

## Discourse on What Is Permitted by the Laws

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*In which it is shown that what is permitted by the laws is not always just and moral*

Magnificent and most honored Lord Bailiff, most honored Lords of the Council of this City, learned and respected members of the Academy, my most honored colleagues, listeners of no matter what rank, sex and age.

The subject I have chosen will be for many a great paradox, both in itself and coming from me. It is usual to set the probity and the duties of a good citizen squarely within the frame of what the [438] laws of the land require.<sup>1</sup> It is an equally common assumption to imagine that knowledge and observation of the laws must constitute the entire scope, indeed the *non plus ultra*, of the studies of a jurisconsult, a man of law, an advocate and, in general, all who are involved in work that has some relation to the laws. But the great masters of the art, the wise inventors of the most famous and the most widely received laws, in other words the jurisconsults of Ancient Rome, were of a different mind. They professed a substantial philosophy that embraced the whole extent of justice and equity; they proposed to turn men into good persons, not only through fear of punishment but also through love of virtue, which car-

1. *Vir bonus est quis? Qui consulta Patrum, qui Leges Juraque servat Sed videt hunc omnis domus & vicinia tota Introrsus turpem, speciosum pelle decora.* Horace, Book I, Epist. xvi, line 40 et seq.

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ries its own reward;<sup>2</sup> they drew a careful distinction between the rules of law, that determine the findings of the judge (see Monsieur Noodt, *Julius Paulus*, chap. x), and the precepts of right, that determine the conduct of a good man. As their maxim, they proposed: "Not everything that the laws permit is just and moral."<sup>3</sup>

It is this same maxim that I want to set down and develop. If, on an occasion such as this, one can discuss matters more appealing to those whose only wish is for amusement, there is [439] scarcely any matter that could be more useful for everyone. After all, why should discourses of this sort not be designed in such a way that each person can take from them something amusing and something that can be put to profitable use? So let us try to convince those who either do not know, or who do not pay adequate heed to the fact, that, setting aside even the imperatives of Christianity, for something to be judged innocent, it is not enough that it is permitted or authorized by the laws. There are two different ideas here, each of which opens up a vast field for our considerations: the idea of a tacit permission, and the idea of an explicit entitlement. Sometimes the laws pass in silence over certain bad actions that they consequently permit; and sometimes the laws positively authorize performance of such actions. Today, we shall limit ourselves to the first of these two headings.

The question reduces to knowing whether the civil laws are the sole rule of citizens' conduct. For if they are not, if there is another rule, prior and higher, it is clear that something is in no way rendered innocent by the mere fact that the laws of the land do not forbid it, either directly or indirectly, either expressly or by implication.

Now, as to there being another rule, prior to and thus the very measure of all civil laws, [440] this is what the wisest and most enlightened

2. *Jus est ars boni & aequi. Cujus merito quis nos Sacerdotes adpollet. Justitiam namque colimus, & boni & aequi notitiam profiteamur: aequum ab iniquo separantes, licitum ab illicito discernentes: bonos non solum metu poenarum, verum etiam prae-miorum quoque exhortatione efficere cupientes: veram, nisi fallor, Philosophiam, non simulatam adsectantes.* Digest Book I, title I, *De Justitia & Jure*, Leg. I, §.i.

3. *Non omne, quod licet, honestum est.* Digest, Book L, title 17, *De diversis Regulis Juris*, Leg. CXLIV, princ.

persons among the civilized peoples have always agreed.<sup>4</sup> There have always been ideas—more or less distinct, more or less far-reaching, more or less accurate—of a law founded in men's very nature, taught by reason, and fitting the true interests both of human society in general and of each state in particular, a perpetual and irrevocable law that is the same in Rome, in Athens, in every country and in every century, a law from which no one can have dispensation, a law that no authority has the right to abolish or amend, in whole or in part.<sup>5</sup>

Therefore all legislators have claimed to establish nothing that is con-

4. Cicero made the point well: *Constituendi vero Juris ab illa summa Lege capiamus exordium, quae saeculis omnibus ante nata est, quàm scripta Lex ulla, aut quàm omnino Civitas constituta.* [In determining the truth of justice, let us start with that supreme law that was born centuries before any law was written, or before any state was established.] *De Legibus*, Book I, chap. vi. *Nec, quia nusquam erat scriptum, ut contra omnes hostium copias in ponte unus adsisteret, a tergoque pontem interscindi juberet, idcirco minus Coclitem illum rem gessisse tantam, fortitudinis lege atque imperio, putabimus: nec si, regnante Tarquinio, nulla erat Romae scripta Lex de Stupris, idcirco non contra illam Legem sempiternam Sextus Tarquinius vim Lucretiae, Tricipitini Filiae adtulit: erat enim Ratio, profecta a rerum natura, & ad rectè faciendum impellens, & a delicto avocans: qua non tum denique incipit Lex esse, quum scripta est, sed tum, quum orta est.* [That nowhere was it written that one man should stand at the bridge against all the forces of the enemy and command that the bridge should be torn down behind him, does not mean we should not believe that Horatio did this great deed according to the law and the command of courage. Nor that, because there was in the reign of Tarquinius no Roman written law of rape, the violence used by Sextus Tarquinius against Lucretia, Tricipitinius' daughter, was not against the eternal law. In fact reason existed, derived from true nature, directing people towards doing good and calling them away from crime, and did not become a law only when set in writing, but when it first originated.] *Idem, ibid.* Book II, chap. iv.

