but in those cases which require an extraordinary despatch, it would be enough were it made immediately after. Would not such an arrangement obviate, in general, the danger of dissensions and delays?

III. *Putting the power of removal into different hands from the power of appointment.* This idea is borrowed from an ingenious pamphlet published in America, in 1778,* by a member of the convention appointed to examine the form of government proposed for the state of Massachusetts.

Our pride is interested in not condemning a man of our own choice. Independently of affection, a superior will be less disposed to hear complaints against an officer of his own appointment, than against an indifferent person, and will have a prejudice of self-love in his favor. This consideration will help to explain those abuses of power, so common in monarchies, where a subaltern is entrusted with great authority of which he is not obliged to render any account, except to the very person who gave him his office.

In popular elections, the part which each individual has in the nomination of a magistrate, is so very trifling that this kind of illusion does not exist.

In England, the choice of ministers belongs to the king; but the parliament has the actual right of dismissal, whenever a majority votes against them. However, this is only an indirect application of the principle.

* Reprinted in *Almon's Remembrancer*, No. 84, p. 223.

IV. *Not permitting governors to remain a long time in the same districts.* This principle has a particular application to important commands in distant provinces, and especially those detached from the body of the empire.

A governor armed with great power, if he is allowed time for it, may attempt to establish his independence. The longer he remains in office, the more can he strengthen himself by creating a party of his own, or by uniting himself to one of the parties which existed before him. Thence originates oppression towards some, and partiality towards others. And though he has no party, he may be guilty of a thousand abuses of authority, without any one daring to complain to the sovereign. The duration of his power gives birth to fears or hopes, both of which equally favor him. He makes himself creatures, who look up to him as the sole distributor of favors; while those who suffer, fear to suffer more if they offend a ruler who is likely to retain his power for a long time.

The disadvantage of rapid changes consists in removing a man from his employment so soon as he has acquired the knowledge and experience of affairs. New men are liable to commit faults of ignorance. This inconvenience would be palliated by the establishment of a subordinate and permanent council, which should keep up the course and routine of affairs. What you gain, is the diminution of a power which may be turned against yourself; what you risk, is a diminution in the skill with which the office is executed. There is no parity between these dangers, when revolt is the evil apprehended.

To avoid giving umbrage to individuals, this arrangement ought to be permanent. The change, at regular periods, should be regarded as fixed and necessary. If it were limited to particular cases, it might serve to provoke the evil which it is intended to prevent.

The danger of revolt on the part of provincial governors,

is unknown except in feeble and badly constituted governments. In the Roman empire, from Cæsar down to Augustulus, we see a constant succession of rebellious governors and generals. This was not owing to any neglect of the precaution here proposed, for new appointments were frequent; but because the application of it was not judicious, or because there was a want of vigilance and firmness, or to some other cause of a similar kind.

The want of a permanent arrangement of this sort, is plainly the cause of the continual revolutions to which the Turkish empire is subject; and nothing more evidently shows the stupidity of that barbarous court.

If there is any European government which ought to adopt this policy, it is Spain in her American, and England in her East Indian establishments.

In the more civilized states of Christendom, nothing is more uncommon than the revolt of a governor. That of prince Gagarin, governor of Siberia, under Peter I., is, I believe, the only example that can be cited in the two last centuries, and that happened in an empire which had not yet lost its Asiatic character. The revolutions which have broken out in Europe have originated from a more powerful and a more respectable principle, opinions, public feeling, the love of liberty.*

V. Renewal of the governing bodies by rotation. The reasons for not allowing a provincial governor to remain a long time in office, all apply with still more force to a council or a directory. Make them permanent, and if they agree among themselves with respect to the generality of their measures, it is probable that among those measures there will be many of which the object is, to promote their

* This principle has been judiciously adopted as respects the stipendary magistrates in the British West Indies. They remain in one district only for a limited time.—*Translator.*

own interest or that of their friends, at the expense of the community. If they disagree, and are afterwards reconciled, it is probable that the public will pay the cost of their reconciliation. On the other hand, if a certain number are dismissed at regular periods, if there are abuses, you have a chance to see them reformed by the new comers, before they have been long enough in office to be corrupted by their associates. A part should always be left, so that the course of affairs may go on without interruption. Ought the part reserved to be larger or smaller than the part renewed? If it is larger, there is reason to fear that the old system of corruption may be still kept up in full vigor; if it is smaller, there is reason to fear that a good system of administration may be embarrassed by capricious innovations. However this may be, it is plain that the mere right of renewal will hardly ever answer its purpose, especially if the power of filling vacancies belongs to the body itself. This right would never be exercised, except upon extraordinary occasions.

