BOOK V

PUBLIC LAW

XIV

LAW AND THE STATE

§ 74. Distinction between Public and Private Law

Austin and Kelsen consider that most jurists exaggerate the importance of the distinction between public and private law. Austin[1] thought that the main mark of public law was the 'peculiarity' of one of the persons to the relationship (the State), and hence that it was most conveniently treated under that branch of the law which dealt with variations in legal capacity—the law of persons. To Kelsen public as well as private law is merely the 'individualization' of a general norm. The ultimate effect of law is to impose constraint on individuals, and an obligation may be imposed either by the order of an administrator, the passing of a statute, the judgment of a court, or the making of a contract. The power to make a contract will depend on the civil code, just as the power of a judge to sentence a convicted criminal will depend on the criminal code, or an administrative act on a particular statute. In making a contract I 'execute' the civil law, just as an administrator does in ordering a ruinous house to be pulled down. Thus all these methods of creating obligations represent law-making within the limits imposed by a superior norm. The only real distinction between public and private law is that in the latter an individual may co-operate in the law-making process (for example, by signing a contract), but in public law he may be bound by a norm in the creation of which he plays no part. But even in private law a duty may be imposed against a person's will, e.g. in quasi-contract.

Why is Kelsen so eager to attack the traditional distinction between public and private law? In part it arises from his view that

[1] *Jurisprudence*, ii. 748.

the developed legal order and the State are the same thing,[1] but in addition he emphasizes that, if the sphere of public law is magnified, it may suggest that the rule of law is one thing for the monarch and another for the subject. One traditional view was that private law deals with co-ordination and the relation between equals, whereas public law is the realm of political domination;[2] but Kelsen maintains that the rule of law has exactly the same scope in the two fields—private law created by contract may be just as much a realm of domination as any constitutional power. What is private law but the particular legal form which corresponds to the economic order of that community? A capitalist society will have one form of private law, a communist another. Kelsen thus desires to show that there is not between public and private law the great gulf which the traditional theory emphasizes.

His analysis follows rigorously from his premisses, but does it reveal more than the rather obvious truth that the foundation both of private and public law lies in the legal order itself?[3] If we postulate an initial premiss[4] as the basis of that order, then the power of Parliament to change the law may be traced to that basic norm, just as can my power to make a binding contract. If there is a legal system, every legal exercise of power must be related thereto. But when we come to apply Kelsen's analysis to the functioning of actual states, we see that his abstract theory of norms gives a false impression. It is difficult to appreciate the real nature of the State without considering, not only the abstract rules, but the organs to which certain powers are given. Yet when Carré de Malberg[5] mildly protested that Kelsen's theories could not easily be fitted to the constitutional structure of France, Weyr[6] replied: 'So much the worse for French law'—his argument being that the truth of juristic theories can be determined only by rigorous logical argument, not by examining the historical antecedents of particular systems. This is somewhat high ground even for a 'pure science' of law to take.

The real crux of the matter is whether we should regard a private individual who makes a contract as sharing in the law-making power given by the legal order. Kelsen answers in the affirmative—the ultimate effect of law is to impose constraint on individuals, and general norms are executed by the creation of the rights and the duties which

[1] *Infra*, § 76.
[2] *Annales de l'Institut de droit comparé* (1936), ii. 44–5.
[3] E. Riezler in *Rec. Lambert*, iii. 117.
[4] *Supra*, § 5.
[5] *Confrontation de la théorie de la formation du droit par degrés.*
[6] *Revue internationale de la théorie du droit*, viii. 235.

flow from a contract. Within the sphere of the law, Brown and Robinson sign a contract and create a norm which will be enforced, if necessary, by the constraint of the law. But it appears paradoxical to regard the private citizen as a law-making organ. Some differences, which according to abstract logic may seem only differences in degree, are so great as to be in reality differences of kind. Within the state machinery there is a broad distinction between the sovereign power of a legislature to create new law and the limited power of the administrator or the judge whose task is primarily to apply the law that exists. It is true, of course, that the judge and the administrator may have a limited power of creation, and that it is difficult to define precisely the distinction between legislation, administration, and the judicial process[1]—but the distinction is of practical importance in most systems of law. As contrasted with these powers, the private citizen has a limited capacity only to use such rules of law as are created by other forces. The citizen has power to create rights and duties within the framework of the law, but cannot modify the rules themselves. Traditionally, jurisprudence distinguishes between the law and the rights and duties created under that law. It seems more reasonable, therefore, to admit the importance of the peculiar character of the State by recognizing a fundamental division between public and private law.[2]

Nevertheless, this distinction has not always been clearly marked. Until the State itself has developed, public law is a mere embryo. Even in the days of feudalism there is much confusion; for no clear line can be drawn between the private and public capacities of the king. Jurisdiction, office, and even kingship are looked upon as property—indeed public law might almost be regarded as 'a mere appendix' to the law of real property so far as the feudal ideal is realized.[3]

How then should the sphere of public law be defined? Holland adopts the simple test of the nature of the parties to the relationship in question—if one of the parties is the State, the relationship belongs to public law.[4] In the days of *laissez-faire* such a criterion would not give too great a scope to public law; but today, with the entry of

[1] *Infra*, § 75.

[2] For much the same reasons it is inadvisable to treat the State only under the heading of the law of persons. To consider the powers of the State in connection with the status of married women, infants, and lunatics seems to suggest a lack of proportion.

[3] F. Pollock and F. W. Maitland, *History of English Law*, i. 209.

[4] *Jurisprudence* (13th ed.), 128.

the State into the business world, we find that the sphere of private law is diminishing. In a community where the ideal of state socialism was realized, public law would cover all the instruments of production. Hence modern jurists seek a narrower criterion.[1] The test of private and public interest is not sufficiently precise—the whole doctrine of public policy depends on a concept of public interest, yet much of it undoubtedly belongs to private law. Another theory we have already mentioned—that public law is the realm of domination, private law that of co-ordination—one treats of ruler and subject, the other of the relations of equals. There is some truth in this test, but it is not sufficiently precise. Others ask whether there is an authoritarian character in that particular activity of the State.[2] Salmond seems to have propounded the most useful definition: 'public law . . . is not the *whole* of the law that is applicable to the state in its relations with its subjects, but only those parts of it which are different from the private law concerning the subjects of the state and their relations to each other.'[3] Private law is thus the residue of the law after we subtract public law. This approach seems to involve fewer assumptions as to the nature and quality of state activity than any other. If the State sets up a state-owned monopoly in order to sell tobacco, then the rules governing the institution of the monopoly belong to public law, but if a contract for the sale of tobacco may be enforced against the monopoly in the normal way, then such a contract belongs to private law.[4]

The normal divisions of public law are constitutional and administrative law. Constitutional law deals with the ultimate questions of the distribution of legal power and of the functions of the organs of the State. In a wide sense, it includes administrative law, but it is convenient to consider as a unit for many purposes the rules which determine the organization, powers, and duties of administrative authorities. Criminal law, the infliction of punishment directly by the organs of the State, is also usually regarded as falling under the head of public law. Some would say that civil procedure should also be placed in this section, since these rules regulate the activities of courts which are mere agencies of the State; but civil procedure is so linked with the enforcement of private rights that it is more convenient to regard it as belonging both to public and private law.

[1] E. Riezler in *Rec. Lambert*, iii. 117. It is said that there are seventeen different theories.

[2] Sometimes called the *Subjektstheorie*.

[3] *Jurisprudence* (10th ed.), 506. (This discussion does not appear in the 12th edition of Salmond's work.)

[4] E. Riezler, op. cit. 132.

One of the most marked features of the present age is the growing importance of public law. Today one of the first points to be examined in any commercial enterprise is the incidence of taxation on various methods of controlling the industry. In a factory we must consider collective agreements as to wages, regulations as to lighting and safety precautions—there may even be an appeal to an industrial board against a dismissal by the master. Price control may affect the market. 'It is today impossible and misleading to study the functioning of the property norm in isolation from public law.'[1]

§ 75. The Separation of Powers

Although in political theory much has been made of the vital importance of the separation of powers, it is extraordinarily difficult to define precisely each particular power.[2] In an ideal state we might imagine a legislature which had supreme and exclusive power to lay down general rules for the future without reference to particular cases; courts whose sole function was to make binding orders to settle disputes between individuals which were brought before them by applying these rules to the facts which were found to exist; an administrative body which carried on the business of government by issuing particular orders or making decisions of policy within the narrow confines of rules of law that it could not change. The legislature makes, the executive executes, and the judiciary construes the law.

The political usefulness of a separation of powers is clearly recognized today,[3] but the major juristic difficulty is to discover any clear definitions of the legislative, administrative, and judicial process which can be related to the functioning of actual states.[4] Many of the suggested tests break down under critical analysis, and hence there has arisen a school of jurists who deny that any clear distinction

[1] O. Kahn-Freund, K. Renner's *The Institutions of Private Law*, 38.

[2] The distinction was known in theory to the ancient Greeks. But it was not recognized by feudalism. In some cases there has been a confusion between separation of powers as a political postulate and as a legal principle: see W. Ebenstein, *Wisconsin L. R.* (1938), 287 at 290.

[3] In most countries. In a dictatorship the notion of checks and balances is anathema. A. I. Vyshinsky, *Law of the Soviet State*, 497–8, claims that in the Socialist State, protection of the interests of the State is also protection of the interests of the citizens, but he admits that there must be power to destroy without pity the enemies of the State.

[4] H. Kelsen, *Allgemeine Staatslehre*; Carré de Malberg, *Théorie générale de l'État*; W. I. Jennings, *The Law and the Constitution*, Appendix I.

can be drawn. Duguit regards the conception of a single sovereign with three powers as a metaphysical conception analogous to the theological doctrine of the Trinity.[1]

What, then, are the tasks of a court, a legislature, an administrative official? The orthodox view was that each performed a different function in the legal order; the modern approach is that whatever broad classification is adopted, no sharp lines can be drawn *a priori* which will enable all governmental functions to be assigned by logic alone to one category or another. Convenience and history have dictated in each particular country the parcelling out of a certain subject-matter to each category.

Courts and Legislature

'The most obvious function of Parliament is to enact general laws';[2] that of the court is to make binding and enforceable orders applying the existing law to disputes before it. The French jurists at the beginning of the nineteenth century believed that, if the courts created new law, they were usurping the province of the legislature. Hence it was laid down that, where the text of the code was silent or obscure, the courts might refer points of difficulty to the legislature, and, where a gap in the law was revealed, such reference was compulsory. But the experiment failed completely, for the legislature had neither the time, the energy, nor the capacity to deal with the task,[3] and there were few regrets when the system was abolished. In fact courts must make law in the course of deciding disputes—did they not do so, the law would soon become intolerable. But to admit that courts make law does not mean that they have full powers of legislation. A court is bound by such authority as exists (whether it be statute or precedent), and its creative power is called into play only within the limits set by that authority.[4] A court may, however, be created to deal with an entirely new field, e.g. the determination of a compulsory basic wage. Such a function may be more like those accepted as proper to legislative bodies, although the procedure

[1] *Traité de droit constitutionnel* (1928), ii. 669; W. Ebenstein, *Wisconsin L. R.* (1938), 291; cf. W. I. Jennings, *The Law and the Constitution* (3rd ed.), 262.

[2] Ibid. 263.

[3] F. Gény, *Méthode d'interprétation*, i. 78–9; B. A. Wortley in *Modern Theories of Law*, 142. A. I. Vyshinsky also believes that interpretation of statutes should be controlled by a body subject to the legislature. But he rejects the doctrine of separation of powers: *Law of the Soviet State*, 339.

[4] *Supra*, §§ 45, 46.

adopted is that employed by bodies accepted as strictly judicial in character.[1]

If the courts encroach on the sphere of creation, Parliaments also sometimes trespass on the judicial sphere. Legislation may be enacted for the settlement of a particular dispute, or a statute may convict and sentence a particular prisoner, as when Parliament made provision for the boiling of the Bishop of Rochester's cook.[2] Moreover, even if we were to admit that Parliament could lay down only *general rules*, it would be impossible to frame a test of generality which could be applied with precision. Under the English system the courts recognize that Parliament is competent to change the law in any way it pleases. No statute can be attacked on the ground that it trespasses on a field reserved to another organ of the State. In countries where there is a written constitution the precise distinction between legislative, judicial, and administrative powers may be of great practical importance, for the exercise of each power may be surrounded by safeguarding conditions. In a federal system where powers are divided between co-ordinate governments and where disputes as to the limits of constitutional powers have to be resolved by courts, the distinction between judicial and other powers may be vital to the maintenance of the constitution itself.[3] But English constitutional theory, being based on the dogma of the supremacy of Parliament, can ignore these difficulties.