5. This is the description that Cicero offers, in a passage of the *Republic* that one of the Church Fathers has conserved for us: *Est quidem vera Lex, recta Ratio, natura congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium jubendo, vetando a fraude deterreat: quae tamen neque Probos frustra jubet, aut vetat, nec Improbos jubendo, aut vetando, movet. Huic Legi nec obrogari fas est, neque derogari ex hac aliquid licet, neque tota abrogare potest. Nec vero, aut per Senatum, aut per Populum, solvi hac Lege possumus. Neque est quaerendus explanator aut interpres ejus alius: nec erit alia Lex Romae, alia Athenis, alia nunc, alia posthac, sed & omnes gentes & omni tempore una Lex & sempiterna, & immortalis, continebit: unusque erit communis quasi Magister & Imperator omnium Deus ille, Legis hujus inventor, disceptator, lator, &c.* Lactantius, Book VI, chap. viii.

trary to this law.<sup>6</sup> Never has a sovereign, no matter how unreasonable, dared to attribute openly to himself the power to make laws purely according to his whim, with no regard to the natural principles of just and unjust, at least to the extent that these were known to peoples. Where they wished to establish laws themselves, peoples have often sought and followed the counsel of philosophers, these being men they believed most versed [441] in the study of the maxims of reason that are to be taken as the ground of every civil law. [See Mr Perizonius, on Elien., *Var. Hist.*, Book II, chap. 42, note 6.] And legislators, to enhance reception of laws they proposed or wished to establish, have sometimes pretended that they brought the laws down from heaven, a device they imagined all the more effective because they knew that, in some respects, God is regarded as the power of the rules of justice. [See what one has said on Pufendorf's *Droit de la Nature et des Gens*, Book II, chap. iv, §.3, note 4.]

Given all that, it was indeed difficult to avoid some unjust laws slipping in among the many that were just. From the records of Antiquity, it seems that the first laws had their origin largely in custom, which all too often is a very poor master.<sup>7</sup> What enters the laws in this way usually does so with little analysis or reflection. Ignorance, prejudice, passions, instances, authority, caprice have all clearly played a bigger part than reason. Custom is the opinion and the decision of a blind multitude, rather than of the wise.

6. On this ground, the same author I have just cited maintains that an unjust law is not a true law: *Ex quo intelligi par est, eos qui pernicioſa & injuſta Populi juſſa deſcripſerint, quum contra fecerint, quam polliciti profeſſique ſint, quidvis potius tuliffe, quam Leges: ut perſpicuum eſſe poſſit, in ipſo nomine Legis interpretando ineſſe vim & ſententiam Juſti & Juſtis legendi.* [From which this is to be underſtood, that thoſe who inſtituted laws harmful and unjust towards the people, by doing what was contrary to what they promiſed and proclaimed, brought forth anything but laws; thus it muſt be clear that the very term "law" carries the ſenſe of chooſing that which is juſt and right.] Cicero, *De Legibus*, Book II, chap. v. See what Plutarch ſaid on the ſubject of Stratocles, in his *Life of Demetrius*, pp. 899, 900, Vol. I, Ed. Wechil (Vol. V, p. 30, Edit London, 1729).

7. Hence in Hebrew and in Greek, the ſame words that ſignify "law" and "juſtice" can ſometimes alſo ſtand for "cuſtom." See Mr Le Clerc on I Samuel, chap. viii, verſe 2.

When later it came to the making of explicit laws, published in standard written forms and thus rendered fixed and unalterable, the established usages [442] that had for so long had the force of law could not but be retained for the most part,<sup>8</sup> only taking on a new form that gave them weight and durability.<sup>9</sup> As for the other laws of which notice was taken, whether their establishment derived from the will of the people, the will of the state aristocracy, or the will of a single man, no matter what the precautions, the ideas of justice and equity were not always or adequately known for people to have been able to keep to them everywhere and in everything, nor were people sufficiently committed to these ideas to consult them and to follow them exactly. The philosophers themselves were not always such good advisers in this matter, as the following example shows. [See Elien., *Var. Hist.*, Book II, chap. 42, and Diogen. Laert., Book III, §.23.] The Arcadians begged Plato to come and teach them the laws that he judged necessary for a new city they wished to establish, at the persuasion of their allies, the Thebans. Flushed with this honor they did him, the famous Athenian prepared to set out. However, he quickly changed his mind when, through an interview with the Arcadian representatives, he realized that this people was in no mood to allow introduction of the community of wealth and women that the philosopher regarded as a rare secret of government, one that he established in his imaginary republic, in the absence of a real state that was willing to introduce it. If the great Aristotle had been called to a place on a similar commission, he would not have been concerned with proposing such community, [443] having rejected the idea in his writings. But he would nonetheless have advised something just as bad: I mean that no child born with some bodily defect would be raised or that pregnancies to women having already given birth to a cer-

8. See Plato, *De Legibus*, Book III, p. 681, Vol. II, Edit. H. Steph.

9. There is a short discourse of Dion. Chrysostom (*Orat.* LXXXI), in which this orator shows how men subject themselves more easily to customs than to laws, and how difficult it is to abolish the former and to establish the latter, given this prejudice.

tain number of children would be aborted. This is one of Aristotle's political maxims. [See *Politics*, Book VII, chap. xvi.]

Yet no matter how the laws were introduced and no matter what the intellectual capacities of those who played the major part in their establishment, it is a certainty that in various times and various places there were laws that were unjust. Among the Egyptians, a people once so celebrated for their wisdom, it fell to daughters alone to support their father and mother, if need arose, sons being spared this duty. [See Herodotus, Book II, chap. xxxv.] A law of the Persians imposed the identical fate, for certain capital crimes, on those who had committed the crime and on those who had no part in it: the innocent children and all the relations of a guilty father [see Herodotus, Book III, chaps. 118, 119. Amm. Marsellini, Book XXIII, chap. vi, p. 416, Ed. Vales. Gron.]. This was the practice too, not only among the Carthaginians [see Justinian, Book XXI, chap. iv, no. 8] and the Macedonians [see Q. Curt., Book VI, chap. xi, no. 20, and Book VIII, ch. vi, no. 28], but remains so still today, among some peoples of Asia [for example in Japan: see Varen, *Descript. Jap.*, chap. xviii; Ferdin. Pinto, chap. 55]. In Taprobane, the island in the great Indian ocean, there was a law against living beyond a certain age, at which point it was necessary—with a light heart—to lie upon a poisonous herb which brought a gentle death [Diod. Sic, Book II, chap. 57. Today this is the island of Ceylon]. At Sardinapolis, in Lydia, when a father became aged, his children themselves had to slaughter him [Elien., Book IV, chap. I]. The pitiless severity of an [444] Athenian legislator, who had decreed the death penalty for the least offence as for the most enormous crimes, caused it to be said, with good reason, that his laws were written in blood [Dracon. See Aristotle, *Politics*, Book II, chap. xii; Plutarch, *Solon*, p. 87; Aulus Gellius, Book XI, chap. xviii]. Established among the same people, ostracism threatened with exile the most honest persons of that state, for no reason other than their merit. The Spartans permitted theft as an exercise of skill [Aulus Gellius, as above; Xenophon, *De Rep. Laced.*, chap. ii, §.7 et seq. Ed. Oxon.; *De exped. Cyri*. Book IV, ch. vi, §.11, &c.], and adultery in order to produce healthy children [Xenophon, *De Rep. Laced.*, chap. I, §.7; Plutarch, in *Lycurg.*, p. 49, Vol. I, Ed. Wech]. Roman law, beyond the obvious in-