Ought those whose places are vacated to be ineligible for a time or forever? If it is only for a time, it will presently happen that at the end of that time they will always be re-elected, and the council will become a close body. If they are never re-eligible, the community will be deprived of the talents and experience of its ablest servants. All things considered, this means seems to be only an imperfect substitute for others which will be presently mentioned, and especially for publicity in all proceedings and accounts.

The arrangement of rotation was long ago adopted in England by the great companies of commerce, and some years since, it was introduced into the direction of the East India Company.

This political view is not the only one which rotation in office has been intended to answer. It has been often intro-

duced for the mere object of producing a more equal distribution of the privileges which appertain to office.

Harrington's celebrated treatise on politics, entitled *Oceana*, depends almost entirely upon a system of rotation among the members of the government. Harrington was a man of talent, but one who did not grasp the whole science of government. Having seized a single idea, he developed it, applied it to everything, and saw nothing beyond it. So it is in medicine, the less the extent of the art is perceived, the more one is inclined to believe in an elixir of life, a universal remedy, a marvellous secret. Classification is useful in order to extend the attention successively to every means.

VI. *The reception of secret informations.* Everybody knows that at Venice secret informations were admitted. There were boxes placed here and there around the palace of St. Mark, the contents of which were regularly examined by the state inquisitors. It is pretended that in consequence of these anonymous accusations, persons were seized, imprisoned, sent into exile or even punished with death, without any further proof. If this be true, then there was nothing more salutary or more reasonable than the first part of the institution, nothing more pernicious and abominable than the second. The arbitrary tribunal of the inquisitors has cast a merited disgrace upon the Venetian government, which must have been wise in other respects, since it maintained itself, for so long a time, in a state of tranquillity and prosperity.

It is a great misfortune that a good institution should have been connected with a bad one; for all minds have not the prismatic power of disuniting good from evil. Where would be the harm of receiving secret informations, even though they were anonymous in the first instance? Certainly one hair of a single head ought not to be touched, upon the mere ground of a secret information, nor should

the slightest inquietude be given to a single individual ; but with this restriction, why forego the advantage of such informations ? The magistrate can judge whether the object denounced, merits his attention. If it does not merit it, he need do nothing in the matter. But if it seems to be of importance, let him give notice to the informer to present himself in person. After examining the facts, if the informer is found to be mistaken, he can be dismissed with praise for his good intentions, and his name may be kept secret. If the informer has brought a charge wilfully and maliciously false, his name and his accusation ought to be communicated to the party accused. If the denunciation is well founded, let a judicial prosecution be commenced, and let the informer be obliged to appear and give his evidence in public.

If it be asked upon what principle such an institution can be useful, the answer is, precisely on the principle of the vote by ballot. In the course of the prosecution, the defendant ought certainly to be informed what witnesses will testify against him ; but where is the necessity of his knowing it before the prosecution is begun ? In that case a witness who may have something to fear on the part of the defendant, would not be willing to expose himself to a certain inconvenience, for the chance of rendering a doubtful service to the public. Hence it is that offences so frequently remain unpunished, because no one is willing to make personal enemies without any certainty of serving the public.

I have enumerated this means under the head of abuses of authority, because it is against men in place that its efficacy is most marked ; since in that case, the supposed power of the delinquent is an additional weight in the balance of dissuasive motives.

The resolution to receive secret and even anonymous informations, would be good for nothing, unless it were publicly known ; but once known, the fear of these infor-

mations would soon render the occasions of them more rare, and would diminish their number. And upon whom would the fear fall? Only upon the guilty, and upon those who were plotting to become so; for with publicity of procedure, innocence could never be in danger; and the malice of false accusers would be confounded and punished.