Legislation and Administration

In theory we can draw a clear line between power to create rules of law and power to put those rules into effect in the appropriate circumstances. But the delegation of limited legislative authority to administrators has obscured the theoretical division. It is becoming increasingly difficult for a legislature to deal with the detailed complexities of the modern regulation of social life, and, whether we like it or not, delegation of power has come to stay, for Parliament has neither the time nor the desire to take the full burden upon itself. Again, Parliament may be incompetent to understand the technical issues involved and may prefer to leave the working out of a broad statutory principle to an expert body. Some legislative schemes are

[1] O. Kahn-Freund, 11 *Mod. L. R.* (1948), 269; *The Queen* v. *Kirby ex. p. The Boilermakers Society*, [1957] A.C. 288 (*The Boilermakers Case*).

[2] 22 Hen. VIII, c. 9, cited Committee on Ministers' Powers, 1932, Cmd. 4060, 21.

[3] See e.g. *The Boilermakers Case* (*supra*) in the High Court of Australia (1956), 94 C.L.R. 254 and in the Privy Council, [1957] A.C. 288.

frankly experimental, and Parliament is sometimes persuaded to grant to a Minister power to make minor amendments in order to carry out the purpose of the Act so as to obviate the necessity of using parliamentary procedure. Flexibility, speed, expert knowledge —these are all in point when the convenience of delegated legislative power is concerned. Thus we obtain what the optimists call government by the expert and the pessimists term control by the dead hand of bureaucracy.[1]

But there is one fundamental limit to bureaucracy under the English system. The King in Parliament has supreme power to change the law—the administrator can act only within the limits of the power that is delegated to him. Hence an administrator can 'legislate' on a particular topic only where he can show a surrender of that power to him.

The Courts and the Administrative Process

It is not easy to define the judicial function with any exactitude. The Committee on Ministers' Powers wrote that

> a true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites:
>
> 1. the presentation (not necessarily orally) of their case by parties to the dispute;
> 2. if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties . . .
> 3. if the dispute between them is a question of law, the submission of legal arguments by the parties; and
> 4. a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law.[2]

The Committee regard a quasi-judicial decision as one which presupposes an existing dispute and the first two factors set out above, but which does not necessarily involve the third and never involves the fourth—the authority is left free to act by reference to considerations of policy. Yet further removed is the 'pure' act of administration. Shall Australia buy her aeroplanes in England or manufacture

[1] For a pithy mis-statement, see A. I. Vyshinsky, *Law of the Soviet State*, 367: 'There is no bureaucracy in the U.S.S.R.'

[2] Committee on Ministers' Powers, 1932, Cmd. 4060, 73. An unkind critic has suggested that this Report 'did more to emphasise the primitive state of political science in England than to solve any constitutional problems': B. Abel-Smith and Robert Stevens, *Lawyers and the Courts*, 120.

them herself? The only relevant statute may create a power to spend a certain sum in the purchase of aeroplanes. In making the decision, the administrator has a discretion that is almost entirely unfettered—there is no legal duty to hear the claims of Australian manufacturers, or to buy the aeroplanes where they are cheapest or best. The grounds of policy on which the administrator decides are left to his own judgment.[1]

These classifications, as Sir Ivor Jennings has shown, cannot be regarded as entirely satisfactory, because reliable criteria for allocating any particular function are not provided.[2] The following difficulties emerge:

(*a*) Courts sometimes find that there is no clear authority on the point in question and hence must create law in the very act of applying it.

(*b*) Merely because the courts decide according to law, we cannot assume that they exercise no discretion or are not concerned with broad issues of policy.[3] A decision whether a particular contract is against public policy involves (if there is no authority) an analysis of the interests at stake. If a petitioner in an undefended divorce suit confesses that he has been guilty of adultery and asks the court to exercise its discretion in his favour and to grant a divorce because of his wife's misconduct, are we not coming very close to the administrative process? The discretion of the court must be exercised in accordance with such rules of law as exist, but that is also true of the administrator.[4]

(*c*) The problem has been made even more difficult in England because of the fact that certain courts exercise what are logically administrative functions, and the rising tide of collectivism has caused executive bodies to encroach on the functions of the courts.[5]

[1] 'The Minister, acting in his administrative capacity, is governed by considerations of expediency only . . . no principle of natural justice . . . has any place in that kind of administration': per Henn Collins J., *Miller* v. *Minister of Health*, [1946] 1 K.B. 626 at 628.

[2] W. I. Jennings, *The Law and the Constitution* (4th ed.), 220; W. A. Robson, *Justice and Administrative Law* (2nd ed.), 350.

[3] *Sorrell* v. *Smith*, [1925] A.C. 700, required a very close analysis of matters of policy, for the law was so confused that it afforded no clear guidance.

[4] Of course, as an accumulation of such cases is dealt with by the courts, precedents are established which sometimes crystallize the broad lines of policy by laying down detailed rules of law. But, in some of these cases, the courts explicitly refuse to fetter their discretion. An administrator does not create binding precedents by following a certain line of policy, although there is a natural tendency to develop a consistent practice. See W. A. Robson, op. cit. 294.

[5] *Administrative Tribunals at Work*, ed. R. S. W. Pollard.

Hence the test of the name by which the tribunal is called has ceased to be of service and there has been a feverish search for a true principle which can differentiate between the judicial and the administrative process. There are tribunals with the trapping of courts which do not really possess judicial power; there are administrative bodies which exercise functions which seem to satisfy all suggested tests of the judicial process. In order to secure a wide operation for the writs of prohibition and *certiorari* (which lie only against inferior *courts*), there is a tendency to extend the meaning of the term 'court' rather far and the phrase 'to act judicially' comes almost to mean the decision after proper investigation of any matter relating to the rights and liabilities of a subject. On the other hand, when it is a question whether a tribunal has the advantage of immunity from actions for defamation, a much stricter view has been taken, and the test is whether there is power to make a binding and enforceable order—that is, an order disobedience to which is punishable, or which is enforceable by execution without further legal proceedings. Thus if we are asked whether a particular body is a court or not, we must reply, 'a court for what purpose?'[1] Willis suggests that in Canada the courts have given up attempting to find a logical distinction and in effect ask, 'Is this tribunal doing something which in 1867 was done exclusively by a Superior Court Judge?'[2]

In Australia it has been necessary to find a working test for another purpose. By the Constitution of the Commonwealth, judicial power may be vested only in courts and the tenure of the judges must be for life, subject to the powers of removal given in § 72. Hence a long line of cases deals with the attempt to find a criterion. If an administrative board is set up to deal with objections by taxpayers, or to deal with the wages of women, is judicial power being exercised?[3] A court martial seems to fall under any test that might be proposed, but the High Court has held that the composition of a court martial is not governed by these sections of the Constitution.[4] The simplest test is the power of enforcement: 'to erect a tribunal into a "Court"

[1] *R.* v. *L.C.C.*, [1931] 2 K.B. 215; *Re Ashby*, [1934] 3 D.L.R. 565 (Ont.); *R.* v. *Woodhouse*, [1906] 2 K.B. 501 at 535; *Shell Company of Australia* v. *Federal Commissioner of Taxation*, [1931] A.C. 275; *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171 at 194.

[2] 53 *Harv. L. R.* (1939), 269; W. I. Jennings, 49 *Harv. L. R.* (1936), 426 at 429; D. M. Gordon, 49 *L.Q.R.* (1933), 94; J. Willis, 1 *Univ. of Toronto L. J.* (1935), 53; E. R. Hopkins, 17 *Can. B. R.* (1939), 619; *Toronto Corporation* v. *York Corporation*, [1938] A.C. 415.

[3] See the incisive survey by G. Sawer, 1 *Annual L. R.* (*W. A.*) (1948), 29.

[4] *R.* v. *Bevan* (1942), 66 C.L.R. 452; *R.* v. *Cox* (1945), 71 C.L.R. 1.

or "jurisdiction" . . . the essential element is that it should have power, by its *determination* within jurisdiction, to impose liability or affect rights.'[1] Australian cases have been summed up in the following propositions. Firstly, there must be the decision of a dispute by officers authorized by law; secondly, the dispute must be decided by reference to a pre-existing rule or standard;[2] thirdly, an interpretative decision is judicial only if it satisfies at least one of the following tests: (*a*) there is power to enforce the decision by execution; (*b*) the decision is conclusive and binding; (*c*) the constitution, procedure, and powers of the tribunal are such as to indicate that Parliament intended that the tribunal should exercise judicial power.[3] The difficulty of applying these tests is shown by the strong dissent in *Rola Co. (Aust.) Pty. Ltd.* v. *Commonwealth*.[4]

Quasi-judicial is a term that is also not easily definable. In the United States, the phrase often covers judicial decisions taken by an administrative agency—the test is the nature of the tribunal rather than what it is doing. In England quasi-judicial belongs to the administrative category and is used to cover situations where the administrator is bound by law to observe certain forms and possibly hold a public hearing but where he is a free agent in reaching the final decision. If the rules are broken, the determination may be set aside, but it is not sufficient to show that the administration is biased in favour of a certain policy, or that the evidence points to a different conclusion.[5] Yet in *Franklin* v. *Minister of Town and Country Planning*,[6] the House of Lords treated such functions of the Minister as purely administrative, although previous cases had regarded them as quasi-judicial.

The growth of administrative law seems to be inevitable, but there are many writers who point out the possible dangers involved. Pound goes so far as to say that 'the pre-supposition of administrative absolutism is that of every form of autocracy. . . . The corollary of the proposition that men are not competent to manage the details of their private affairs is that they are not competent to manage public affairs. In the end administrative absolutism must stand upon a

[1] *R.* v. *Local Government Board*, [1902] 2 I.R. 349 at 373.

[2] This seems to depend on the theory that the rules of the common law are clear, but that the only difficulty is to find out what they are.

[3] G. Sawer, op. cit.

[4] (1944), 69 C.L.R. 185, and also by such cases as: *The Queen* v. *Davison* (1954), 90 C.L.R. 353; *The Queen* v. *Spicer ex. p. Aust. Builders' Labourers' Federation* (1957), 100 C.L.R. 277; *The Queen* v. *Spicer ex. p. Waterside Workers' Federation of Australia* (1957), 100 C.L.R. 312. *R.* v. *Trade Practices Tribunal*, [1970] A.L.R. 449.

[5] H. W. R. Wade, 10 *Camb. L. J.* (1949), 216.

[6] [1948] A.C. 87.

political absolutism.'[1] This is somewhat exaggerated, but it is true that the division of powers supplies a useful system of checks and balances. If the same administrative body makes the regulations, prosecutes the offender, acts as a court, and inflicts the sanction, there is less chance of impartiality than if the case comes before an independent tribunal. To consider in detail this most controversial topic of modern law is beyond our scope; suffice it to say that administrative law has come to stay,[2] and that the only practicable reform is to secure such safeguards as will adequately protect the liberty and property of the subject. It is natural that Fascist or Soviet states demand executive freedom and scorn any doctrine of separation of powers.[3] The liberal state 'is derided as atomistic, negative, pluralist, mechanistic; the nation state is extolled as integrating, dialectic, organic'.[4] The problem before the democracies is to secure machinery for rapid and effective executive action, and at the same time to preserve those essential liberties which are necessary for the development of human personality. The courts of law have manifested great independence in protecting the subject and, however valid may be the reasons for referring certain matters to the decision of administrative bodies, we must see that checks on arbitrary action are imposed either through judicial review or the creation of a new system of administrative courts. On the other hand, if the jurisdiction of the courts is to be preserved, speed of trial and cheapness of cost are factors that must not be ignored.

In the United States there has been much controversy over the working of administrative tribunals and after an exhaustive inquiry the Federal Administrative Procedure Act was passed in 1946 as an attempt to destroy the worst evils without trammelling administrative necessities. There is a case for separation of function within an agency, if it is given power both to make regulations and to impose penalties. The administrative court should be independent and distinct from the part of the agency that determines policy and creates law.[5]

[1] *West Virg. L. Q.* (1938–9), 205 at 219; see also R. Pound, *The Task of the Law* (1944). For a reply see H. J. Morgenthau, 57 *Harv. L. R.* (1944), 922. For an English analysis, see C. K. Allen, *Law and Orders*.

[2] See e.g. K. C. Davis's major work in four volumes, *Administrative Law Treatise* (1958); B. Schwartz, *Introduction to Administrative Law* (1958); G. Sawer, *The Separation of Powers in Australian Federalism*, 35 *A.L.J.* (1961), 177.

[3] J. W. Jones, *Historical Introduction to the Theory of Law*, 280; A. I. Vyshinsky, *Law of the Soviet State*.