clusion of persons liable for punishment for various sorts of crimes [see Pufendorf, *Droit de la Nature et des Gens*, Book VIII, chap. iii, §.25], condemns to the maximum penalty every slave who happened to be under the same roof as their master at the time when the latter was assassinated, even though there exists no proof that they were accomplices to the murder [see Tacitus, *Annal.*, Book XIV, chap. 42; *Digest*, Book XXIX, title 5, *De Senatus-consulte Silanien.* &c.]. If, wherever it was able to reach, Christianity finally saw such laws abolished, this did not prevent other laws, no less bad, from being introduced in respect of other things. Look at the Theodosian and Justinian Codes and there you will find numerous laws, thoroughly inhumane and utterly unjust, against people whose only crime consisted in not sharing the opinion of the more powerful party in respect of speculative matters. Did paganism produce anything more tyrannical and more abominable than those tribunals of the Inquisition which, to the shame of religion and of humanity itself, handed over to the secular authorities innocent people condemned by rogues, whilst granting full indulgence [445] for every sort of crime before the judges of this order, with the authority of the laws of various countries? In light of this, it comes as no surprise that in a Christian state [Poland], where this religion is dominant, the political law-makers judged it appropriate to permit cut-price homicide: in Poland a gentleman who has killed a peasant pays just ten *écus*.

That, I think, is more than enough of what is needed to indicate the extent to which civil laws are liable directly to contradict the clearest laws of nature. And to indicate, in consequence, how very insecure it is to consider civil laws as infallible interpreters of the laws of nature, or as embodying all that is required to provide a model of conduct. In truth, one must not lightly tax with injustice the laws established in the country where one lives; indeed, it is the case that, where doubt arises, the presumption must be in their favor.<sup>10</sup> But meanwhile one must be

10. It is on this basis that one can apply to individuals what Quintilian said of judges, namely that they must not always dissect to an ultimate degree the justice of the laws, these having been established in order to specify the range of judgments on many things about which there was no agreement as to what was just: *Interim hoc*

alert, one must always be open as far as is possible to the ideas of justice and equity, ideas of which we each carry the seeds within us. For in the end, the instant that the most genuine laws of the most legitimate sovereign conflict in any way whatsoever with these immutable laws written in our heart, there is no question of seeking a balance, because it is absolutely necessary, cost what it may, to disobey the former in order not to do damage to the latter. Men's submission [446] to civil government does not extend, and never could extend even when they wished it, to the point where a human legislator is set higher than God, the author of nature, the creator and supreme legislator of men. As for things indifferent, it is entirely reasonable if, beyond the mountain or the river, something is considered just, while as a result of the contrary wills of the legislators of two different states, on this side it is considered unjust. But when it is a question of that which is clearly commanded or forbidden by the universal law of humankind, all the laws in the world can no more render just what is unjust than they can render healthy what is toxic for our bodies.<sup>11</sup> Thus in relation to such things, the conduct of the good man is everywhere the same. He never believes himself bound to obey manifestly unjust laws, and even less does he be-

*dico, Iudices, Perniciosissimam esse Civitati hanc Legum interpretationem. Nam si apud Iudicium hoc semper quari de Legibus oportet, quid in his justum, quid aequum, quid conveniens sit Civitatis supervacuum fuit scribi omnino Leges. Et credo fuisse tempore aliquando, quae solam & nudam Justitia haberent aestimationem. Sed quoniam hac ingeniis in diversum trahebatur, nec umquam satis constitui poterat, quid oporteret; certa forma, ad quam viveremus, instituta est. Declam., CCLXIV.*

II. *Quod si Populorum jussis, si Principum decretis, si sententiis Iudicum, Jura constituerentur; Jus esset, latrocinari; jus, adulterare, jus testamenta falsa supponere; si haec suffragiis aut scitis multitudinis probarentur. Quod si tanta potestas est stultorum sententiis atque jussis, ut eorum suffragiis rerum natura vertatur: cur non sanciant, ut quae mala perniciosaeque sunt, habeantur pro bonis ac salutaribus? aut cur, quam jus ex iniuria Lex facere possit, bonum eadem non facere possit ex malo.* [If the laws were established by decree of the people, by the order of princes or by the decisions of judges, it would then be lawful to commit robbery, lawful to commit adultery, lawful to fake wills, if this was approved by the popular vote or plebiscite. Because if the views and judgments of fools have such power that they can turn nature upside down by their decree, why do they not confirm that those things which are bad and harmful are to be considered good and healthy for us? Or why, since law is able to make injustice just, can it not make good from evil?] Cicero, *De Legibus*, Book I, chap. xvi.

lieve himself authorized to exploit the most explicit permission in the world when it conflicts with moral good.