VII. *The right of petitioning the supreme authority.* Though informations reached only the minister, they would have their use; but to insure their utility, it is essential that they should come to the knowledge of the sovereign.

The great Frederic received letters, like a private individual, from the meanest of his subjects, and the answer was often written with his own hand. This fact would be incredible were it not perfectly well attested. But we are not to conclude from this example that the same thing is possible in all governments.

In England, every one has a right to present a petition to the king; but the fate of these petitions, handed the same moment to a gentleman in waiting, has become proverbial; they serve the maids of honor for hair-papers. It may well be imagined, after this, that these petitions are not very frequent; but neither are they very necessary in a country where the subject is protected by laws which do not depend upon the sovereign. There are other means for a private man to obtain justice; there are other channels of information for the prince.

It is in absolute monarchies that it is essential to maintain a communication, constantly open, between the subjects and the monarch; it is necessary that the subject may be sure of protection; it is necessary to assure the monarch against being duped by his ministers.

The people may be called *canaille*, *populace*, or what you will, but the prince who refuses to hear the lowest individual of that populace, so far from augmenting his power by doing so, in fact, diminishes it. From that moment he loses the

capacity of self-direction, and becomes an instrument in the hands of those who call themselves his servants. He may imagine that he does as he pleases, that he determines for himself; but in fact, it is they who determine for him; for to determine all the causes of a man's actions, is to determine all his actions. He who does not see and does not understand, except as it pleases those who surround him, is subject to all the impulses which they choose to give.

To put an unlimited confidence in his ministers, is to put an unlimited confidence in those who have the greatest interest to abuse it, and the greatest facility for doing so.

As to the minister himself, the more honest he is, the less will he need such a confidence; and it may be affirmed without paradox, that the more he deserves it, the less he will desire to possess it.

VIII. *Liberty of the press.* Hear advice from every quarter, and you may be the better for it; you cannot be the worse. Such is the decision of simple good sense. To establish the freedom of the press, is, to admit the advice of everybody. It is true that upon most occasions, the public judgment is heard, not before the measure is determined upon, but only after it is executed. Still, this judgment is always useful as regards all measures of legislation which can be rectified, and all executive acts which are of a nature to be repeated. The best advice given to a minister in a private manner, may be thrown away; but good advice given to the public, if it does not avail at one time, may avail at another; if it does not avail to-day, it may avail to-morrow; if it is not presented in a becoming shape, it may receive from another hand ornaments that will make it attractive. Instruction is a seed which requires to be planted in a great variety of soils, and to be cultivated with patience, because its fruits are often a long time in ripening.

Freedom of the press is much more powerful than the right of petition, in freeing the sovereign from the control

of favorites. Whatever may be his discernment in the choice of his ministers, he can only select from a small number of candidates, whom the chances of birth and fortune present to his choice. It may be reasonably supposed that there are other men more enlightened than these; and the greater power he attains of knowing such men, the more he increases his power and his liberty of selection.

But opinions may be given with insolence and passion; instead of limiting itself to the examination of measures, criticism is extended to persons. And in fact, how much address is necessary to keep these two things distinct? How can a measure be censured without attacking, to a certain extent, the judgment or the probity of its author? This is the stumbling-block; this is the reason why the liberty of the press is as uncommon as its advantages are manifest. All the fears of self-love are against it. Yet, Joseph II., and Frederic II., had the magnanimity to establish it. It exists in Sweden; it exists in England; it might exist everywhere, with such modifications as would prevent its greatest abuses.

If according to the usages of the government, or owing to particular circumstances, the sovereign cannot admit a free examination of his administrative acts, he ought at least to permit the examination of the laws. Though he claims for himself the privilege of infallibility, he need not extend it to his predecessors. If he is so jealous of the supreme power as to extort respect for everything that has been touched by the royal sceptre, he might at least allow a free discussion of merely scientific subjects, such as principles of law, of procedure, and of subaltern administration.

Even granting that the liberty of the press may have inconveniences, as respects pamphlets and handbills which may be scattered among the people, and addressed to the ignorant part of a nation, as well as to the enlightened, the same reason cannot apply to serious and lengthy works,

to books which can have but a certain class of readers, and which, as they are unable to produce an immediate effect, always afford opportunity for preparing an antidote.