[4] J. W. Jones, op. cit. 283.

[5] K. C. Davis, 61 *Harv. L. R.* (1948), 389.

Thus no test for distinguishing between the three powers of government is at once intellectually satisfying and functionally useful. However, there are sound political reasons for preserving some separation. Sir Ivor Jennings suggests that the major principles of policy should be laid down by Parliament and that in general law should be administered in contested cases by courts staffed with an independent judiciary employing a technique and procedure which gives some guarantee of justice. But the precise determination of the subject-matter attributed to each function can be determined only by convenience and policy, not by logic. 'The safeguard against bureaucracy and tyranny lies not in a precise delineation of functions, but in democratic control through an elected House of Commons in which the Party system makes criticism open and effective'.[1]

§ 76. Law and the State

There are three ways of constructing a theory of the State: we may examine the actual functioning of the State (as in political science), or the ideal of what a state ought to be (as in political philosophy), or the theoretical basis of the lawyer's approach to the State. The last method (the so-called juristic theory of the State) is not meant to present a complete picture of the actual working of a state, but rather the theoretical conceptions around which the doctrines of the law are built. In particular, the juristic theory of the State deals with the relationship of law and the State, or (to put the same problem in another way) it asks the question whether public law is really law. Can a subject have legal rights against the State?

There are three main juristic theories of the relationship between the State and the law which can tersely be expressed thus: the State is superior to and creates law; law precedes the State and binds it when it comes into existence; law and the State are the same thing looked at from different points of view.[2]

[1] W. I. Jennings, op. cit. 284. Even A. I. Vyshinsky emphasizes the importance of the independence of the judiciary: *Law of the Soviet State*, 505. H. Kelsen suggests that logically a pure democratic theory requires that both courts and executive should be subject to parliament: *General Theory of Law*, 282. Courts may, of course, be resistant to new social experiments and eviscerate statutes, but no human institution will ever be beyond the risk of error.

[2] G. Gurvitch, *L'Expérience juridique*, 213. Lon L. Fuller compares analytical jurisprudence with its theories of law, the State, and the sovereign to theology with its doctrine of the Trinity: *The Law in Quest of Itself*, 41; R. Pound, 57 *Harv. L. R.* (1944), 1193.

(*a*)

The first theory is illustrated by the work of Austin, who defines law as the command of the sovereign. But when Austin attempts to define sovereignty and the State he adopts a practical test. Firstly there must be a political society of 'considerable' numbers, and a superior in that society who is habitually obeyed by the bulk of the members of that community and who is not in the habit of obedience to another superior.[1] Within this community, the superior has a sovereign power to lay down the law. The relation between subject and sovereign is therefore one of power: the sovereign can have no legal rights against his subjects nor can he be bound by legal duties, for a legal relationship can exist between two parties only when there is above them a sovereign who will enforce the rule of law. Hence constitutional law must be divided into two parts: as against the sovereign body as a whole, constitutional law is mere positive morality enforced by moral sanctions alone; but it may be regarded as positive law in so far as it binds particular members of the sovereign body.[2] Collectively considered, the sovereign is above the law, but a member of the House of Commons is individually bound by an Act of Parliament though he is a member of the body which creates the law. If the sovereign consists of only one person, constitutional law is only positive morality. Rules of the game can hardly be considered to bind a person who can change them at any minute, though it is true that, if he is always changing the rules to suit himself, he may find it difficult to persuade the others to play with him. The word 'unconstitutional',[3] Austin points out, is often merely a vague term of disapprobation, since the conduct criticized may involve no actual breach of the law.

The lawyer's view of sovereignty is based on practical considerations rather than on any theory of values—'the English sovereign is merely the "person" who has the last word in a particular connection'.[4] The fact that there is in England an omnicompetent legislature and a strong centralized organization of justice which recognizes the power of Parliament has obviated the necessity of

[1] *Jurisprudence*, Lect. VI. It is difficult to say precisely what is the smallest community which could be rightfully regarded as a state. In practice the doctrines of international law are usually invoked to determine whether a particular society is a state or not.

[2] J. Austin, *Jurisprudence*, i. 267.

[3] As used in England.

[4] J. W. Salmond, *Jurisprudence* (9th ed.), 689. (This passage is rewritten in the 12th ed.)

theoretical debates since the settlement of 1689. The particular problem of the relationship of Church and State, which has produced so many theories of sovereignty, was settled in England at a fairly early date. To an English lawyer the concept of the sovereignty of Parliament merely means that the courts will recognize as law rules made by Parliament in the form of legislation.[1]

But it is not easy to find out who has the 'last word' in a federation. The legislature is bound by the constitution, and in most cases a court has power to decide whether a particular statute is constitutional or not. Hence the court is the ultimate authority in one sense; but only in a narrow sense because, firstly, the power of the court is purely negative, since it can reject but not initiate legislation, and, secondly, the electorate normally has the ultimate power of amending the constitution.

But there is no need for any *one* person or body to have the 'last word' on every point. So long as the system provides a method of settling the law on each particular issue, it matters not in theory how many 'authorities' there may be, provided there be some practical means of resolving conflicts. The legal theory of the State becomes increasingly difficult the more this ultimate power is divided, but that does not prove that in practice it cannot be divided. The constitutional law of an absolute dictatorship is simple: 'whatever pleases the emperor has the force of law'; and in England it is comparatively easy, since the legally unrestricted power of the King in Parliament prevents deadlocks arising from a division of powers. But in a federation constitutional difficulties may prevent effective action, for powers may be so divided that a particular reform can be achieved only by the co-operation of the states and the central authority: indeed, there may be some powers which cannot be exercised even by this co-operation.[2] The difficulties of waging modern war have made this point apparent in every federation.[3]

How far can a sovereign parliament place legal limits on its future exercise of the power to create law? The past has shown that statutes which were declared to be immutable have been changed, and

[1] W. I. Jennings, op. cit. 143.

[2] Thus § 92 of the Australian Commonwealth Constitution declares that trade, commerce, and intercourse between the states shall be absolutely free. This binds the Commonwealth as well as the states and prevents legislation on marketing from becoming effective.

[3] E. S. Corwin, *Total War and the Constitution* (1947); D. P. Derham, *The Defence Power*; ch. vi of *Essays on the Australian Constitution* (2nd ed. 1961), ed. R. Else-Mitchell.

probably if the Imperial Parliament repealed § 4 of the Statute of Westminster (which restricts the right of the Imperial Parliament to legislate for the Dominions without their request and consent), the English courts would treat the repeal as lawful. This, however, is academic theorizing, for the Statute of Westminster really created a new basic norm for the Empire. It is doubtful if Dominion courts would recognize the validity of such a repeal.[1] If a statute grants 'Dominion status' to Scotland and Wales, presumably in theory a subsequent statute could repeal the former grant. If Parliament cannot bind its successors, this is the only logical answer, however unrealistic it may be politically. If a statute granted true independence, the answer might well be different. Where parliaments are not sovereign, it is possible to evolve a technique whereby a statute can be protected from simple repeal[2]—thus a referendum may be required before the statute can be altered.[3]

Should constitutional conventions be regarded as law? If we adopt as the test of a rule of law whether it will be applied by a court, many of these conventions are not law, for they could not be made the subject-matter of an action.[4] If we are considering the juristic theory of the State, an answer would depend on the facts. If the convention was so wrapped up with the functioning of the State that the ultimate power could not be described faithfully save by reference to it, then such a convention would be law, or, more accurately, part of the essential premiss on which the legal order was built.[5]

As a postulate to explain the working of a legal order the concept of sovereignty has its uses. But the term is used with so many conflicting meanings and so easily stirs the emotions that it is better for jurisprudence to forgo its use. The 'initial premiss' is a better and more neutral phrase: there is no need for jurisprudence to postulate sovereignty in the sense of power that is unlimited, illimitable and indivisible. These qualities are not *a priori* necessary, but depend

[1] W. I. Jennings, op. cit. 145, discusses the problem. Cf. Dixon C.J.: 'The Act of 1956 (Copyright) contains no declaration that the Commonwealth of Australia has requested or consented to the enactment thereof. The repeal, therefore, of the Act of 1911, which is effected by the Act of 1956, does not because of s. 4 of the Statute of Westminster, 1931 . . . extend to Australia': *Copyright Owners Reproduction Society Ltd.* v. *E.M.I. (Aust.) Pty. Ltd.*, (1958) 100 C.L.R. 597 at 604.

[2] *Harris* v. *Dönges*, [1952] 1 T.L.R. 1245.

[3] *A.-G. for N.S.W.* v. *Trethowan*, [1932] A.C. 526.

[4] W. I. Jennings, op. cit. 99–100.

[5] Constitutional law is obligatory because it is recognized that, if the rules are not obeyed, the society will come to an end: A. L. Goodhart, *Interpretations of Modern Legal Philosophies*, 293.

only on particular political theories, as is demonstrated by a study of the functioning of actual states. The basis of law is a legal order, the presuppositions of which are accepted by the community as determining the methods by which law is to be created, and those presuppositions will vary from one community to another.

This legal conception of the initial hypothesis does not pretend to explain the real nature of politics or the art of government. If England were ruled by a Fascist Council of Three, whose demands Parliament obeyed, the King in Parliament would still be the formal means used to change the law. But from the moment the Fascist Council directly imposed its will on the courts, and was accepted by the community as having power to create law, a new legal order with a new initial premiss would have been created. And it may be that the purely juristic theory is not sufficient for all the purposes of jurisprudence. But the fact that to understand the real functioning of the law of contract we must go beyond Anson's analysis does not absolve us from understanding the propositions that the learned author lays down. And in the same way it is indispensable to have a knowledge of the legal forms through which the law approaches the problem of government.

Thus the theory of sovereignty has been of service as a formal theory, but some writers go farther and seek to justify sovereignty as a moral necessity instead of as a convenient hypothesis. For example, Hegelianism treats the State as a supreme moral end—being a value in itself it is not bound by the rules of ethics that apply to individual men.[1] Only in the State can man attain true self-realization; and since the will of the State represents the real will of the individuals, the State thus includes the entire hierarchy of social life. This theory 'grants to state absolutism the virtue of moral truth'.[2] 'The state is the divine idea as it exists on earth.'[3] This doctrine has been carried farther by the Nazi and Fascist conceptions which regard law as but the will of the Leader. To attempt to bind the State (these engaging theorists tell us) is to commit treason at the bidding of out-moded liberal ideas, which, striving to protect the liberty of the subject, strike at the welfare of all. This doctrine is more understandable (if less palatable) when we appreciate that the totality deserving of consideration consists only of those whose political heart is in the right place.

[1] For the philosophic issues that lie behind the Hegelian theory of the State, see B. Bosanquet, *Philosophical Theory of the State*; F. Hallis, *Corporate Personality*, 61 et seq. But as W. Friedmann shows, *Legal Theory* (4th ed.), 354, finally the Nazis turn to Nietzsche rather than Hegel.

[2] F. Hallis, *Corporate Personality*, 68.

[3] Hegel, *Philosophie des Rechts*, 349.

In Russia there are traces of the same theory. 'Despotism is . . . not merely tolerated by Soviet jurists and publicists: it is an essential element in their conception of the social order of their time and place.'[1] These doctrines treat law as an instrument of executive action, not as a check upon it: law is a weapon to achieve the ends of state policy, not a chain to hamper the executive.[2]

This approach is far removed from that of Austin and Kelsen. Austin said only that, if law was the command of the sovereign, you could not in theory bind that sovereign. Kelsen makes no ethical plea but argues that logically we must accept some source of power as the formal basis of the legal order. Hegelianism, on the other hand, claims that ethically the State is an end in itself, and that the individual has claims only as a unit in the absolute of the State.

This grant of ethical justification to a formal theory of 'the last word' has led to a revolt, not only against Hegelianism, but also against formal theories such as those of Austin and Kelsen. This leads to the next view of the relation of the State and the law.

(*b*)

The second theory regards law as more fundamental than, and as anterior to, the State. Hence law may bind the State. Some turn to the medieval solution of natural law—the sovereign has absolute power over positive law, but is bound by *ius naturale*. In the Middle Ages even a royal justice such as Bracton could 'fearlessly proclaim' that the king was bound by law.[3] We cannot impose on the Middle Ages an Hegelian theory of the State, for the Church still exercised over the State an undefined control. Moreover, the baronage claimed vague rights of judging the king in his own court, although there were no effective means of bringing this about save by revolution. Modern constitutional theories may attempt to bind the government by the creation of a higher law which can be amended only by referendum. Declarations of rights may be inserted in constitutions to place certain interests beyond the reach of arbitrary interference by chance majorities.[4]

[1] J. W. Jones, *Historical Introduction to the Theory of Law*, 278.