It is even clearer that the silence of the laws is not, of itself, a warrant for the innocence of actions concerning which the laws say nothing, actions that are not embraced within their valid scope. The examples here are infinite in number: travelers' reports, ancient and modern, are little more than a tissue of things, as vicious as they are excessive, that can be observed openly practiced [447] and adopted as custom among one people or another. Let us do no more than cite two or three instances capable of shaking the best secured mind from a false and erroneous idea of its duties. Were not the greatest impurities, the most infamous sins against nature, formerly so much to the liking of the Greeks and Romans that even the wise men gave in to them without any shame? [See Grotius on Romans I, 27.] Did not Roman women quite publicly abort their pregnancies, until a rescript of Severius and Antonius forbade them so to do, under pain of banishment for a given time [*Digest*, Book XLVII, title xi: *de extraord. crim.* Leg. IV; see Mr Noodt's *Julius Paulus*, chap. xi]? Throughout the Roman Empire, as well as among the majority of the Greeks, that is, among the most enlightened and civil of peoples, could not a father and mother expose or kill their own children with impunity—I am horrified at the thought—if they did not wish to raise them?<sup>12</sup> And was not this barbaric custom preserved—who would believe it?—under Constantine the Great and some of his successors? [See generally on this, Mr Noodt's *Julius Paulus*, where the whole matter is fully considered.] Among the Christians of past centuries, was not the rage for duels so extreme that the laws required to suppress it are counted as the most hard-won and celebrated achievement of certain states?

[448] Notwithstanding this, let us not condemn the civil laws more

12. This still happens in China, in Japan, and perhaps in various other countries of the Orient. There is even talk of a law, observed for more than a century in Matamba, according to which fathers and mothers were obliged, under pain of severe sanctions, to expose or kill the male children that were born to them. See the extract from an Italian voyage, in the *Bibliothèque Universelle*, Vol. IX, pp. 418 et seq. One can also consult the *Analecta Sacra* of J. H. Ursinus, Book I, chap. ix.

than they deserve. It is not always the fault of these laws if they do not forbid unjust or dishonest things. Doubtless they must rectify vice up to a certain point; but beyond that, it is absolutely outside their jurisdiction. Since they are, as it were, secondary laws, their sphere too is correspondingly restricted.<sup>13</sup> Once proven, this principle will serve not only to undermine in their entirety the foundations of the illusion which we are challenging, but also, if we pursue the consequences, to dissipate false ideas on other important points.

Let us therefore briefly consider the nature and the end of the civil laws. What does a human legislator as such propose? What must he propose? Is it to bring men to practice the full range of all their duties? Surely not. There are some duties of a kind that their very nature requires that they be left entirely free, like those of beneficence, which is no longer beneficence, from the moment when for some purposes coercion is involved. Should the human legislator act solely to prevent a man committing some irregular and morally bad action? In vain would a mortal man set his mind on this. It is simply beyond human nature. As long as there are men there will be vices; and these vices will always create internal agitations, some external effects of which [449] may well be stifled by the fear of some great ill, but not all of them could be, not even most of them. I will go further and maintain that the end of the civil laws, in themselves, is not to render truly virtuous those on whom the laws are imposed. [See the Discourse of Mr Noodt on *Liberté de Conscience*, p. 159 and following p. 194, p. 215 of the third edition, Vol. 1 of his *Recueil de Discours*, published in 1731.] For that, the laws would

13. *Sed nobis ita complectanda in hac disputatione tota causa universi Juris est, ac Legum, ut hoc, Civile quod dicimus, in parvum quemdam & angustum locum concludatur Natura.* [But it is for us in this argument to address the whole issue of universal law, such that what we call "civil law" is contained within a small and narrow part of nature.] Cicero, *De Legibus*, Book I, chap. v. Mr Davies, in his 1727 edition, omits the final word *Natura*, because, he says, it disturbs the meaning. But by his admission this word is in most manuscripts and it makes, in my opinion, perfect sense. Cicero means to say that the civil law constitutes a very limited part of this universal jurisprudence which, he then explains, is founded in nature itself, as he declares immediately afterwards. The word *Natura*, which opens the following sentence, has eclipsed *Natura* in the rare manuscripts in which this final word of the cited sentence is missing.

have to be able to regulate men's interior; but since they cannot reach this, they have no business in meddling with what happens there; this is the preserve of the infinite scrutineer of hearts. As for the external signs, it would be very difficult, not to say impossible, to isolate what is bad in an infinity of equivocal actions, where vice often masks itself with the appearances of virtue. Nor are the means available to the laws such that, through a principle of virtue, they can achieve compliance with what they require as most just and moral. The laws do not take the path of the heart; they do not work to persuade, nor do they reason; rather, they command, they forbid, they intimidate, they threaten: he who does such and such a thing will be punished in such and such a manner. This is their language, this is their sole and common rationale: it all comes down to fear of the coercive power with which ministers and those who execute the laws are armed.

Now, note this well, whatever partakes of force is of itself incapable of winning over the mind and, it follows, of softening the heart. Force does not enlighten, it shocks. It [450] may assist in holding a man to his duty, but force does not incline him to practice his duty willingly, and as a duty. When one is constrained only by fear, one is all the more ready for a bold evasion the instant that fear ceases or a way is glimpsed of avoiding the effect of the threats. Coercion even serves to inflame desire the more. And this is why those who seek to persuade have to take care to do nothing that might encourage the suspicion that their aim is to coerce. Men like to act freely for themselves; and they enjoy a sense of doing so when they heed only those reasons they find convincing. The great secret of persuasion consists in appearing to be oneself persuaded without meanwhile displaying any great wish to persuade others. This zeal to possess others' spirits passes for an attempt on their freedom; the overly zealous doctor is considered one who seeks to take control or who is unsure that his own reasoning is sound. In a word, to the extent one has recourse or appears to have recourse to coercion, so to that same extent impressions that reach the heart will be rejected. The slightest air of authority renders almost useless whatever an orator, sacred or profane, might say. If force sometimes contributes to forming good people, it is only insofar as it disposes them to turn away from

certain largely involuntary aberrations, and to return to one's self, to reflect, examine, and discipline oneself, in this way allowing that which alone is capable of forming virtuous sentiments to act. But this happens very rarely, and only when one is already favorably disposed to virtue. For in those whose heart and mind are astray, in them fear produces only forced actions that are nothing but external.