Under the old French regime, it was enough that a book of moral science was printed at Paris, to inspire a prejudice against it. The *Instructions* of the empress of Russia to the assembly of deputies, respecting the compilation of a code of laws, were prohibited in France. The style and the sentiments of that performance appeared too popular to be tolerated in the French monarchy.

It is true that in France, as elsewhere, negligence and inconsistency palliated the evils of despotism. A foreign title served as a passport to genius. The rigor of the censorship only availed to transfer the trade in books to the bordering states, and to render more bitter the satire it was intended to suppress.

IX. *Publication of the reasons and facts on which the laws and administrative acts are founded.* This is a necessary part of a generous and magnanimous policy, and an indispensable attendant upon the liberty of the press. The freedom of the press is a debt which rulers owe to the people; to publish the reasons of their laws and acts, is a debt they owe to themselves. If the government disdains to inform the nation of its motives upon important occasions, it thereby announces that it chooses to owe everything to force, and that it counts as nothing the opinions of its subjects.

The partisan of arbitrary power will not agree to this. He is unwilling to enlighten the people, while he despises them because they are not enlightened. You are not capable of judging, he says, because you are ignorant, and we will keep you ignorant that you may not be capable of judging. This is the endless circle in which he moves. What is the consequence of this vulgar policy? Discontent spreads little by little, till at length it becomes general, founded sometimes upon false and exaggerated imputations,

which gain credit because they are not examined and discussed. The minister complains of the injustice of the public, without remembering that he has not afforded to it the means to be just, and that a false interpretation of his conduct is a necessary consequence of the mystery with which it is covered. To be systematic and consistent, there are but two ways of acting with men, absolute secrecy or perfect frankness ; the complete exclusion of the people from the knowledge of affairs, or making that knowledge as thorough as possible ; preventing them from forming any judgment, or putting them into a condition to form the most enlightened judgment ; to treat them like children, or to treat them like men. Between these two plans, a choice must be made.

The first of these plans was followed by the priests in ancient Egypt, by the Bramins in Hindostan, by the Jesuits in Paraguay. The second is established by practice in England, and by law in the United States of America. The greater part of European governments float incessantly between one and the other, without daring to attach themselves exclusively to either ; and they are constantly in contradiction with themselves, from a desire to have industrious and enlightened subjects, and from a fear of encouraging a spirit of examination and discussion.

In many branches of administration it would be useless, and it might be dangerous, to publish the reasons of measures beforehand. But those cases ought to be distinguished in which it is necessary to enlighten public opinion to prevent it from being misled. In matters of legislation, this principle is always applicable. It may be laid down as a general rule, that a law ought never to be made without some reason expressed or understood. For what is a good law, but a law for which good reasons can be given ? Of course there must have been some reason, good or bad, for making it, since there is no effect without a cause. But

oblige a minister to give his reasons, and he will be ashamed not to have good ones to give; he will be ashamed to offer you false coin if obliged to present a touch-stone along with it, by which it can be tried.

This is a means by which a sovereign may continue to reign after death. If there are good reasons for his laws, he gives them a support which cannot fail. His successors will be obliged to maintain them through a feeling of self-respect; and the more good he has done in his lifetime, the more will he contribute to the happiness of posterity.

X. *To forbid all arbitrary proceedings.* "Clotaire made a law," says Montesquieu, "that no person accused of crime should be condemned without a hearing; a law which indicates a contrary practice in some particular case, or among some barbarous people."—*Spirit of Laws*, chap. 12.

Montesquieu did not dare to tell the whole. Did he write that passage without recollecting the *Lettres de Cachet*, and the administration of the police, such as it existed in his times? A *lettre de cachet* may be defined, an order to punish without proof, for an act forbidden by no law.

