“Cases unmeet for punishment ...”

Jeremy Bentham

In chapter 25 of his Introduction to the Principles of Morals and Legislation, *published in 1789, Bentham analyzes punishment from* the perspective of his ruling principle of Utility.

§ I. GENERAL VIEW OF CASES UNMEET FOR PUNISHMENT.

I. The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief.

II. But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.

III. It is plain, therefore, that in the following cases punishment ought not to be inflicted.

1. Where it is groundless: where there is no mischief for it to prevent; the act not being mischievous upon the whole.

2. Where it must be *inefficacious:* where it cannot act so as to prevent the mischief.

3. Where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented.

4. Where it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate.

§ 2. CASES IN WHICH PUNISHMENT IS GROUNDLESS.

These are,

IV. 1. Where there has never been any mischief: where no mischief has been produced to any body by the act in question. Of this number are those in which the act was such as might, on some occasions, be mischievous or disagreeable, but the person whose interest it concerns gave his consent to the performance of it. This consent, provided it be free, and fairly obtained, is the best proof that can be produced, that, to the person who gives it, no mischief, at least no immediate mischief, upon the whole, is done. For no man can be so good a judge as the man himself, what it is gives him pleasure or displeasure.

V. 2. Where the mischief was outweighed: although a mischief was produced by that act, yet the same act was necessary to the production of a benefit which was of greater value than the mischief. This may be the case with any thing that is done in the way of precaution against instant calamity, as also with any thing that is done in the exercise of the several sorts of powers necessary to be established in every community, to wit, domestic, judicial, military, and supreme.

VI. 3. Where there is a certainty of an adequate compensation: and that in all cases where the offense can be committed. This supposes two things: 1. That the offense is such as admits of an adequate compensation: 2. That such a compensation is sure to be forthcoming. Of these suppositions, the latter will be found to be a merely ideal one: a supposition that cannot, in the universality here given to it, be verified by fact. It cannot, therefore, in practice, be numbered amongst the grounds of absolute impunity. It may, however, be admitted as a ground for an abatement of that punishment, which other considerations, standing by themselves, would seem to dictate.

§ 3. CASES IN WHICH PUNISHMENT MUST BE INEFFICACIOUS.

These are,

VII. 1. Where the penal provision is not established until after the act is done. Such are the cases, 1. Of an *ex-post-facto* law; where the legislator himself appoints not a punishment till after the act is done. 2. Of a sentence beyond the law; where the judge, of his own authority, appoints a punishment which the legislator had not appointed.

VIII. 2..Where the penal provision, though established, is not conveyed to the notice of the person on whom it seems intended that it should operate. Such is the case where the law has omitted to employ any of the expedients which are necessary, to make sure that every person whatsoever, who is within the reach of the law, be apprised of all the cases whatsoever, in which (being in the station of life he is in) he can be subjected to the penalties of the law.

IX. 3. Where the penal provision, though it were conveyed to a man's notice, could produce no *effect* on him, with respect to the preventing him from engaging in any act of the sort in question. Such is the case,

1. In extreme infancy; where a man has not yet attained that state or disposition of mind in which the prospect of evils so distant as those which are held forth by the law, has the effect of influencing his conduct.

2. In insanity; where the person, if he has attained to that disposition, has since been deprived of it through the influence of some permanent though unseen cause. 3. In intoxication; where he has been deprived of it by the transient influence of a visible cause: such as the use of wine, or opium, or other drugs, that act in this manner on the nervous system: which condition is indeed neither more nor less than a temporary insanity produced by an assignable cause.

X. 4. Where the penal provision (although, being conveyed to the party's notice, it might very well prevent his engaging in acts of the sort in question, provided he knew that it related to those acts) could not have this effect, with regard to the individual act he is about to engage in: to wit, because he knows not that it is of the number of those to which the penal provision relates. This may happen, 1. In the case of unintentionality; where he intends not to engage, and thereby knows not that he is about to engage, in the act in which eventually he is about to engage. 2. In the case of unconsciousness; where, although he may know that he is about to engage in the act itself, yet, from not knowing all the material *circumstances* attending it, he knows not of the tendency it has to produce that mischief, in contemplation of which it has been made penal in most instances. 3. In the case of missupposal; where, although he may know of the tendency the act has to produce that degree of mischief, he supposes it, though mistakenly, to be attended with some circumstance, or set of circumstances, which, if it had been attended with, it would either not have been productive of that mischief, or have been productive of such a greater degree of good, as has determined the legislator in such a case not to make it penal.