[451] Such is the ordinary effect of the civil laws, which speak only by threatening. Mosaic law itself, for all its divinity, no matter what the beautiful precepts that come with it, obtained from the Jews a purely servile obedience that remained unreliable, corresponding only to the impact of fear [see Romans VIII, 15]. Thus no matter how virtuous a legislator is or should be, the proper and natural end of his laws is not to raise men to virtue. So then what is it? Here is the answer. For the civil laws, the end is to prevent citizens from doing each other some considerable harm, whether in their persons or in their property; and with this aim, to curb the external actions of vice which tend towards such wrong, to the extent that society's peace demands and permits. Now, to achieve this, repression of the grossest excesses and the most palpable injustices is sufficient. Indeed, sometimes prudence requires that these are suffered in order to avoid more onerous risks. Those whose ill-doing harms only themselves are sufficiently punished by their own actions; no one has an interest in having them punished further by the public authorities. As to injustices, if these cause victims minor harm, or if they are so subtle and hidden that it is difficult to determine their authors, or if they are so common that most people could accuse each other of committing these harms, the law suits they entailed would be beyond count, and would occasion an interminable debate that exhausted the most constant patience. What is more, the impact of the inquiries would generate greater disturbances than would connivance or toleration. There are even times and places in which one would be openly jeopardizing the authority of the laws and the magistrates if [452] an untimely attack was made on some enormous iniquity that was backed by all the forces of custom. In general, it is in light of the circumstances that a legislator takes steps to proscribe more or fewer bad actions, and to punish them with more or less severity.

However, no matter what limits the legislator sets to vice when he proscribes vicious things, it is not specifically as immoral that he proscribes and punishes them, but as harmful to the public or to individuals. And, conversely, when he prescribes things that may be linked to some virtue, it is not specifically as so many acts of virtue, but as so many necessary means to achieving the ends of civil government; it is not as praiseworthy things, but as useful things. Therefore he does not concern himself with the principle or motivation by which one obeys his laws. Whether one believes them to be just or unjust; whether one observes them consciously or unconsciously; whether one regards them as a duty or as an impediment, provided that one does externally what the law demands, the legislator has what he wants: the effect that his laws can produce has been produced, and society is no less calm than if obedience had derived from a sense of virtue. It is only indirectly, and as it were in another persona, that the legislator can and must work toward the true interests of virtue, by furnishing the citizens with solid instruction and such other means as are appropriate to achieving that which he could not himself achieve, even with all the force at his disposal.<sup>14</sup> For the rest, the office of legislator and [453] the office of moralist are always quite distinct; the latter complements the former, and the legislator leaves a vast field of action to the moralist. The legislator, as legislator, permits many things which he condemns in others and which he severely forbids to himself as a man and, more strongly still, as a Christian. Legal permission does not always presuppose that the legislator finds what he permits to be just and moral: often it is a mere *permission of impunity* and not a *permission of approval*. Or rather, legal permission must always be viewed on this basis, no matter what the legislator's ideas about the nature of the things that are not forbidden.

It has even been necessary, in order to prevent abuse of the legislative power, for the authority of legislators not to be extended to the point of forbidding, under pain of sanction, all that they might judge to be contrary to some moral virtue. For, not all being sufficiently enlightened,

14. See my *Traité de la Morale des Pères*, published in 1728, chap. xii, §.53.

under such a pretext they could easily punish entirely innocent things. There are only too many examples of this. Suspicious-minded princes have sometimes made something a crime on the basis of a dream that had upset them. [See Tacitus, *Annales*, XI, 4; *Amm. Marcellin*, XV, 3.] There was a time when people of distracted mind were burned, like sorcerers, and for this purpose one saw nothing but pyres burning everywhere. In certain places marionettists came close to being mistaken for magicians, and were punished accordingly. On the basis of the false ideas that uninformed ecclesiastics had given him on the subject of interest on money loans, a Christian emperor (Basil the Macedonian), not content with reducing interest to an equitable rate, forbade it altogether as an [454] illegal contract, both in its nature and in the light of the rules of the Gospel. Thanks to this vain scruple and this ill-informed piety, he ruined commerce and reduced a multitude of people to wretchedness, with the result that his son and successor, Leon known as the Philosopher—and more of a philosopher in this respect than his father—was forced to constantly raise the defenses and to permit interest, as previously, on a modest scale [see Leon's *Novelle*, LXXXIII]. But do we not still see today, in various places, supremely unjust and inhumane laws which, under the fine pretext of advancing the glory of God and repressing vice, directly persecute virtue? Though they are doing no more than fulfil the essential obligation, as is only natural for each individual, to follow the light of one's conscience, people are being punished, and punished cruelly, because others wish to believe them guilty either of wilful and rectifiable errors, or of a malicious and unbending stubbornness.

This last example would suffice to demonstrate the importance of establishing that the laws must not punish something simply because it is morally bad and, following from this, that impunity does not here win out over innocence. Such impunity, therefore, does not prevent certain things of a vicious nature from sometimes being known to be vicious, in the very countries where they are nonetheless permitted. Civil laws leave to the forces of ill-reputation the task of punishing that which deserves punishment, if [455] in the general opinion of citizens

the thing is considered morally bad,<sup>15</sup> while the judgment of the wise at least conserves its rights. Under the Roman laws, a mere false oath, which causes harm only to the person who swore it, remains unpunished [see Cujas, *Obl.*, II, 19];<sup>16</sup> nevertheless, there has at all times been outrage at whosoever rendered himself guilty, no matter in what way, of a crime such as this that directly impugned the divinity.<sup>17</sup> Ingratitude, a vice as shameful as it is common, was punished only among a few ancient peoples [see on Pufendorf, *Droit de la Nature et des Gens*, Book III, chap. iii, §.17, note 3]: but, as Seneca tells us, it is condemned by all.<sup>18</sup> The trades of courtesan, gaming-house keeper and others such are nothing less than honest in the actual places where they are publicly exercised. It was allowed to the ancient philosophers to utter lofty censures on the *mores* of the times, even when, without great risk, they could not have raised their voice against the idolatry and superstitions of the vulgar.