[2] Op. cit. Contrast the approach of Greene M.R. in *Kawasaki* v. *Bantham S.S. Co.*, [1939] 1 All E.R. 819 at 822: 'I do not myself find the fear of the embarrassment of the executive a very attractive basis upon which to build a rule of English law. . . .'

[3] F. Pollock and F. W. Maitland, *History of English Law*, i. 160.

[4] Such an approach really strengthens H. Kelsen's argument that the problem should be looked at, not as a conflict between law and government, but on the basis of the postulates of the legal order.

Ihering considered that law in the full sense was achieved only when it bound both ruler and ruled. But, as Ihering regards the State as the maker of law, we may well ask how the creator may be bound by the creature of his fancy? Ihering solved the problem by what is really a political argument: law is the intelligent policy of power, and it is easier to govern if the State voluntarily submits to the law it has created. This is merely an argument of expediency—we can do everything with bayonets but sit on them—and, while it undoubtedly contains much truth, it is of little service to juristic theory.

Jellinek develops this doctrine into a theory of autolimitation—the State is the creator of law, but voluntarily submits to it. But if the State is bound only because of its own consent, why cannot that consent be withdrawn at any time? A more radical attack is made on the problem by Krabbe and Duguit, both of whom deny that the State creates law. Once we postulate that law is created by a source other than the State, it is easy to see how the State can be bound. Krabbe places the source of law in the subjective sense of right in the community[1]—he is not merely making the obvious point that the moral ideas of a community are reflected in the legal system under which it lives; he goes further and asserts that the State cannot make law. He abruptly asserts that any statute which is opposed to the majority sense of right is not law.[2] Hence the legislature, executive, and the judiciary are but subordinate instruments through which the community expresses its sense of values. Krabbe thus treats as the source of law an instinctive sense of right—he rejects all definitions which emphasize the general will of the community for he fears that once law is made to depend on will, an attempt will be made to invoke the superior will of a sovereign with power to crush the discordant individual wills of the community.

But there are many faults in Krabbe's theory. How can a sense of right be effective unless men are willing to put their wills at the service of the ends they desire? Moreover, Krabbe uses the term 'law' in a sense very different from that of the lawyer—his theory would be true only if the judge could ignore all statutes and precedents and base his decisions purely on what he conceived to be the sense of right of the majority of the community. Thus he says that a statute

[1] *The Modern Idea of the State.*

[2] It is difficult to justify majority rule save as a convenient political expedient—it is preferable to count heads rather than to break them. But H. Krabbe holds that any rule possesses a higher value if approved by the majority.

ceases to be law when it is no longer acceptable, that constitutional provisions are void if they require a majority of more than half the electors before amendment can be made. From this angle a statute and a decision of a court are but experiments—either would create a rule of law only if and when that rule is accepted by the community. Although the ethical basis of Krabbe is far removed from the positivism of Duguit, in essence they both take the same view of the relationship of the State and law. Rules derived from the fact of solidarity bind the State, writes Duguit; there is no such thing as sovereignty, for the State is merely a convenient term for the organization of such public services as the dictates of solidarity demand.

Accordingly, to these theories public law is positive law in every sense of the word. It binds the ruler who lacks power to change the law by his mere volition. Hence law is not organized power, as in Fascist theories, but rather a check on the arbitrary exercise of power by the executive. Krabbe emphasizes the hackneyed dictum that there should be a government of laws and not of men,[1] but he employs the term 'law' in a sense very different from that of the normal use. It has been reiterated again and again in this work that law is a result of the social forces of the community, but the acceptance of this doctrine does not lead to Krabbe's result that some statutes are not law. The lesson of legal history is that law functions best if adequate organs are set up to create, declare, and enforce it—law cannot be left to be determined only by a vague sense of right. Efficiency demands that power be placed at the service of law and that institutions be set up to draw the boundaries of legal rules as sharply as possible. We can best secure the effective protection of the subject, not by denying power to the State nor by inventing paradoxical theories of law, but by spreading the basis of political power among as many members of the community as possible through a wide franchise. The ultimate sanctions of 'constitutional law' as against the ruling body are extra-legal—'revolution, active, and passive resistance and the pressure of public opinion'.[2]

In English writing, the same problem has been discussed under the heading of *the rule of law*. Dicey found three meanings in this

[1] T. I. Cook, 30 *Calif. L. R.* (1942), 151.

[2] P. Vinogradoff, *Historical Jurisprudence*, i. 120. See also W. I. Jennings, *The Law and the Constitution* (3rd ed.), 314: 'The constitution of a country, whatever it be, rests upon acquiescence.' This does not, of course, mean that an active minority in a country may not control power to such an extent that few are willing to revolt. Again, a conquering horde may hold a smaller community in subjugation.

phrase: firstly, the supremacy of regular law over arbitrary power; secondly, equality before the law in the sense that officials must obey it and are subject to the jurisdiction of the ordinary courts; thirdly, the fact that the law of the constitution is the result of decisions of the courts as to the rights of private individuals.[1] These are undoubtedly the characteristics of the English legal system, but they result from the political struggles of the past and are not logical deductions from a rule of law.[2] For law may have a varying content; it may protect the subject against despotism or give the most ruthless power to a tyrant. It is not enough for the democrat to demand a rule of law—everything depends on the nature of that law. Every legal order which functions has a rule of law; this applies to a Nazi state as well as a democracy. What democratic liberals desire is that the powers of government should be restrained so as to protect as far as possible the 'personal freedoms'—this is a noble ideal, but not one that is necessarily secured by a rule of law.[3]

There is, however, a growing movement among Western nations, and others influenced by them, to achieve more than that and attach a more specific and demanding meaning to the phrase 'rule of law'. The nineteenth-century movements for constitutional reform, based in the main on eighteenth-century thinking, did not proceed on any Diceyan kind of notions about the rule of law. They sought to fetter governmental powers by laws which would protect individual human values. It is seen today that economic questions must be solved before such ideas can be implemented fully: that men must eat before they can enjoy freedom from tyranny.[4] Further there has been a growing school of thought, often based on revived 'natural law' notions, which seeks to find in the concept of law itself fundamental aspects requiring limits to be placed upon the exercise of power by governments of whatever kind.[5]

[1] *Law of the Constitution* (8th ed.), ch. iv.

[2] W. I. Jennings, *The Law and the Constitution*, Appendix II.

[3] Note the interesting argument of Dixon J. (as he then was) in 51 *L.Q.R.* (1935), 590. In English legal history three conceptions have been struggling for mastery—the supremacy of the law which was owed to the Middle Ages, the supremacy of the Crown symbolized in the Divine Right of Kings, and finally the supremacy of Parliament established by the revolution settlement. Today, if we take the Commonwealth as a whole, the Crown is the symbol of unity, and 'thus in the end we return to a conception of the supremacy of the Crown'.

[4] See the many recent publications of the International Commission of Jurists, and in particular the '*Declaration of Delhi*' on the Rule of Law.

[5] See e.g. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. R.* (1958), 630.

(*c*)

Kelsen illustrates the third type of theory that law and the State are really the same. The State is only the legal order looked at from another point of view. Human individuals alone can act, and legal force is imputed to their behaviour only if it is in accordance with a rule of law. Just as men personified world forces and created a deity, so the jurist has personified the hierarchy of norms and created a state.[1] When we think of the abstract rules, we speak of the law: when we consider the institutions which those rules create, we speak of the State. But the practical importance of Kelsen's approach is that he emphasizes that law is a more fundamental notion than that of the State. While it is true that law cannot exist without a legal order, that order may take forms other than that of the State. Hence the theory is wider, and therefore more acceptable, than that of Austin. A legal order may be created in the international sphere even though no super-state is set up.

The three theories relating to the relationship of law and the State have now been discussed. Logically, each may be defended, but, if we examine actual states, we discover that no one solution will apply to all. Just as law may serve many purposes, so the relationship between law and the State may vary.[2] It is possible to conceive of a state which recognizes a fundamental law, which it is beyond the power of any authority to alter. Such a legal order might prove impracticable as conditions changed, but an unalterable fundamental law is not beyond the bounds of imagination. At the other extreme a sovereign parliament may have no limits whatever on its exercise of legislative powers.

What are the essential marks of the State? Salmond defined the State as an association of human beings established for the attainment of human ends, two of which are primary and essential—war and the administration of justice. These two purposes Salmond regarded as partaking of the same quality—the maintenance of right by the exercise of force: hence he regarded a state as a society organized so as to use force to maintain peace and justice within a given territory.[3] But in what way can we show that the functions

[1] 'It can be said that the state creates the law, but this means only that the law regulates its own creation': H. Kelsen, 55 *Harv. L. R.* (1941), 65.

[2] E. Bodenheimer, *Jurisprudence*, 57.

[3] *Jurisprudence* (10th ed.), 129–30. J. W. Salmond, in order to take this point, argued that only a *just* war can be regarded as an essential form of state activity. Salmond's own view is seen in 9th ed. 165. This discussion does not appear in the 12th ed.

chosen by Salmond are more essential than any other activities of the State?[1] The theory of *laissez-faire* would curtail the State's sphere of operation, just as modern collectivist conceptions would increase it. If a permanent international order were set up, it may be that war would entirely disappear—however pessimistic we may be, we cannot prove *a priori* that the carrying on of war will always be a function of the State.

From the purely juristic angle, many say that what distinguishes the State is the fact that legally it cannot, without its own consent, be deprived of its power to rule. Kelsen,[2] on the hypothesis that international law is supreme, suggests that the national legal order can be defined as 'a relatively centralized coercive order whose territorial, personal, and temporal spheres of validity are determined by international law and whose material sphere of validity is limited by international law only'. A corporation may set up its own legal order, but it is subject to the overriding power of the State. If a powerful corporation within a state sets up a legal order which defies the State, nevertheless the State (at least in formal theory) remains supreme, until its legal order is overthrown and a new basis for law set up: in other words, until revolution has taken place. As we have said, constitutions have an extra-legal origin and the jurist can only accept that which has been created by the wars and struggles of the past. The normal marks of a state are a fixed territory, population, and competence to rule which is not derived from another state.[3] Groups existing within the State may not have been created by the State, but the extent of their legal power depends on what is granted by the law. Kantorowicz, therefore, defines the State as a juristic person endowed with the right to impose its will on the inhabitants of a given territory, of which right it cannot by law be deprived without its own consent.[4]

§ 77. The State as a Legal Person

The State has been regarded by some as the greatest corporation known to the law, by others as mere machinery or as one aspect of

[1] H. Kantorowicz, 12 *Economica* (1932), 5.

[2] *General Theory of Law and State*, 351.

[3] Many emphasize the originality and the non-delegated character of the State's competence to rule. It may be that this theory has a theological counterpart, but it is none the less true that, for juristic theory, the State created itself. The tests of international law are an independent government, a sufficient degree of internal stability to give effective government, and a defined territory: H. Lauterpacht, *Recognition in International Law*, 26.

[4] 12 *Economica* (1932), 12.

the legal order. The wealth of learning and the subtle argument that has been applied to the notion of corporate personality[1] has almost buried the problem of the nature of the entity which we described as the State. In modern systems the State can be seen as a legal person endowed with such powers as the legal system which supports it provides. These may vary from absolute power to impose its will on the inhabitants of a given territory, to much more limited powers as in federations like those of the United States of America and the Commonwealth of Australia. It is always necessary to distinguish 'states' and 'sovereigns' seen from the international point of view from the aspect they wear when seen from within a legal system as the principal legal person in that system.