It was in France and Venice that this abuse was carried to the highest pitch. These two governments, mild in other respects, gained themselves a very bad reputation by this piece of folly. They exposed themselves to imputations which were often unfounded, and to the re-action of alarm; for there are precautions which, by the terror they inspire, produce the very danger they aim to prevent. Behave well, it is said, and the government will not be your enemy. Perhaps so;—but how can I be certain of it? I am hated by the minister, or by his valet, or by his valet's valet. If I am not to-day, I may be to-morrow, or somebody else may be, and I may be taken for that somebody else. It is not my conduct upon which my safety depends; it is the opinion of my conduct entertained by men more powerful than I. Under Louis XV. *lettres de cachet* were an article of

trade, sold by ministers and mistresses to gratify private hatreds. If that could happen under a government which had the reputation of mildness, what fruits of such a law might we expect in less civilized countries? If justice and humanity have not influence enough, the pride of governments, at least, ought to induce them to abolish such remnants of barbarity.

Such expedients may be palmed off under the cover of maxims of state; but lately this pretext has lost its magic. The first thought they suggest is the idea of the incapacity and weakness of those who employ them. If you dared to hear what this prisoner has to say, you would not shut his mouth; if you compel him to be silent, it is a proof that you fear him.

XI. *The exercise of power according to certain rules and formalities.* This is another regulation with respect to subordinate officers, not less applicable to absolute monarchies than to mixed governments. If the sovereign thinks it for his interest to be independent of the laws, there is no reason for extending the same independence to all his agents.

The laws which limit subordinate officers in the exercise of their power, may be divided into two classes: to the first class belong those laws which limit the cases in which the exercise of such or such a power is permitted; to the second, those which determine the formalities according to which its exercise is to be regulated. These cases and these formalities ought to be specifically enumerated in the law; and this being done, the citizens ought to be informed that these are the cases, and the only cases, in which their security, their liberty, their property or their honor can be brought into danger. Thus the first law at the very beginning of a code ought to be a general law in behalf of liberty, a law which restrains delegated powers, and limits their

exercise to such or such particular occasions, for such or such specific causes.

Such was the intention of *Magna Charta*, and such would have been its effect, but for the unlucky want of precision in some of its expressions, as *lex terræ*, &c. ; for all was made to depend upon an imaginary law, which restored all to uncertainty, since those in search of that law always referred back to the customs of ancient times, and sought examples and authorities among the very abuses which it was intended to prevent.

XII. *The establishment of the right of association, that is, of assemblies of the citizens to express their sentiments and their wishes upon public measures.* Among the rights which a people ought to reserve, when they establish a government, this is the chief, since it is the foundation of all the rest. Yet it is hardly necessary to mention it here, for to the people who possess it, it needs no recommendation, and those who possess it not, have but slight hope of obtaining it,—for what can induce their governments ever to grant it?

At the first view, this right of association seems incompatible with government; and it is admitted that to establish this right as a means of keeping the government under, would be absurd and contradictory. But the intention is very different. If the smallest act of violence is committed by one or more members of the association, punish it as if it had been committed by any other individual. If you perceive that you are not powerful enough to punish it, it is a proof that the association has made a progress it could not have made without a just cause; so that in fact it is either not an evil, or a necessary evil. It is taken for granted that you have a public force, an authority organized in all its parts; if then these associations have become strong enough to intimidate you, in the midst of all your regular means of power, if no associations have been formed upon your

side, yours, who have so many means at your command to obtain a superiority in that respect,—is it not an infallible sign that the calm and considerate judgment of the nation is against you? This being granted, what reason can be given for keeping the government in the same state,—for not satisfying the public wish? I know of none. Doubtless a nation, since it is composed of men, does not possess the privilege of infallibility; a nation may be deceived, as well as its rulers, as to its true interests; nothing is more certain; but if a great majority of the nation is seen upon one side, and its government upon the other, may it not be presumed, in the first instance, that the general discontent is well founded?

Far from being a cause of insurrection, I look upon these associations as one of the most powerful means of preventing that evil. Insurrections are the convulsions of weakness, finding strength in a momentary despair. They are the efforts of men who are not allowed to express their feelings, or whose projects could not succeed if they were known. Plots which are in opposition to the general sentiment of the people, can only succeed by surprise and by violence. Those who plan them, cannot hope for success, except by forcible means. But those who believe that the people are on their side, those who flatter themselves that the general opinion will secure their triumph, why should they use violence? Why expose themselves to manifest danger without advantage? I am persuaded that men who had a perfect liberty of association, and who could exercise it under protection of the laws, would never have recourse to insurrection, except in those rare and unfortunate cases in which rebellion has become necessary; and whether associations be permitted or forbidden, open and general rebellions never will take place until they are necessary.