The civil laws and the laws of virtue thus form as it were two distinct jurisdictions, which may well converge up to a certain point, but beyond this point virtue alone remains, and commands absolutely. Or rather virtue is always the supreme mistress. No human ordinance can in any way exempt anyone whomsoever from the natural empire that virtue holds over men: whatever virtue calls for is always indispensable, [456] whether or not the civil laws lend it their authority; whatever virtue forbids is always illicit, whether or not it is permitted by the civil laws, the wisest and most perfect of which necessarily leave to each per-

15. On this one may also see Bernardi Henrici Reinoldi, *Var. ad Jus Civile fere pertinent.*, chap. xv.

16. As occasionally occurs also in the most corrupt of times. See the *Continuation des Pensées sur la Comète*, by the late Mr Bayle, pp. 636 et seq., Article CXXX.

17. It is in this light that Cicero establishes as one of his proposed laws, in Plato's manner: *Perjurii poena divina, exitium: humana, dedecus*, *De Legibus*, Book II, chap. ix.

18. *Hoc frequentissimum crimen [ingrati animi] nusquam punitur, ubique improbat. Neque absolvimus illud: sed, quum difficilis essa incerta res aestimatio, tantum odio damnavimus, & inter ea reliquimus, quae ad Judices Deos mittimus.* *De Benefic.*, Book III, chap. vi.

son's freedom and conscience no small number of vicious and immoral things. Of this I offer another and final proof, but a proof that is irrefutable. When He gave laws, God Himself as temporal legislator allowed such things. The law of Moses certainly punished false oaths [see Leviticus V, 1 and VI, 3], but not vain and foolhardy oaths [see Matthew V, 33 et seq.]. Among the Jews there was no action in respect of insults [*Ibid.*, verse 22]: that nation's rough and gross temperament made abstinence from crude speech and from outbursts of uncontrolled anger too difficult. Likewise it was to accommodate the untamed savagery of a husband, that the law permitted him to divorce his wives as often and whenever he wanted, for no other reason than his aversion and his own good pleasure [Deuteronomy XXIV, 1; Matthew XIX, 8]. There were places designed to receive and shelter those men whose misfortune it was to have killed someone accidentally and without intent; but if the involuntary homicide, having been declared such by the judges, happened to stray outside the limits of the asylum, whether by imprudence or by chance, and if once outside he was killed by the closest relative or the heir of the deceased, the latter was not held to be guilty of murder. Such was the privilege granted to the vindictive spirit of the blood avenger [Numbers XXXV, 27]. Nevertheless, all this was later clearly forbidden by Him who was the true end of the law, by Jesus Christ the perfect doctor, the infallible preacher of virtue [Romans X, 4]; and even had the Jews [457] taken note of it, they would also have found the condemnation of things of this sort within the precepts of their own law, precepts that are in essence the same as those of nature and of the Gospel.

I have thus proved quite decisively, so it seems to me, that mere permission or impunity under the laws does not always authorize before the tribunal of conscience and reason that which the laws permit. And what would it be, if I were now to go into the detail of the many things that, though permitted almost everywhere, are clearly contrary to the essential duties of man in general, or of a good citizen, or of the different statuses of life? But to do that would require a complete account of the manners of our times, and the limits of the present discourse allow scarcely enough space to give a few samples.

There have been laws against idleness, among the Egyptians, the Athenians, the Spartans and the Lucanians. [See Ménage, on Diog. Laerce., Book I, §.55; and Mr Perizonius, on Elien., *Var. Hist.*, II, 5; IV, 1.] There everyone was obliged to declare to the magistrate his means of livelihood and his occupation; and those who found themselves without a profession were punished, to the extent that in Egypt and at Athens, under the rules of Dracon, it was a matter of paying with one's life. But today, if one excepts Persia, where it is said this ancient regulation has been kept in force [J. Cartwright, in J. de Laet., *Descript. Pers.*, p. 260], I know of no country in which one may not be idle with impunity, and in which one believes one cannot be idle without fear, once one has the wealth to do so, or is satisfied with what one has. In certain countries, it is true, one is more subject to regulation than in others, but everywhere there is a multitude of people who even [458] boast that they pride themselves on spending their days calmly doing nothing but drinking, eating and amusing themselves. Yet is there anything more unworthy of man, naturally endowed with so many faculties of body and mind, than to waste them in feeble indolence? Is there anything more insulting to the generosity of the Creator and Supreme Master, from whom men received these talents, some in greater number and strength, others less, but all wonderful and useful of their kind; all fitting to give us a high idea of His power, His goodness and His wisdom; all fruitful in productions that tend of themselves to render human life happier and more comfortable? Is there anything more contrary to the duty of man, and *a fortiori* to the duty of the citizen who, as such, beyond the general obligation to be good for something in this world, still has a concrete commitment to make himself as useful as he can to the civil society of which he is a member? If there was not a great number of people, reduced by their condition to the necessity of working assiduously, and some small number who do so for the love of work and out of duty, what would become of the others, who wish to shirk it? Where would they find what they need to provide for their pleasures, or even for the necessities of life? Most of them believe they are not obliged to work, because they have no need to do so, that is to say, because they would be in a position to choose the occupation which most pleased

them, and to which they would be most suited, and which they would therefore exercise with more success than so many others who are not masters of their time, and who cannot employ their time as they would wish [459].

What a mental reversal, to seek to justify idleness precisely in terms that make the obligation to busy oneself even stronger! The freedom allowed by the laws on this account does not provide any more valid an excuse. If they do not prescribe anybody's style of life, if even in the shadow of their protection one can live idly, the laws do not for all that relieve nor can they ever relieve anyone, no matter whom, from a duty imposed by nature, or rather by the author of nature, by the great protector of society. The laws do no more than lay on the conscience and the honor of each individual the responsibility for busying oneself in the most fitting and advantageous manner. The impunity the laws grant is no more capable of disculpating those who embrace no useful and honest profession or occupation than of justifying those who with impunity seek exercise or employments for which they neither are nor wish to become competent. The latter case is, perhaps, more common than the former; but neither is excusable. While more harm comes from involving oneself in that which one does not understand, with the result that one does damage to the public and to many individuals, more than enough harm follows from involving oneself in nothing, and living a wholly inactive life.