In the history of English law we find much confusion. English lawyers were not good at abstract theory: 'they liked their persons to be real.' Nearly all that is said of the king in the Year Books is strictly true of a man.[2] When it became necessary to find a legal theory for the State, the notion of the *corporation sole* was borrowed from ecclesiastical law and the king was '*parsonified*'.[3] But neither in the case of the parson nor in that of the king was a clear-cut separation made between the artificial *corporation sole* and the natural man who occupied the office.[4] It is 'idle optimism to seek logic in constitutional law'.[5] When a king died, instead of the law assuming that the artificial *corporation sole* continued, there was a curious hesitancy. All delegation ceased, litigation ended and must be begun again, military commissions terminated. 'When on a demise of the Crown we see all the wheels of the State stopping or even running backwards, it seems an idle jest to say that the King never dies.'[6] When George III wished to buy some land for his private use, a special Act had to be passed to allow him to hold it as a man and not a King.[7] The most obvious difficulties were gradually dealt with by statute and today the theory of the *corporation sole* is

[1] *Infra*, Ch. XVI.
[2] F. W. Maitland, *Collected Papers*, iii. 246–7.
[3] Ibid. 245.
[4] There were various reasons why it was felt dangerous politically to apply a logical doctrine of separation, and curiously enough the confusion was supported by both monarchists and anti-monarchists: see W. S. Holdsworth, *History of English Law*, ix. 4–7. 'Even in Bracton's day the number of legal ideas is very small and public law has hardly an idea of its own': F. Pollock and F. W. Maitland, *History of English Law*, i. 511. G. W. Keeton, *Elementary Principles of Jurisprudence* (2nd ed.), 152, gives an excellent historical survey.
[5] R. R. Sholl, 3 *Aust. L. J.* (1929), 6 at 9.
[6] Maitland, *Collected Papers*, iii. 253.
[7] Ibid. 252 referring to 39 & 40 Geo. III, c. 88.

well understood. But history has still left us a legacy of theoretical difficulties.[1]

The expansion of the British Empire and the grant of self-government to the Dominions raised many problems for juristic theory. Within Australia, the Crown acts both in right of the Commonwealth and of the States, and Griffith C.J. suggested that in this sense the Crown should be regarded not as one but as several juristic persons.[2] Later cases, however, adopted the view that the Crown is one and indivisible, but that its legislative, judicial, and executive power is exercised by different agents in different localities.[3] To evolve a general theory that explains that amazing self-contradiction, the British Commonwealth, is more than most scholars attempt. The Commonwealth of Australia, which has a separate international legal personality as a member of the United Nations, is (at least where prerogative rights are concerned) a mere agent of an indivisible Crown.[4] In practice, however, the Commonwealth of Australia and the States are separate legal personalities whatever the theory may be. The question whether a suit should be brought against the Crown in right of one dominion, possession, or jurisdiction rather than another depends on the treasury out of which the claim put in suit is to be satisfied.[5] The Constitution of Australia, in effect, treats Commonwealth and States as separate juristic entities, although it has not incorporated them. 'The principle that the Crown is one and indivisible is very important and significant from a political point of view. But, when stated as a legal principle, it tends to dissolve into verbally impressive mysticism. It is of little assistance in a practical system of law where a Commonwealth can sue a State. . . .'[6]

The doctrine of the indivisibility of the Crown throughout the British Commonwealth gives rise to practical difficulties. Can New

[1] Sometimes the Crown is used as a term to denote any act of the *corporation sole*: at other times, however, the *Crown* is used to refer to acts of ministers, and the *King* kept for acts of the monarch in person. The Crown Proceedings Act, 1947, 10 & 11 Geo. VI, c. 44, s. 40, refers to 'His Majesty in His private capacity'.

[2] *Municipal Council of Sydney* v. *The Commonwealth* (1904), 1 C.L.R. 208 at 231.

[3] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1920), 28 C.L.R. 129 at 152.

[4] At least where prerogative rights are concerned 'the Crown is to be considered as one and indivisible throughout the Empire and not to be considered as a quasi-corporate head of several distinct bodies political': per Strong J., *R.* v. *Bank of Nova Scotia*, 11 S.C.R. 17. See W. Harrison Moore, 20 *L.Q.R.* (1904), 357.

[5] *A.-G.* v. *Gt. S. & W. Rly. Co. of Ireland*, [1925] A.C. 754; *Faithorn* v. *Territory of Papua* (1938), 60 C.L.R. 772.

[6] Per Latham C.J., *Minister for Works* v. *Gulson* (1944), 69 C.L.R. 338 at 350; *R.* v. *Dalgety & Co. Ltd.* (1944), 69 C.L.R. 18.

Zealand claim priority for a Crown debt (e.g. income tax) in an action in Canada? How do we rank priority between Commonwealth and States in Australia?[1] A reference to the Crown in a State statute does not bind the Crown in right of the Commonwealth.[2] In England there is now statutory recognition of the phrase 'belonging to His Majesty in right of the Government in the United Kingdom'.[3] In fact each part of the British Commonwealth must be treated as a separate legal *persona*. In spite of historical theory, the Crown is now a symbol of free association of nations each with individual and international personality.

In international law the State is a legal person. Since there is no super-state at whose magic touch personality may be conferred, such law as there is concerns the recognition of a new State by its equals. Recognition is sometimes withheld for political reasons, but should be given as soon as the new order shows a reasonable promise of permanence and of stable government. Recognition, as the term implies, is not creation but an acknowledgement of facts that already exist—in other words, in international law it is a question of fact whether legal personality exists.[4] The United Nations has legal personality.

The application of the doctrine of the *corporation sole* to the State has not proved a very convenient technique for English law. The superior advantage of the analogy of the corporation aggregate is that it emphasizes that subjects are also members of the State. The *corporation sole* is a convenient conception, only if the powers are exercised by one human personality at a time. Since the powers of government are often widely distributed, the organization of the State can best be understood if we think of the analogy of powers shared between the members and directors of a corporation; the memorandum and articles of association of the State are to be found in the fundamental presuppositions of the legal order which may be expressed in a written constitution or unwritten. If to any organ of the State there is given an unlimited power to create law, then logically we cannot bind by law powers that by definition are unlimited. Protection of the subject can be found only in a

[1] *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (1940), 63 C.L.R. 278.

[2] *City of Essendon* v. *Criterion Theatres Ltd.*, [1947] A.L.R. 270.

[3] Crown Proceedings Act, 1947, § 38.

[4] H. Kelsen, 35 *Amer. J. Int. Law* (1941), 605; H. Lauterpacht, *Recognition in International Law*.

distribution of powers, but even this will fail unless there be a strong public opinion which will express itself in cases where power is abused by the ruling body.

If the State is a legal person, how far is it, and how far should it be, liable to actions brought by citizens? The formal theory of sovereignty considered that suit against a sovereign was a contradiction in terms: in England the maxim, 'The King can do no wrong', was thought to provide a practical bar. Modern Fascist jurists think that the grant of any rights to the subject as against the State is a relic of obsolete ideas, since the judge is above private law and his only duty is to execute the will of the Leader.[1] Some Russian writers argue that rights of property should never be placed above the welfare of all. At the end of last century in France the dogma of sovereignty was so emphasized that a theory that the State should be liable for wrong was thought anomalous. But if, as is the case in democratic countries, we do desire to make the State liable to suit, there is no *a priori* reason why this should not be done. If there is a written constitution, then it may make the State liable both in contract and in tort—in such a case amendment of the constitution would be necessary to remove this protection of the subject. In England an Act makes the Crown liable in tort,[2] although it would alway be possible for Parliament to repeal it: the State is bound only so long as it consents to be bound. In France one of the most interesting developments in the field of administrative law is the working out of a definite theory of state responsibility. Duguit perhaps goes too far when he states that the doctrine of sovereignty must give way to one of social service, but a distinct change of approach is visible since the beginning of this century. Certainly, the problem of state responsibility is today much more acute than in the days of *laissez-faire*, for the activities of officials are now much more likely to infringe the rights of individuals.

The conflict between the ancient and the modern conceptions of the State may be seen in the argument whether the Crown can be criminally liable. If we put the emphasis on the old feudal conceptions, there is something ludicrous in the Crown condemning itself to pay a fine to itself: if we consider the modern collectivist state, there is much to be said for the view that the sanctions of the criminal

[1] R. Hoehn in *Rec. Lambert*, iii. 240.

[2] Crown Proceedings Act, 1947. The Commonwealth of Australia and all of the states subject the Crown to liability in tort. In U.S. the Federal Tort Claims Act, 1946, imposed liability.

law should be available against government departments.[1] If the Crown may make itself liable in civil cases, why not in criminal?[2] Many modern statutory offences are administrative in character and the object is not financial punishment but rather to police the rules by way of the stigma of conviction.[3]

[1] *Cain* v. *Doyle* (1946), 72 C.L.R. 409, discussed W. Friedmann, 13 *Mod. L. R.* (1950), 24.

[2] 'A penal sanction does not seem an impossibility especially when, as in this case, the judicial authority may order that portion of the penalty be paid to the employee': per Starke J., same case, at 421. The statute in question related to preference to ex-servicemen.

[3] W. Friedmann, op. cit. 35.

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XV

CRIMINAL LAW

§ 78. Introduction

To determine whether criminal law should properly be placed under the heading of public law it is necessary to consider what are the characteristic marks of a crime. Criminal law may be easily distinguished from most branches of private law, but it is very closely related to the law of tort. It is impossible to use the type of act as a test, since the same act may well be both a crime and tort. If Fagin takes John's watch, then that is both the tort of conversion and the crime of larceny. *Furtum* in Roman law was a wrong which gave a right to compensation to the injured owner, but the thief could alternatively be punished criminally.[1]

One suggested distinction is that crime is a breach of public law and tort a breach of private law. But this does not aid us, for to know whether a particular wrong falls under public law we must first decide whether it is a crime. Another test is that the criminal law requires *mens rea*, whereas in tort there may be absolute liability. But not all crimes require *mens rea*.

In English law the formulation of the distinction has been made more difficult by the course of legal evolution. One juristic freak, the action by the common informer, defied all logical classification. The object was punishment, but the penalty went into the pocket of the informer.[2] We shall first examine the formal differences. Kenny defines crimes as 'wrongs whose sanction is punitive, and is no way remissible by any private person, but is remissible by the Crown alone, if remissible at all'.[3] Firstly, the Crown has control over proceedings—a plaintiff in tort may compromise an action at any stage and the Crown cannot interfere, whereas in crime, even though a private prosecutor wishes to discontinue, the Crown may continue the proceedings. Moreover, the Crown has the right to pardon,[4]

[1] Clearly all acts which constitute torts do not subject to criminal liability; nor does every crime give a right of action in tort, for many crimes protect a public rather than a private interest, e.g. treason. See C. S. Kenny, *Criminal Law*, ch. i.

[2] The procedure was abolished by the Common Informers Act, 1951.

[3] *Criminal Law* (15th ed.), 16. The treatment is changed in the 19th ed.: see p. 5.

[4] There are exceptions to the power of pardon: see C. S. Kenny, op. cit. (19th ed.), 634.

whether the private prosecutor be agreeable or not, whereas in tort the plaintiff has the sole right to compromise proceedings. Secondly, a crime involves liability to punishment.[1] Although the prisoner suffers, the private individual who has been wronged does not benefit in a material sense.[2] The essence of a civil action is that a plaintiff sues to protect his own rights—either to secure performance or to recover compensation. Exemplary damages may introduce a punitive element, but the inflated damages go to the wronged individual and not to the State. Imprisonment for debt belongs to the civil law, but its object is not to punish but rather to coerce the debtor and, when the debt is paid, release follows.

In considering the material elements of crime, Dr. Allen stresses intrinsic wrongfulness and social expediency as two of the most important factors which have led to the designation of certain conduct as criminal.[3] Jerome Hall finds the distinguishing mark of a crime in social harm involving moral culpability. This is a factor which cannot be disregarded in studying the evolution of the criminal law, but it is not true that this is the only point to be considered.[4] Cutting across this notion of intrinsic wrongfulness are what have been called the 'public welfare' offences, which involve no moral delinquency, but are intended to secure the effective regulation of conduct in the public interest. Thus no moral slur is cast on a person who is convicted of driving a motor car without showing a rear light, nor is it necessary to prove that the defendant knew that his lamp was not alight. Criminal law may have originally been intended to keep the peace—today it also is used to enforce traffic regulations,[5] the selling of pure food, the keeping of a dustbin of an appropriate pattern, the

[1] C. K. Allen, *Legal Duties*, 220 at 231. P. H. Winfield defines a crime as 'a wrong the sanction of which involves punishment: and punishment signifies death, penal servitude, whipping, fine, imprisonment (but not, as a rule, non-coercive imprisonment) or some other evil which, when once liability to it has been decreed, is not avoidable by any act of the party offending': *Province of the Law of Tort*, 200. Punishment is personal to the offender, and the courts will not entertain an action against another for indemnity: *Askey* v. *Golden Wine Co. Ltd.*, [1948] 2 All E.R. 35 at 38.

[2] It is true that in certain cases a court may have a power after conviction of the prisoner to award restitution of stolen goods to the true owner, but this function is given to criminal courts merely for administrative convenience.

[3] *Legal Duties*, 237: naturally these cannot be used as a formal test. Many acts which are intrinsically wrong are not crimes, and many crimes do not consist of acts which are intrinsically wrong: see C. S. Kenny, op. cit. 8 et seq.

[4] *General Principles of Criminal Law*, 213. From this premiss the learned writer draws the conclusion that no conduct which is merely negligent should involve criminal liability (p. 239). To apply this doctrine to Anglo-American law would force us to deny that 'public welfare offences' were crimes.