The associations which were openly entered into in Ireland in 1780, did not produce any evil, and even served to

maintain tranquillity and security, though that country, scarce semi-civilized, was distracted by all the possible causes of a civil war.

I even believe that associations might be permitted, and might become one of the principal means of government, in the most absolute monarchies. This kind of states are more troubled than others by risings and revolts. Everything is done by sudden movements. Associations would prevent these disorders. If the subjects of the Roman empire had been in the habit of combining together, the empire and the lives of the emperors would not have been constantly put up at auction by the pretorian guards.

For the rest, I know very well that slaves cannot be allowed to assemble. Too much injustice has been done them not to have everything to fear from their ignorance or their resentment. It is not in the American islands, it is not in Mexico, that the people can be armed and allowed to form associations; but there are states in Europe in which this strong and generous policy might be safely adopted.

I admit that there is a degree of ignorance which renders associations dangerous. This proves that ignorance is a great evil; it does not prove that associations are not a great good. Besides, the measure itself may operate as an antidote against its own bad effects. In proportion as an association extends, the foundation on which it rests is examined, the public is enlightened, and the government may avail itself of all these means to spread the knowledge of facts and to dissipate errors. Liberty and instruction go hand in hand; liberty facilitates the progress of knowledge, and knowledge restrains the extravagancies of liberty.

I do not see why the establishment of this right need give disquiet to governments. There is no government which does not fear the people; which does not think it necessary to consult their will, and to accommodate itself to their opinions; and it would seem that the most despotic are the

most timid. What sultan is so tranquil, so secure in the exercise of his power, as a British king? The janissaries and the populace inspire the same fear in the seraglio, that the seraglio inspires among the janissaries and the populace. At London, the voice of the people makes itself be heard by lawful assemblages; at Constantinople, it bursts forth in outrage. At London the people express their feelings in petitions, and at Constantinople by setting the city on fire.

Poland perhaps may be brought forward as an objection—a country in which associations seem to have produced so many evils. But that is a mistake. The Polish associations sprung from anarchy, they did not produce it. Besides, in speaking of this means as a restraint upon government, there is supposed to be a government established; it is offered as a remedy, not as an independent means.

It may even be added, that in states where this right exists, circumstances may occur in which it will be well,—not to suspend it entirely,—but to regulate its exercise. There is no need of an absolute and inflexible rule. We have seen the British parliament, during the late war with France, restrain the right of assembling, and forbid meetings for a political object, unless that object were publicly announced, and unless the meeting were held under the authority of a magistrate who had power to dissolve it; and these restrictions were imposed at the very time that the citizens were called upon to form military corps for the defence of the state, and whilst the government announced the most noble confidence in the general spirit of the nation.

Though these restraints have ceased, everything remains in the same condition; and it might be supposed that the restrictive law still existed. The reason is, that a people sure of its rights, enjoys them with moderation and tranquillity. If they are ever abused, it is because they are

thought to be in danger. The precipitation of the people is the effect of their fear.

CHAPTER XXII.

Means of diminishing the bad effect of offences. General result and conclusion.

THE general result of the principles laid down in this treatise upon the subject of penal legislation, offers a happy perspective, and well-founded hopes of diminishing offences, and of diminishing punishments. At first, this subject presents to the mind only sombre ideas, images of suffering and of terror. But while occupied with this class of evils, painful feelings soon give place to agreeable and consoling sentiments, when it is discovered that the human heart is not corrupted by any inherent and incurable perversity; that the multiplicity of offences is principally owing to errors of legislation easy to be reformed; and that even the evil that results from them is susceptible of being repaired in various ways.

This is the great problem of penal legislation:—1st. To reduce all the evil of offences, as far as possible, to that kind which can be cured by a pecuniary compensation. 2d. To throw the expense of this cure upon the authors of the evil, or, in their default, upon the public. What can be done in this respect, is much more than is generally imagined.