But I am mistaken. No, idle ones, yours is not a wholly inactive life: try as you might, you could never bear the crushing burden of total idleness. Nature, which has granted you so many talents, talents that you seek to neglect, has refused you this one that you often sigh for. And please to God that you may always be as motionless as statues; or that you may do nothing but drink, [460] eat and sleep like swine; or that you may only seek to end your boredom like that emperor who spent hours in his room, catching flies [Domitian, see Suetonius on his life, chap. 3]. But you have too much time left, when you would be a burden to yourselves if, in the absence of any honest or useful occupation, your passions did not provide you with a thousand shameful and damaging amusements. Debauchery, malign gossip, gaming, criminal

plotting and other such things, these are your stock in trade, for in the end you have one. But these are also a deadly source of quarrels, disorder, public and private ills, which combine to earn you the titles of scourges and plagues of the state, and no-goods and useless deadweights of the earth.

Is it possible that one can lead such a life, and still believe that one is a moral person, and be so regarded by many people who do not have a more reasonable idea of true probity and authentic honor? Yet such is, shall I say, the glory or the shame of virtue, that everybody approves it, praises it, admires it in general, yet nevertheless the respect that is its due is most times given to vain phantoms, or rather to the opposite of virtue, to its mortal enemy, to vice itself. In the commerce of life, how many instances of bad conduct do we not see, how many falsehoods, sometimes even gross, which walk as it were with head held high, and whose authors, under cover of the fact that the laws take no notice, even pride themselves on evading public censure? You are someone's friend, or at least you pretend to be. As long as there is no [461] conflict of interest, all is well; yet when a conflict arises, not only will you not make it your duty and pleasure to give way, whether right is on your side or not, but, not content to claim honestly the rights you believe are yours, you will have recourse to a thousand secret manoeuvres, a thousand tricks, to outdo your friend; you will try to darken his reputation, cost what it may, and sometimes spare no effort in defaming him. You are not going to lie in wait for travelers on the highway, in order to rob them, you are not directly taking someone else's property, that is true; but you seek out hidden ways to get it, to draw it towards you. Sometimes you take advantage of someone's penury, of the sad state of his affairs, of his negligence or his ignorance, in order to get at a very low price things that he could have sold elsewhere for much more. Sometimes you provoke a thousand disagreements, a thousand difficulties, a thousand problems, a thousand complications for some poor Naboth, to force him, willing or unwilling, to strip himself of his father's inheritance. Sometimes you conceal the faults, well known to you and of which you are often yourself the author, in something that you wish to dispose of at a better price than you should. A creditor, in return for a

good service that he has provided, finds himself reduced either to suffering or to losing part of his money, when an urgent need forces him to seek repayment. A workman is deprived of benefit of his wages by the delays by which you keep him waiting and purchase his labor.

It would take too long just to note all the deviousness and injustices of this sort which, favored by impunity under the laws, are practiced daily by innumerable [462] so-called moral men, sometimes even by those who claim to be devout. What a shame for them that they were not born in some country where legal permission extended further still! Ah! They would have known how to exploit that situation! But let us not be surprised that they make such ill use of the freedom that the laws allow them. Let us not be surprised that they explain this to the gross disadvantage of virtue's inviolable rights. They no longer respect the sacred authority of the clearest, the most explicit, the most just laws, when the negligence of those who should ensure respect for the laws makes impunity almost as certain as it is with regard to those actions on which the legislator in fact maintains a complete silence. It is futile for the laws to forbid pulling of strings and bribery: these are the only ways for many good people to improve their situation. A thousand means are found to elude these and many other laws. Pulling of strings, in particular, is so common in every country that those with rectitude and a sufficient competence are reduced to seeking out friends and patrons to compensate for their not having on display a merit which alone should speak for them, but which on its own is usually quite ineffective. Such is the life of these good people, in coarse grain, that it would still be a great deal for them, and for the public, if the civil laws, imperfect though they are, were the constant rule of their conduct.

So here "it is long since we lost the true names of things,"<sup>19</sup> to express myself in the words of an Ancient, who himself gave the lie to his speech [463] by his actions, but from whom the force of truth drew some fine moralizing, whether in the mouths of others or uttered by his

19. *Jam pridem equidem nos vera rerum vocabula amisimus: quia bona aliena largiri, liberalitas; malarum rerum audacia, fortitudo vocatur.* Sallust, *Catilin.*, chap. lv.

own lips. So and so is a good man; such and such a thing is permitted; equivocal words if ever there were, poorly understood and misapplied most of the time! A palpable example of the usefulness of that neglected art of distinguishing the different ideas attaching to the one term! A sad proof of the fatal consequences that sometimes flow from neglecting grammar! Yes, by dint of saying and hearing others say "This is permitted, who is going to stop me?," we unconsciously get used to confusing impunity with innocence; we almost cease distinguishing these two kinds of permission, so often diametrically opposed one to the other. All my preceding reflections aim to lay bare this unfortunate ambiguity, and, it seems to me, they leave no doubt about it. But let me be permitted to add one word more, to underscore the ambiguity, and for this purpose to address some of those people who seem to recognize it the least, or to abuse it the most.

Where shall I begin? To whom shall I speak? So many different characters crowd into my mind that I have difficulty choosing. Let us take whatever by chance comes first. Whoever you may be that I omit to mention, or that I shall pass over, learn from what I say to others the true sense of a word, a word on which it is no less important for you to have some accurate ideas.