[5] In England and in the U.S.A. over 60 per cent of the total offences are concerned with violation of the traffic law.

duty to vote at a parliamentary election.[1] In these cases proof of *mens rea* would make the task of the Crown too difficult: moreover, no injustice is done in imposing a light fine even on a person who is morally innocent. The danger is that these offences may be confused with 'true crimes' where the penalty is serious and there is a real stigma attached to conviction.[2] It is in recognition of the fact that some crimes involve no moral wrongdoing that certain countries which prohibit the entry of convicted criminals limit the operation of the rule to such crimes as involve moral turpitude.

Historically the general test of a crime is the degree of activity of the community. Thus if a wrong is regarded as primarily a matter of compensation as between individuals, it is a private delict. If the community itself takes steps to punish the offender, it is a public delict. The test is—if the victim does nothing or is compensated, will the community act? Hence, historically, intrinsic wrongfulness and social expediency are the tests which each community applies—but wide are the variations between the opinions of primitive men and the world of today. Moreover, we must add the pragmatic test that the community must consider that the wrong can be satisfactorily dealt with by punishment. It is wrongful to think evil of one's neighbour, to covet, to plan a seduction—but the law, in general, confines its attention to conduct.

Dr. Allen distinguished between 'public' and 'private' crimes in the sense that some offences primarily injure specific persons and only secondarily the public interest, while others directly injure the public interest and affect individuals only remotely.[3] There is a broad distinction along these lines, but differences naturally arise in the application of any such test. The learned author finds that out of 331 indictable English offences 203 are public wrongs and 128 private wrongs.

In crime, therefore, we find that the normal marks are that the State has power to control the procedure, to remit the penalty, or to inflict punishment. Many crimes also are wrongs against particular individuals only indirectly if at all. Thus we see that special rules apply because the State is one of the parties to the relationship—there is the power of the State to punish and the liability of the prisoner to be affected. Hence criminal law is correctly placed under the heading of public law.

[1] In Australia voting is compulsory in certain cases.

[2] *Infra*, § 82.

[3] *Legal Duties*, 249.

The criminal law is an interesting field in which to test the tenets of functional jurisprudence. The determination of what conduct should be termed criminal illustrates the relationship between law and morals; the imposition of strict liability in some cases shows the demands of social convenience; the analysis of *mens rea* reveals a serious lack of a logical approach; the imposition of prohibition in the United States shows that there are effective limits to the criminal law in action; the relative failure of the law to decrease the extent of crime shows how much more research is necessary before there can be increased detection and improved methods of 'treatment' of those convicted. Functional jurisprudence cannot proceed faster than the social sciences in solving these problems.[1]

§ 79. Theories of Punishment

Crime is man's second fear. A third of the people of America are afraid to walk alone at night in their communities.[2] Moreover, the intensity of the problem is increasing. In 1901, 80,962 crimes were recorded by the police in the United Kingdom: by 1965 the figure had risen to 1,133,382.[3] Even allowing for the growth of population and for the greater efficiency of the police force in recording crime, the increase is staggering. In the United States, taking 1940 as an index number of 100, the index rose to 165 by 1952.

There are many theories concerning the justification of punishment, but only typical approaches to this problem can be dealt with here. It is clear that the philosophy of punishment will affect the actual standards of liability laid down by the law. If punishment is based on an ethical desire to make men better, then a subjective theory of liability should be adopted. If punishment is designed to protect society from certain acts, then punishment may be inflicted where there is no moral guilt.

Is punishment an end in itself or a means to an end? Some theories look to the past—e.g. those that emphasize either the need to take vengeance on the wrongdoer or the necessity for expiation or retribution. The preventive theory concentrates on the prisoner, but seeks to prevent him offending again in the future. The reformative theory sees in the readjustment of the prisoner to the demands of society

[1] The problem of the relationship of crime and sin is discussed *supra*, § 37 (4).
[2] N. Morris and G. Hawkins, *The Honest Politician's Guide to Crime Control*, ix.
[3] McClintock and Avison, *Crime in England and Wales*, 23.

the greatest need of the criminal law. The deterrent theory emphasizes the necessity for protecting society, for so treating the prisoner that others will be deterred from breaking the law.[1] No system of law adheres entirely to any one theory. Even primitive law, apparently based on vengeance, is also built on the hope of deterring others. A successful reform of the prisoner will prevent him from offending again. On the other hand, the easiest way to prevent a prisoner from offending again is to hang him, but this can scarcely be called a reformative method.

The theories of expiation depend on moral doctrines which go beyond the limits of the law. It is not suggested that criminal law can or should be entirely divorced from the moral views of a particular community, but ethics must take a more subjective viewpoint than is possible for the law. Many ethical wrongs are not crimes at all and, conversely, the State often condemns acts which are free of ethical guilt.[2] It is not the task of the State to punish sin, but only to adopt measures against certain social dangers. Any attempt to enforce an ethical code in its entirety by the crude compulsion of the criminal law is foredoomed to failure. The more that science examines the mainsprings of human action, the more forcibly do we feel the strength of Christ's maxim, 'Judge not that ye be not judged'. If expiation be the reason for punishment, then a prisoner should be convicted only where he is ethically responsible for the act. Whether the will be free or not, it is now recognized that environment, heredity, and physical factors play a greater part in the urge to crime than our forefathers dreamed of.[3] How much of our administration of criminal law would stand an ethical searchlight? Clearly law must act to protect society, but it should not claim too lofty a justification for acts the reason for which is necessity rather than morality.[4]

Some forms of the retributive theory emphasize that punishment should be inflicted not merely in order to attain certain ends, but

[1] Cf. the sentence in *R.* v. *Blake*, [1961] 45 Cr. App. Rep. 292 at 298: 'This sentence had a threefold purpose. It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country'—per Hilbery J. in considering an appeal in a spying case. There was a decrease in drunken driving cases after the new legislation in 1967.

[2] Ignorance of the law is no excuse. Some statutory crimes do not require *mens rea*. It is no defence that the accused considered it his moral duty to perform the act.

[3] *Infra*, § 80.

[4] Jerome Hall strongly attacks this utilitarian approach. He considers that punishment should be based only on moral culpability—this would exclude liability for negligence: *General Principles of Criminal Law*, 239.

solely because the prisoner has committed a crime. If an island community was about to dissolve, its duty (so it is said) would be first to execute the convicted murderers in prison. The retributive theory is not, of course, the narrow theory of vengeance, but rather the doctrine that the wrong done by the prisoner can be negated only by the infliction of the appropriate punishment. The community as a whole places emphasis on the retributive theory, at least where certain crimes are concerned; a feeling of outrage demands satisfaction and, if the penalty imposed by the courts is not considered sufficiently harsh, there is a danger of lynch law. But 'the fuller becomes our insight into the springs of human conduct, the more impossible does it become to maintain this antiquated doctrine (of retribution)'.[1] Modern criminal law must seek another basis, whatever may be the view of religion or morality.

Today the usual legal approach is utilitarian, for it is recognized that the law cannot attempt to carry out all the dictates of religion or morality, but can enforce only that minimum standard of conduct without which social life would be impossible. The law must certainly protect society, and its rules cannot, of course, be determined without reference to moral values. But the object of the criminal law is not to reform men's hearts but to stamp out courses of conduct which either offend the minimum ethic or are socially inexpedient. Punishment must be directed both to deterring others from breaking the law and to readjusting the attitude of the offender to the demands of social life. Norval Morris writes that every criminal law system except one 'has deterrence as its primary and essential characteristic'.[2] But even a utilitarian approach does not mean that we can ignore the inner springs of human conduct, for punishment based on a real understanding of the mind of the particular criminal is more likely to be effective than that which metes out the same punishment for the same acts irrespective of the individual's character.

The tendency in the past has been to emphasize the *wrongful act*

[1] W. P. McDougall, *Social Psychology*, 12. Cf. Sir Samuel Hoare, introducing the Criminal Justice Bill, 342 *H.C. Debates* 282 (29 Nov. 1938), where he points out that he is trying to approach these problems principally 'from the angles of prevention and reformation. In a scheme of this kind there is no place for the remnants of a period that looked at the treatment of crime principally from the angles of retribution. I am therefore proposing to sweep away the remnants of former dispensations, now little more than the stage properties of Victorian melodrama: penal servitude, hard labour, ticket-of-leave, the name criminal lunatic.'

[2] 33 *Univ. of Chicago L. R.* (1966), 631. The exception is Greenland.

of the prisoner, and to assume that the traditional methods of treatment achieve good results. Seventy years ago Holmes J. asked: 'What have we better than a blind guess to show that the criminal law in its present form does more good than harm?'[1] Today skilled workers are examining the problem in an endeavour to discover the real effect of different methods of punishment. Modern criminology considers that the *personality* of the offender is as important as his *act* and emphasizes that the wrongdoer is not only a criminal to be punished but a patient to be treated.[2] The cry is for individualization of the penalty, not to let the punishment fit the crime, but the personality of the criminal.

Thus it is argued that the real test of criminality should be the extent to which the prisoner is endangering society, his act being treated as an index to his personality rather than as that alone which is deserving of punishment.[3] Some cases graphically show the weakness of our present methods. Thus in 1937, a man was convicted of rape. He was a psychopath, but not insane. After serving a sentence of five years, he was convicted of molesting two young girls. He was released after one year and then committed rape and murder, for which he was electrocuted.[4] If we fully applied the test of the danger of the personality of the prisoner, it would change the principles on which the severity of the punishment is calculated, for a relatively innocuous act may be done by one who is in fact a danger to society, whereas a serious crime may be committed by one who is unlikely to repeat the wrong. If we put all the emphasis on the likelihood of the prisoner's offending again, we would reach results very different from those of the orthodox system which grades penalties merely by a consideration of the act that was done and the harm that resulted. In the case of a lawyer or a doctor the real punishment is not the imprisonment, but his exclusion from the professional brotherhood, and, even without imprisonment, he is less likely to offend again than one who suffers no such loss. Ferri suggests that no doctor would fix rigidly in advance a patient's stay in hospital—his stay is

[1] (1897) in *Collected Legal Papers*, 188.

[2] In the medical sense treatment covers both cure and precautions against infection. Few today are likely to ignore the necessity for the treatment of the prisoner to be such as to deter others from following the example of the prisoner. Cf. P. Vinogradoff, *Historical Jurisprudence*, i. 59. *R.* v. *Ford*, [1969] 1 W.L.R. 1703, is an interesting case. Two accused pleaded guilty to the same offence. One was regarded as incorrigible and was sentenced to twelve months: the other was given a longer sentence in the hope that there would be time for reform. On appeal the longer sentence was reduced to twelve months. Cf. T. B. Hadden, 23 *Camb. L. J.* (1965), 117.

[3] S. Glueck, *Crime and Justice*, 214–15.

[4] 18 *Univ. of Cin. L. R.* (1949), 167.

determined by the time it takes to effect a cure.[1] Similarly he urges that the legal provisions for the treatment of criminals should be flexible enough to take into account the prisoner's response to treatment, or, in other words, the speed with which his reformation takes place. Baroness Wootton[2] has carried the modern theory furthest, in her thesis that the court should be confined to determining the facts and that punishment (or rather treatment) should be determined by a panel of experts who, as in the case of a doctor and a sick patient, could vary the treatment according to the progress of the prisoner.

There are several factors to be considered in assessing the practicability of such an approach. Firstly, it is not always easy to determine by a prisoner's conduct, when subject to observation, how he will behave when he is released. Secondly, there is the problem of the protection of individual liberties. In the case of disease, we are willing to enforce quarantine if necessary, but, save for such instances as leprosy, the periods of isolation are relatively short. Imprisonment raises more serious issues concerning private rights—thus liberalism feels that the power of the State to curb the liberty of wrongdoers must be curtailed and hence supports the rigid fixing of the maximum limits of punishment in each case. If an offender is incorrigible, should he be permanently detained, even if his only crime be larceny? The safeguarding of the liberty of the subject by stating in advance the maximum penalties involved in certain breaches of the law has its advantages.[3] C. S. Lewis has shown the danger of divorcing the criminal law entirely from morality.[4] The concept of danger to society, divorced from moral guilt, may lead to authoritarian interference with human liberty. The community would not tolerate deterrence as being the sole determinant of punishment. At a time of social fear, a judge may award a heavy sentence to a spy,[5] without raising resentment in the community—but it is otherwise with regard to more common offences. Illegal

[1] See *Relazione sul progetto preliminare di codice penale italiano* (1921); S. Glueck, 41 *Harv. L. R.* (1928), 453 at 469. See also a translation by J. I. Kelly and J. Lisle of Enrico Ferri's *Criminal Sociology* (1917). The Soviet theory also emphasizes that the social danger of the act should be the most important consideration—in this case, of course, the social danger being considered from the point of view of the proletariat: see J. Zelitch, *Soviet Administration of Criminal Law*, 366.