The word *cure* is employed in order to present the party injured, whether it be an individual or the community, under the character of a patient suffering from a disorder. The comparison is just, and it points out the procedure best adapted to the end in view, without the intermixture of

popular passions, and of antipathies, which ideas of crime are but too apt to awaken, even in legislators themselves.

There are three principal sources of crime,—incontinence, hatred, and rapacity.

The offences which spring from *incontinence* are hardly of a nature to be cured by a pecuniary compensation. This remedy may apply to certain cases of seduction, and even of conjugal infidelity; but it does not cure that part of the evil which consists in dishonor and the disturbance of family peace.

The evil effects of other offences are more surely arrested in proportion as the offences themselves are more clearly proved; but it is to be observed as a remarkable and important singularity, that offences of incontinence only become hurtful in proportion as they become known. A good citizen should look upon it as his duty to make known an act of fraud; but he ought to be very much on his guard how he publishes to the world the secret faults of love. To conceal a fraud is to become a party to it; to betray to the public an unknown weakness, is to do an evil without compensation; a wound is inflicted upon the sensibility of those who are exposed to shame, but the thing done is not repaired. I count among the establishments which do honor to the humanity of the present age, those secret asylums for accouchment, those foundling hospitals, which have so often prevented the fatal effects of despair, by covering with the shade of mystery the consequences of a momentary error. The rigor which declares against this indulgence is founded upon the ascetic principle.

The offences which spring from *hatred* are often of such a kind that a pecuniary compensation can hardly be applied to them. Compensation, indeed, if in the case of such offences it can take place at all, is seldom complete; it cannot undo what is done; it cannot restore a lost limb; it cannot give back a son to his father, a father to his

family; but it may act upon the condition of the party injured; it may furnish him a portion of good, in consideration of a portion of evil; and in regulating the account of his prosperity, it puts an item on the favorable side, to balance an item on the other.

With respect to these offences, it is an essential observation that they diminish from day to day, by the progress of civilization. It is an admirable thing to observe, in the greater part of European states, how few crimes are produced by the irascible passions, so natural to man and so violent in the infancy of society. What an object of emulation for those tardy governments which have not yet reached this degree of police, and among whom the sword of justice has not yet been able to banish the stilettoes of revenge!

Rapacity is an inexhaustible source of offences. This is the enemy, always active, always ready to seize every advantage, against which a continual war must be carried on, and this war demands a peculiar kind of tactics, the principles of which have not been well understood.

Be indulgent to this passion so long as it confines itself to the use of peaceable means; but be careful to deprive it of all its unlawful gains. Grow severe towards it, in proportion as it breaks out in overt acts, and has recourse to menace and to violence. But still reserve means for further severity in case it is guilty of such atrocities as arson and murder. It is in the skilful gradation of these preventive means that the penal art consists.

Do not forget that all penal police is but a choice of evils. Let the wise administrator of punishments always keep the balance in his hand, and in his zeal to prevent trifling evils let him avoid the imprudence of himself producing great ones. Death is almost always a remedy which is unnecessary or inefficacious. It is not necessary as to those whom an inferior punishment might deter from crime, or whom imprisonment might restrain; it has no efficacy as to those

who throw themselves, so to speak, in its way as a refuge against despair. The policy of a legislator who punishes every offence with death, is like the pusillanimous terror of a child, who crushes the insect he does not dare to look at. But if the circumstances of society, if the frequency of a great offence, demand this terrible means, be careful, without aggravating the torments of death, to give it an aspect more dreadful than nature gives; surround it with mournful accessories, with emblems of crime, and the tragic pomp of ceremony.

But be slow to believe in this necessity for death. By disusing it as a punishment you will prevent it as a crime; for when men are placed between two offences it is desirable to give them a sensible interest not to commit the greater. It is desirable to convert the assassin into a thief; and to give him a reason for preferring a reparable to an irreparable offence.

That which can be repaired is comparatively trifling. Everything that can be made up for by a pecuniary indemnity, may soon become as if it had never been; for if the injured individual always receives an equivalent compensation, the alarm caused by the offence ceases altogether, or is reduced to its lowest term.