XI. 5. Where, though the penal clause might exercise a full and prevailing influence, were it to act alone, yet by the predominant influence of some opposite cause upon the will, it must necessarily be ineffectual; because the evil which he sets himself about to undergo, in the case of his not engaging in the act, is so great, that the evil denounced by the penal clause, in case of his engaging in it, cannot appear greater. This may happen, 1. In the case of physical danger; where the evil is such as appears likely to be brought about by the unassisted powers of nature. 2. In the case of a threatened *mischief;* where it is such as appears likely to be brought about through the intentional and conscious agency of man.

XII. 6. Where (though the penal clause may exert a full and prevailing influence over the will of the party) yet his physical faculties (owing to the predominant influence of some physical cause) are not in a condition to follow the determination of the will: insomuch that the act is absolutely involuntary. Such is the case of physical compulsion or restraint, by whatever means brought about; where the man's hand, for instance, is pushed against some object which his will disposes him not to touch; or tied down from touching some object which his will disposes him to touch.

§ 4. CASES WHERE PUNISHMENT IS UNPROFITABLE.

These are,

XIII. 1. Where, on the one hand, the nature of the offense, on the other hand, that of the punishment, are, in the ordinary state of things, such, that when compared together, the evil of the latter will turn out to be greater than that of the former.

XIV. Now the evil of the punishment divides itself into four branches, by which so many different sets of persons are affected.

1. The evil of coercion or restraint: or the pain which it gives a man not to be able to do the act, whatever it be, which by the apprehension of the punishment he is deterred from doing. This is felt by those by whom the law is observed.

2. The evil of apprehension: or the pain which a man, who has exposed himself to punishment, feels at the thoughts of undergoing it. This is felt by those by whom the law has been broken, and who feel themselves in danger of its being executed upon them.

3. The evil of sufferance: or the pain which a man feels, in virtue of the punishment itself, from the time when he begins to undergo it. This is felt by those by whom the law is broken, and upon whom it comes actually to be executed. 4. The pain of sympathy, and the other derivative evils resulting to the persons who are in connection with the several classes of original sufferers just mentioned. Now of these four lots of evil, the first will be greater or less, according to the nature of the act from which the party is restrained: the second and third according to the nature of the punishment which stands annexed to that offense.

XV. On the other hand, as to the evil of the offense, this will also, of course, be greater or less, according to the nature of each offense. The proportion between the one evil and the other will therefore be different in the case of each particular offense. The cases, therefore, where punishment is unprofitable on this ground, can by no other means be discovered, than by an examination of each particular offense; which is what will be the business of the body of the work.

XVI. 2. Where, although in the ordinary state of things, the evil resulting from the punishment is not greater than the benefit which is likely to result from the force with which it operates, during the same space of time, towards the excluding the evil of the offenses, yet it may have been rendered so by the influence of some occasional circumstances. In the number of these circumstances may be, 1. The multitude of delinquents at a particular juncture; being such as would increase, beyond the ordinary measure, the quantum of the second and third lots, and thereby also of a part of the fourth lot, in the evil of the punishment. 2. The extraordinary value of the services of some one delinquent; in the case where the effect of the punishment would be to deprive the community

of the benefit of those services. 3. The displeasure of the people; that is, of an indefinite number of the members of the same community, in cases where (owing to the influence of some occasional incident) they happen to conceive, that the offense or the offender ought not to be punished at all, or at least ought not to be punished in the way in question. 4. The displeasure of foreign powers; that is, of the governing body, or a considerable number of the members of some foreign community or communities, with which the community in question is connected.

§ 5. CASES WHERE PUNISHMENT IS NEEDLESS.

These are,

XVII. 1. Where the purpose of putting an end to the practice may be attained as effectually at a cheaper rate: by instruction, for instance, as well as by terror: by informing the understanding, as well as by exercising an immediate influence on the will. This seems to be the case with respect to all those offenses which consist in the disseminating pernicious principles in matters of duty; of whatever kind the duty be; whether political, or moral, or religious. And this, whether such principles be disseminated under, or even without, a sincere persuasion of their being bicial. I say, even without: for though in such a case it is not instrution that can prevent the writer from endeavoring to inculcate his principles, yet it may the readers from adopting them: without which, his endeavoring to inculcate them will do no harm. In such a case, the sovereign will commonly have little need to take an active part: if it be the interest of one individual to inculcate principles that are pernicious, it will as surely be the interest of other individuals to expose them. But if the sovereign must needs take a part in the controversy, the pen is the proper weapon to combat error with, not the sword.