[2] 76 *L.Q.R.* (1960), 224.

[3] *Infra*, § 83, for the effect of the maxim *nulla poena sine lege*.

[4] *The Humanitarian Theory of Punishment*, 3 *Twentieth Century* (1949), 5; (1953) 6 *Res Judicatae*, 224, but see N. Morris and D. Buckle, *The Humanitarian Theory of Punishment, a Reply* (1953) 6 *Res Judicatae*, 231, and J. J. C. Smart (1954) 6 *Res Judicatae*, 368; C. S. Lewis (1954) 6 *Res Judicatae*, 519; H. L. A. Hart, *Changing Conceptions*, 205; P. Brett, *An Enquiry into Criminal Guilt*, 74.

[5] *R.* v. *Blake*, [1961] 3 All E.R. 125.

parking of motor cars would be much diminished if the penalty was the confiscation of the car, but no society of motor car owners would tolerate such a law.[1] Thirdly, the law treats an attempt as deserving of less punishment than a completed crime. Yet, if the consummation of the crime is prevented by causes beyond the control of the prisoner, an attempt reveals that the prisoner is as much a social danger as if the crime had been completed. But so imbued are we with the notion that the punishment must bear some measure to the injury caused, that, at first sight, it would seem unjust to treat an attempt as severely as a completed crime.[2] Fourthly, in addition to social danger, we must also consider moral blameworthiness. There are cases where it is expedient to create crimes which do not require *mens rea*, but these exceptions should be strictly limited. Unless the average man feels that there is an element of blame attachable to the offence, then it may become 'respectable' to be convicted and the criminal law may lose one of its deterrents. It may be necessary to have objective standards, but, if these are not related to the habits of the ordinary citizen, the standard set will probably be too high. Even from an objective standpoint it is necessary to consider *mens rea*, for a prisoner who commits a dangerous act accidentally is on the whole less likely to repeat his conduct than is one who acted intentionally. Fifthly, we can carry the theory too far. If a person commits a murder under extraordinary psychological stress which is most unlikely to recur, then that murderer is hardly a future danger to society. But few would suggest that punishment should therefore be waived. Lastly, it must be remembered that in an imperfect world the law must provide an outlet for that resentment which arises against the perpetrator of certain outrages. If modern schemes are to be successfully applied, then a cautious and tentative beginning must be made with crimes that do not arouse too much public indignation.[3] But even in these cases we must remember that the treatment should not only readjust the prisoner, but be such as to deter others. If it were proved that all tendency to steal could be removed by a grant of £20,000, would that 'treatment' encourage or discourage *others* from committing larceny? Psycho-analysis has shown that even the law-abiding citizen is helped in the struggle against his anti-social desires by the spectacle of others being punished for doing that which he

[1] H. L. A. Hart, *Punishment and Responsibility*, 76.
[2] See the discussion by Rupert Cross, 81 *L.Q.R.* (1965), 205.
[3] J. Hall, *Theft, Law and Society*, 293, 298. The author suggests petty larceny as a useful field for experimentation.

consciously or unconsciously desires to do.[1] There is thus a conflict in each case between the needs of a particular prisoner and the social interest in enforcing the law. What may be the best treatment for a criminal may conflict with the necessity of deterring others.[2] Moreover, the 'social danger' school should be modest, for our methods of treatment do not yet win the success which they should. Until we can be more exact in methods of treatment, we should not divorce the criminal law too far from community standards.[3] The real problem is therefore to combine the deterrent and reformative theories in due proportions. The expense of research into proper methods and of experimental treatment will be high—but what is the cost of crime to the community? To readjust a prisoner so that he may play a useful part in social life is in the long run a cheaper method than that of periodical sentences or life imprisonment.

Among lawyers, the deterrent theory was, until recently, the most popular, and much scorn was sometimes poured on the 'weak' or 'sentimental' approach of those who advocate reform. It is true that some reformative theories are marked by lack of realism, by sentiment, and show no evidence of contact with the criminal classes, but the modern approach to criminology is as coldly scientific as it can be. The criminal is a danger both to society and to himself, and the criminologist urges only that the most scientific methods be used to remove this danger.[4] Few modern writers fail to recognize the need to deter others. On the other hand, to regard deterrence as the sole end of the criminal law is a confession either of defeatism or of cynicism.

One of the best deterrents is that a wrongdoer's chance of discovery and conviction is fairly high. The percentage of crime 'cleared up' in England is estimated by McClintock and Avison[5] as follows:

Year	*Percentage*	*Year*	*Percentage*
1938	50·1	1955	48·7
1945	41·3	1964	39·6
1954	49·2	1965	39·2

[1] F. Alexander and H. Staub, *The Criminal, the Judge and the Public.*

[2] F. B. Sayre, 43 *Harv. L. R.* (1930), 689 at 720; Barbara Wootton, *Social Science and Social Pathology* (1959), 336.

[3] N. Morris and Howard, *Studies in Criminal Law*, 168.

[4] Thus Dr. R. D. Gillespie writes that in so far as the psychiatrist forgets society, he is ceasing to be a psychiatrist, and lapsing into sentimentalism: 7 *Medico-Legal and Crim. R.* (1939), 153 at 154.

[5] *Crime in England and Wales*, 93. Such figures cannot be entirely relied on, for some alleged crimes reported to the police may not have taken place, and there may be many

The detection rate varies for different offences, from 95 per cent for homicide to 25 per cent for larcenies. Where there is an 'even chance' of escaping conviction, many may be willing to take the risk who would not do so if punishment followed as certainly as night follows day.

Russia divides crime into two classes: minor crimes and those which strike at the safety of the State or are the result of *bourgeois* motives. Those guilty of offences of the latter description are harshly treated, and Russian jurists scornfully dismiss as out-moded liberalism any guarantee to the prisoner of rights which might conflict with the safety of the State. Thus trial by jury is distrusted, as a jury might not always decide in accordance with the general directions of state policy. But those who are guilty of minor crimes are tried in the People's Court, and the treatment in prison is built on modern reformative methods. Many persons are placed in open or semi-open camps: in some cases prisoners are placed in labour communes, with a village life which is as much as possible like that of free men.[1] There is little prison stigma and, since many prisoners receive a technical training, they have, on release, no difficulty in securing employment. But the accessible data are not yet full enough to make a final assessment of the result—such literature as is available shows very diverse pictures. This is clearly brought out by the analysis of Zile who points out that American writers on Soviet law have by and large tended to find what they wanted to find.[2]

But the real problems of punishment cannot be finally disposed of until the question of the causes of crime has been discussed.[3]

§ 80. The Causes of Crime

The question 'What is the cause of crime?' has been called a non-question. We do not look for a cause of all disease, we analyse the cause of each specific disease.

Criminology is a fairly new science and is in a rapid state of development. Moreover, it is a 'parasitic' science and its conclusions

crimes which for various reasons are not reported to the police at all. For an examination of the method by which criminal statistics are compiled, see L. Radzinowicz, 56 *L.Q.R.* (1940), 483; see C. H. Rolph, *Common Sense about Crime and Punishment* (1961), ch. ii; Barbara Wootton, *Social Science and Social Pathology* (1959), 21–2.

[1] See D. N. Pritt, in *Twelve Studies in Soviet Russia* (ed. M. I. Cole), 145.

[2] Z. L. Zile, 70 *Col. L. R.* (1970), 194.

[3] The same crime may be committed by very different types. Thus the receiver of stolen goods may be one who buys cheaply for his own use and has never offended before, or one who makes a profession of the practice. For a functional study of the problems of larceny and receiving, see Jerome Hall, *Theft, Law and Society.*

are dependent on the further development of psychology, psychiatry, and sociology. Much more research is necessary before a criminologist can draw sound conclusions. Indeed, the apparently chaotic list of what are alleged to be causal factors does not at the moment provide much assistance in the prevention of crime. It is not quite true to say that statistics can be found to prove anything, but it is alarming to see the conflict between different statistical studies of causative factors.[1] This is strongly borne out by even a casual reading of Sutherland and Cressey's work.[2] One great problem is that criminal statistics, being collected on different bases, are not really comparable as between one country and another: and even within one country, methods of collection have varied over the years. Moreover, our study of the criminal classes is limited to those convicted—those who escape arrest are not known as criminals—and, as Baroness Wootton points out, in much research work there is a devastating lack of precision in the terms used.[3]

The acts termed criminal by the law have nothing (or little) in common save that a statute or the common law has prohibited them —crimes vary from deliberate murder to not having a dustbin of the appropriate pattern. Hence we need to break the subject up into its component factors, for the incoherent mass of the criminal law cannot be dealt with as a whole from the angle of causation.

(*a*) *Physical Causes*

Lombroso believed that criminality was closely related to the possession of certain physical qualities. From his examination of prisoners he believed that certain physical characteristics revealed a tendency to crime in their possessor and that, if several of these characteristics were found in one person, he belonged to a criminal type.[4] Crime was an atavistic phenomenon. Dr. Goring, however, subjected these conclusions to a detailed examination,[5] correlating his results with statistics obtained from the non-criminal population, and he found greater physical differences between the English and the Scottish than between convicts and observers of the law. He concluded that there is no such thing as a 'physical criminal type'. The most recent detailed examination of the biological characteristics

[1] Morris and Hawkins, *The Honest Politician's Guide to Crime Control* (1969), 241.
[2] *Principles of Criminology* (1955).
[3] *Social Science and Social Pathology*, 170.
[4] *Criminal Man* (ed. G. L. Ferrero).
[5] *The English Convict*.

of criminals is that of Hooton,[1] who devoted twelve years to tabulating and measuring 17,000 American cases. The criminals were divided into racial stocks and the conclusions were checked by comparative samples taken from the non-criminal population. The conclusion was that, while there was no evidence to support the conclusion of Lombroso that the criminal is in general a primitive man at odds with society, nevertheless the criminal was, on the whole, poorer in physique and organic adaptability. Hence the result of the statistics collected is only that the more numerous and accentuated are the signs of organic inferiority in any individual, the more likely he is to indulge in crime. This is far removed from any doctrine that our physical characteristics inevitably predispose us to crime, for Hooton recognizes that sociological, as well as biological, factors play their part. Moreover, the criminal in custody is largely drawn from the lower economic strata in which the position is unfavourable for physical development. Females have a lower rate of criminality than males. If we accept Hooton's thesis, it should follow that females are biologically superior to males.

While it is impossible to find general physical characteristics which mark all the criminal population, nevertheless, in an individual case, a physical condition may be a contributory cause of crime. Medical research on the ductless glands reveals what tremendous changes in personality may take place because of their disordered functioning. It is, however, rash to conclude from a few striking cases either that character is solely determined by physical causes, or that such cases represent more than a small percentage of the criminal population. But it is reasonable to admit that, where the cause of crime can be demonstrated to be due to physical disease, a hospital and not a prison should be the answer of the law.[2]

Age and sex, however, are physical characteristics, and the influence of these is reflected in the statistics. For some years, the most dangerous age bracket for males was thirteen to fourteen years, and for females fifteen to seventeen, but by 1965, the age was fourteen for both sexes.[3] In the United Kingdom, over half of those convicted of

[1] *The American Criminal; Crime and the Man.* Cf. W. Norwood East, 30 *Minn. L. R.* (1946), 435. Serious criticisms have been made of the statistical techniques used by Hooton. His control groups were rather small and were not a random sample.

[2] Compare the case of males with an extra γ chromosome—R. G. Fox, 2 *Aust. and N.Z. J. of Criminology* (1969), 5. Exaggerated claims have been made for the causative effect of the extra chromosome in inducing crime, and more research is necessary before dogmatism is justified.

[3] Barbara Wootton, *Crime and the Criminal Law*, 10.

indictable offences are under twenty-one years.[1] The chances of a person being convicted drop after the age bracket of greatest criminality.

With regard to sex, Baroness Wootton points out that no serious attempt has been made to explain why the ratio of male criminality to female is 8:1.[2] In countries where the female is not emancipated, the ratio of feminine crime is exceedingly slight.[3]

It has often been argued that race is a cause of crime. To the native born American it was a convenient hypothesis that immigrants were responsible for a large proportion of crime. The figures show, however, that while the first generation of immigrants tend to follow the pattern of criminal behaviour of the country they have left, their contribution to the criminal problem is lower than that of the local born: the children of the migrants begin to adopt the American criminal pattern, and by the third generation, there is no significant statistical difference between the grandchildren of the immigrant and the local population.[4]

Crime rates of the negro are high, but this does not necessarily demonstrate biological causation. If the figures are analysed, the rates vary from one district to another, and are lower as educational status rises. Depressed economic environment at least plays some part.