It is an object highly desirable that the fund of compensation due for offences should be amassed from among the delinquents themselves, either by being levied upon their property, or obtained from the profits of their compulsory labor. If this were so, security would be the inseparable companion of innocence; and grief and anguish would fall exclusively to the lot of the disturbers of social order. Such is the point of perfection to which we ought to aspire, though we can only expect to reach it slowly and by continuous efforts. It is enough for me to have pointed out the end. The happiness of attaining it will be the reward of persevering and enlightened governments.

This means failing, it is necessary to provide compensation either from the public treasury, or by means of *private insurances*.

The imperfections of our laws, in this behalf, are very flagrant. If an offence is committed, those who have suffered from it, either in their persons or their fortune, are abandoned to their fate. But society, which they have contributed to uphold, and which has undertaken to protect them, owes them an indemnity.

When an individual, even in his own case, prosecutes a criminal at his own expense, he is not less the defender of the state, than he who fights its foreign enemies: the losses which he sustains in defending the public ought to be made up for at the public expense.

But when an innocent person has suffered by mistake of the courts, when he has been arrested, detained, subjected to suspicion, condemned to all the misery of a trial and a long confinement, it is not only for his sake, but for her own, that Justice should grant him compensation. Established to repair injuries, does she desire an exclusive privilege to injure?

Governments have made no provision for any of these indemnities. In England, some voluntary associations have been formed to supply this deficiency. If the institution of insurance is good in one case, it is good in all, with the precautions necessary to prevent negligence and fraud.*

* Insurance is good because the insurer has volunteered to sustain the loss, considering the premium he receives as equivalent to the danger he runs. But this remedy is imperfect in itself, because the premium, which is a certain loss, must always be paid, to guarantee one's self against a loss which is uncertain. In this point of view it is desirable that all unforeseen losses which may fall upon individuals without their fault, were made up at the public expense. The more numerous the contributors, the less sensibly do any of them feel the contribution. It is to be observed, on the other hand, that a public fund is more exposed to fraud, to speculation and to loss than a private

The inconvenience of exposure to fraud is common to all funds, public and private. It may diminish the advantage of insurances without destroying it. Fruit-trees are still cultivated though they are liable to perish by a thousand accidents. *Monts-de-piété** have succeeded in many countries. An establishment of this kind set up in London, in the middle of the last century, failed at the beginning, through the dishonesty of the directors, and this theft left a prejudice which has prevented any subsequent attempt of the sort. According to the same logic, it might be concluded that vessels are bad instruments of war, because the *Royal George*, whose ports had been left open, sunk at her moorings.

Insurances against offences may have two objects:—1st, to create a fund to indemnify the parties injured, in case the delinquent is unknown or insolvent; 2d, to defray, in the first instance, the expense of judicial prosecutions in favor of the poor. This payment might be extended to cases purely civil.

But the method of these indemnities would be foreign to the subject of this treatise; its principles have been explained elsewhere, and I must here confine myself to the announcement of the general result of this work. It is this: *That by good laws, almost all offences may be reduced to acts which can be repaired by a simple pecuniary compensation, and thus the evil of offences may be almost wholly done away.*

At first, this result, simply announced, does not strike the imagination; it must be meditated upon before its importance can be perceived, and its weight be felt. It is not fund. Losses which fall directly upon individuals, give all possible force to motives of vigilance and economy.

* This was the name given to a kind of banks established in different parts of Europe, for the purpose of lending money to the poor upon pledges, without interest.—*Translator.*

the brilliant society of fashion that can be interested by a formula almost arithmetic in expression. It is offered, statesmen, to you ! It is yours to judge it !

The science of which the basis has been investigated in this work, can be pleasing only to elevated souls who are warmed with a passion for the public good. It has no connection with that trickish and subversive kind of politics which prides itself upon clandestine projects, which acquires a glory composed wholly of human misery, which sees the prosperity of one nation in the abasement of another, and which mistakes convulsions of government for conceptions of genius. We are here employed upon the greatest interests of humanity ; the art of forming the manners and the character of nations ; of raising to its highest point the security of individuals ; and of deriving results equally beneficial from different forms of government. Such is the object of this science ; frank and generous ; asking only for light ; wishing nothing exclusive ; and finding no means so sure to perpetuate the benefits it confers, as to share them with the whole family of nations.