What strikes me immediately is that man of vanity, he who is also seeking always to have himself noticed; in him I see his like. Men of ambition, you are thus *permitted* to consider nothing as above your reach, to seek out [464] with the utmost zeal the most frivolous marks of distinction, to deploy every sort of trick to achieve your ends. Misers, you are *permitted* to make your money your idol, to enrich yourselves by deceptions and frauds that are too subtle to be discovered or punished by the laws. Hedonists, you are *permitted* to live like little lords, to sacrifice everything to your appetites as far as you can do so, without fear of public stigma. Men of influence, credit and authority, you are *permitted* to misdirect your patronage, to listen only to reasons of interest, kinship or recommendation. Men of justice, you are *permitted* to judge according to fortuity, or to base your judgments on any reason whatsoever other than those of law and equity. Men of the sword, you are *permitted* to sell your services and your life to the highest bidder,

without even thinking to examine the justice of the cause. Men of commerce, you are *permitted* to subtly falsify your merchandise, to make it appear what it is not by presenting it in a false light, to exploit the naivety and ignorance of the buyer. Barkeepers, gaming-house keepers, publicans, you are *permitted* to offer youth every occasion and means for debauchery. Artisans, workmen, you are *permitted* to promise to several clients what you wish to provide to none, to offer bad work for good, to apply yourself negligently to the task. Husbands, you are *permitted* to behave toward your wives like real brutes and petty tyrants. Wives, you are *permitted* to try the patience of your husbands to breaking point. Masters, you are *permitted* to mistreat your servants for no reason, [465] feeding them poorly and paying them poorly. Servants, you are *permitted* to take no care for the interests of your masters, and to serve them only so far as they can see you. Fathers, you are *permitted* to give your children only bad lessons and the worst of examples, to think at most of amassing wealth for them, without troubling yourself to make them truly virtuous and capable of the employments that you plan for them. Children, you are *permitted* not to respond to the rare diligence of a father who overlooks nothing and who spares no effort for the sake of making you worthy members of human and civil society. People of no matter what age, rank or sex, you are *permitted* to do a thousand similar things. But the same applies to you as it did under an ordinance of the Spartan magistrates regarding the outrages committed in their country by some young foreigners: Clazomenians are permitted to be without shame [Elien., *Var. Hist.*, Book II, chap. xv].

It is for each of us to see whether he wishes still to profit from so disgraceful a privilege. I leave it to the legislators to examine whether they could not, without undue complications, define more sharply the limits of what their laws permit, or at least arrange indirect yet appropriate means to make more citizens willing to renounce voluntarily the right that most believe they have under this poorly understood permission. Nor do I wish here to draw on the help of religion; I shall not put before your eyes this plea by an apostle: “that whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, [466] whatsoever things are lovely, whatsoever

things are of good report, if there be any virtue, and if there be any praise, think on these things" [Philip. IV, 8]. By which he gives us to understand that we must not be satisfied simply with doing nothing that is against the laws. Indeed no, I do not call you to the school of Jesus Christ, I call you to the school of your own reason. I do not cite you before the tribunal of Him who will judge the living and the dead in the last instance, I cite you before the natural tribunal of your consciences. We must be human, before being Christian; and whoever does not listen to the voice of nature will no more listen to the voice of the law or that of the Gospel. Pride yourselves only on having ideas and sentiments as reasonable as those of the wise of antiquity, I ask no more. This is what they said, and on which you will reflect at your leisure: "Is it not an insufficient thing, to conduct oneself well only to the extent that the laws require it? How much further does the rule of our duties extend, than that of the law? How many duties flow from natural affection, humanity, liberality, justice, good faith, on which the civil laws are silent?" These are Seneca's words.<sup>20</sup>

Young men, (for it is concerning you that I must finish, since you are the occasion of this my discourse), are you too *permitted* to neglect those duties that are yours, and to abandon yourselves to dissolute behavior? Ah! if your parents, [467] if those who are most concerned with directing your conduct, are sadly willing to grant you such a fatal freedom, may it not please God should you find any support in us on this matter. May it not please God should we neglect any of our responsibility for stopping the heat of youth from overcoming you, and for forming in you early those good dispositions that will give you immunity from the pernicious lures of the bad things that the laws, or your parents, may permit. But it is not possible constantly to oversee your

20. *Ut hoc ita sit, quam angusta innocentia est, ad Legem bonum esse? quanto latius Officiorum patet, quam Juris regula? quam multa Pietas, Humanitas, Justitia, Liberalitas, Fides, exigunt, quae omnia extra publicas tabulas sunt?* Seneca, *De Ira*, Book II, chap. xxvii. Mr Schulting has made a commentary on this passage of Seneca, in a speech pronounced on leaving the rectorate at the University of Leyden, and which was soon printed, in 1730, under the title *Sermo Academicus Sollennis De angusta innocentia Homini ad Legem boni*.

every action; and you know only too well how to hide them from the most intense vigilance. Beware of yourself, each time you are tempted to do something without your superiors' knowledge or approval; you are not yet at a stage to be able to govern yourself, and you must question your desires. You prefer by far the trivial to the substantial, the pleasant to the useful; and if the ideas of the good touch you just a little, when they are put to you in a certain way, they still have infinitely less power over you than the ideas of your passions. Keep in mind, therefore, that nothing you do when you follow your inclinations alone is *permitted* to you. Take care not to imitate the bad examples of older people, and pride yourself on actually being smarter than those who would always be by comparison less smart than you, were you to act like them. Follow the precepts of your superiors, who are wise and committed [468] to your well-being (you will easily know who they are), and do nothing that might displease them. Love them in your turn; fear them too; take heed of the effects of their justified indignation. We have to take you as best we can; and at a time when reason is still weak, it is often necessary to bring in some appropriate constraint to overcome the obstacles that would end by making you unreceptive to reasonable sentiments. If nothing can be obtained from you by kindness, you will nonetheless be made to obey by fear, such that we shall have nothing with which to reproach ourselves.

But this is not the time for punishment or censure; this is the day for praise, the day for rewards. We give them with the greatest pleasure in the world, even to those who have barely merited them. May this encourage them, and encourage others, to give us day by day ever greater proofs of their commitment to study, and to all their duties generally!

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