(*b*) *Mental Factors*

There have been many rash assumptions made as to the influence of mental weakness. 'Enthusiasm not uncommonly outruns discretion and it would be a great misfortune if the psychiatric approach to crime became discredited by irresponsible exponents unaware, perhaps, of the complexity of the problems involved.'[5] Before the war many investigators maintained that weak intelligence was one of the major causes of crime, but recent researches have shown that there is less difference between the criminal class and the general population than was formerly believed.[6]

[1] Op. cit. [2] Op. cit. 6.

[3] The proportion in Algiers is alleged to be 2,744 males to 1 female.

[4] E. H. Sutherland and D. R. Cressey, *Principles of Criminology* (1955), ch. viii.

[5] W. N. East and W. H. de B. Hubert, *The Psychological Treatment of Crime*, 157.

[6] R. H. Gault, *Criminology*, 123. East and Hubert, op. cit. 7, think that the 'normal group would include at least 80 per cent of offenders'. 'More recent psychological evidence has conclusively demonstrated that inferior mentality is neither the specific cause nor the outstanding factor in crime and delinquency': J. C. Coleman, cited Sutherland and Cressey, op. cit. 120. Even if a high percentage of delinquent children come from the ranks of the mentally defective, the real cause is the failure to adjust to school or society.

It must not be supposed, however, that the work of the psychiatrist is limited to those with a low level of intelligence. Possession of the highest intellectual power is no guarantee against crime. Mental conflict, a neurosis, or an unconscious feeling of guilt may lead astray one with a high intelligence quotient. Where certain types of personality are concerned, ordinary methods of punishment may well fail, unless psychotherapy removes the mental factors which are the real cause of the delinquency. The psychopath, for example, may not be insane as the law defines that term, but may benefit greatly from understanding treatment. The psychologist would be the first to admit that society must be protected from such persons and that in many cases there may be little prospect of successful treatment.[1] But a wider power to order psychiatric treatment would add to, and not diminish, the effectiveness of the law. The practical difficulty is to discover a method which will isolate the cases in which such treatment will be useful, for to order psychological examination of all offenders would be impracticable. But great advances are now being made, as knowledge of the working of the human mind increases. Without accepting the views of determinism, it is clear that the will is not as free as was once thought—a bad environment or wrong handling may predispose to crime. Moreover, the line between the sane and the insane is not as clear cut as the law supposes, and even if we adopt an air of cautious reserve towards some of the more startling claims of the psycho-analyst, it must be admitted that there are many cases where ordinary punishment will not protect society and will not 'cure' the offender.[2]

Insanity. The legal test of insanity is still based on the advice which was given by the judges to the House of Lords in 1843.[3] English law puts all the emphasis on the cognitive factor: did the prisoner understand the nature and quality of his act? If he did, did he know that what he was doing was wrong? If a prisoner's act falls outside these tests, it matters not how weak or diseased the will may

[1] East and Hubert, op. cit., *Mental Abnormality and Crime* (ed. Radzinowicz).

[2] Dr. D. Carroll in 8 *Medico-Legal and Crim. R.* (1940), 182. See A. A. Bartholomew, 'The Forensic Psychiatrist's Place in Correction', 3 *Aust. and N.Z. J. of Crim.* (1970), 83.

[3] *R.* v. *M'Naghten* (1843), 10 Cl. & F. 200; H. Barnes, 8 *Camb. L. J.* (1944), 300; L. A. Tulin, 32 *Col. L. R.* (1932), 933. Dr. R. D. Gillespie has described the rules from the angle of a psychiatrist as 'both theoretically fantastic and practically unacceptable'—7 *Medico-Legal and Crim. R.* (1939), 153 at 159; Sir Roland Burrows, K.C., has retorted that some doctors commit themselves to definitions of insanity which would make it almost impossible to find a really sane person—op. cit. 163. For a spirited defence of the *M'Naghten* rules, see J. Hall, *General Principles of Criminal Law*, ch. xiv.

be—thus irresistible impulse is no defence.[1] Many judges have urged that the more powerful the influence, the more certain should be the punishment. 'If an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it', said Bramwell B.[2] Similarly Lord Hewart referred to the fantastic and subversive theory of uncontrollable impulse.[3] Yet many psychiatrists recognize that one under the control of an irresistible impulse is not really responsible for what he is doing. The High Court of Australia has suggested that, where there is evidence of uncontrollable impulse, it should be carefully explained to the jury, as it may provide reason for inferring lack of capacity to understand the nature of an act or to know that it was wrong.[4] This would be an effective way of broadening the spirit of the M'Naghten rules. Many are rightly dubious of the wisdom of leaving the decision of such an issue as irresistible impulse to a jury; but this argument really shows that the jury is not a fit body to determine the question of sanity rather than that the doctrine of insanity should be narrowed for the benefit of laymen. The Queensland Criminal Code recognizes as a defence both the cognitive and the conative aspects—incapacity to control as well as incapacity to understand are relevant.[5]

If a person suffers from insane delusions, the law adopts a simple but rather quaint test—provided that the act would be innocent if the delusion represented a true state of facts, then the prisoner escapes. If the act would be a crime, even if the delusion pictures reality, then the prisoner is guilty. The absurdity of this test is that it assumes that a man's mind may be divided up into separate compartments, and that a delusion may exist in one, while the other compartments are perfectly sane.[6] What is really significant is the unhealthy state of mind which allows an insane delusion to flourish—the connection between the delusion and the act may be quite irrational but nevertheless exist.

[1] *A.-G. for South Australia* v. *Brown*, [1960] 1 All E.R. 734, and see the note of this case and of the Australian developments by P. Brett, in 23 *Mod. L. R.* (1960), 545.

[2] *R.* v. *Haynes* (1859), 1 F. & F. 666 at 667.

[3] *R.* v. *Kopsch* (1925), 19 Cr. App. Rep. 50.

[4] *Sodeman* v. *R.* (1936), 55 C.L.R. 192: per Latham C.J. at 203–4; per Dixon J. at 214–15; per Evatt J. at 227. Actually statistics show that the jury must treat the rules in a broad fashion. Thus in England, of 77 persons arrested for murder, 27 were convicted, 16 found guilty but insane, 15 were found insane on arraignment: *Home Office Criminal Statistics* (1948), Cmd. 7428.

[5] § 27.

[6] As J. F. Stephen puts it, the prisoner is treated as a sane man under a mistake of fact for which he is not to blame: *H.C.L.* ii. 157.

The doctrine of 'diminished responsibility' was introduced by the Homicide Act of 1957. When capital punishment was in force, this provided an alleviation of penalty, when it could be shown that the accused suffered from such an abnormality of mind as to substantially impair his mental responsibility for his act. Lady Wootton has incisively examined the case law in this respect.[1] The rules of insanity were difficult to apply,[2] but to ask the jury to rule on diminished responsibility was to give to them a question which even the experts found unanswerable. She takes the heroic step of suggesting that the concept of responsibility should be allowed to wither away. Courts would be concerned with finding the prisoner guilty of the prohibited act. Questions of insanity, diminished responsibility, and moral guilt would be considered only after conviction and be relevant to treatment only. This is further discussed below.[3]

It may be noted here, however, that if the criminal law is entirely divorced from moral values and if mental health is regarded merely as adjustment to community demands, then deviant liberals under Hitler's regime were fit subjects for criminal treatment.[4] Is mental health to be determined by the psychiatrist without any thought of moral values?

(*c*) *Regionalism and Economic Causes*

Crime rates vary, not only from one nation to another, but also are normally higher in urban than in rural areas. The United States has a fire-arms homicide rate of 2·7 per 100,000 persons, whereas that of the United Kingdom is 0·05 per cent.[5] In many countries there is a greater crime ratio in the large towns than in rural areas. Thus per 100,000 of the population London had a rate in 1965 of 3,378 and the small counties 1,719.[6] If we take a particular city and draw a series of concentric circles based on the centre, crime rates decrease as we

[1] 76 *L.Q.R.* (1960), 224.

[2] Barbara Wootton points out that, for all its faults, the M'Naghten rule could be more easily applied than any doctrine of an impaired will: *Social Science and Social Pathology*, 233.

[3] § 81. S. H. Kadish, 26 *Camb. L. J.* (1968) at 285, reads Barbara Wootton's proposal as abolishing *mens rea* in the widest sense (the mental element required for a particular crime), but this is questionable, as she states: 'I am not, of course, arguing that all crimes should immediately be transferred into the strict liability category. To do so would in some cases involve formidable problems of definition—as, for instance, in that of larceny': *Crime and the Criminal Law*, 56–7.

[4] Barbara Wootton, *Social Science and Social Pathology*, 221.

[5] Morris and Hawkins, 10 *Midway* (1969).

[6] McClintock and Avison, *Crime in England and Wales*, 74.

get to the periphery.[1] Criminality rates may sometimes be linked to slum areas, but we find also in new communities, e.g. Housing Commission development with high rise flats, that the incidence of crime is higher than in the normal suburb. The type of community is thus important, as much criminality is behaviour learned from associates.

Statistics are not yet complete enough to discover any precise relationship between poverty and crime. Indigence may afford a contributing cause. A millionaire, who is not abnormal mentally, is not likely to steal a hundred pounds, whereas one pressed by hunger has strong motives to do so. But there are crimes other than those against property and to these the wealthy as well as the poor may be tempted. Glueck writes that in the juvenile delinquent group 68 per cent of the families were in 'marginal economic circumstances', and in the adult criminal group 56 per cent of the families.[2] But these figures would need to be tested by comparison with other data, e.g. the proportion of families in the whole population that lived in such poor conditions and reliable comparative figures are not yet available.[3] At least it may be said that it is now recognized that the attack on the problem of crime must be accompanied by an attempt to raise the general standard of life both in a material and an intellectual sense. If we confine our attention to indictable offences, then nine out of every ten criminals are convicted for an offence against property. This does not, of course, show that poverty was a factor in each of these cases, but it illustrates the great concern of the law with the protection of property. Whenever an economic depression occurs, the number of criminal offences increases.

(*d*) *Alcoholism*

While we cannot accept the easy answer that consumption of alcohol is *the* cause of crime, a study in Victoria showed that out of 1,836 prisoners sentenced to imprisonment for three months or more, 17·6 per cent were chronic alcoholics and 25·8 per cent were under the influence—a total of 43 per cent.[4]

[1] Ibid. 138.
[2] *Crime and Justice*, 189.
[3] In England in 1965, out of 1·1 million indictable crimes known to the police, 95·8 per cent related to offences against property: McClintock and Avison, *Crime in England and Wales*, 36.
[4] A. Bartholomew, 1 *Aust. and N.Z. J. of Crim.* (1968), 70.

(e) *Conclusion*

It is impossible to regard crime as the result of any one cause. Crime is the result of character, but what is character? Is it mainly a resultant of heredity or of environment or do both play an equal role? The theory of evolution is more easily understood if we accept the view that parents transmit to their children the characteristics which they have acquired, but no conclusive biological evidence has yet been produced to justify this doctrine. In the human sphere especially it is difficult to distinguish what is due to heredity from what is the result of the environment in the early years of life, for in the normal case the parents determine the environment for the child. Moreover, there is sometimes great diversity in the characteristics of children of the same parents. Biology and psychology are only on the fringe of the problem of the inheritance of acquired characteristics and of the formation of character.[1]

What can be dogmatically stated is that, whatever is the precise role of the genetic factor, environment frequently predisposes to a criminal life. Maladjustment to society may easily follow from the wrong treatment of children by parents. No successful attack can be made on the problem of crime if the evils which threaten home life are not removed. But this is an issue which goes to the roots of the community life. Just as general health is necessary to the individual to make him strong enough to ward off disease, so a sound life in the body politic is the best preventive of crime. Poverty which makes home life miserable, friction between the parents which makes it intolerable, both influence adversely the children exposed to it. The most fruitful course for the community to pursue is to ensure as far as possible that the influences which surround the young are such as to adjust them to community life. But the statistics do not allow us to put forward any simple theory of causation of crime or any miraculous method of lessening its incidence.

§ 81. Modes of Punishment

A set punishment for a particular crime will not operate with equal effectiveness if the causes which led the first offender to break the law are different from those which induce the second offender.

[1] Interesting work has been done concerning the records of 'identical twins': J. Lange, *Crime as Destiny*, trans. Charlotte Haldane.

The more savage modes of punishment have gradually been abolished—physical torture is now happily rare. Few modern codes emphasize corporal punishment as a general sanction. In England corporal punishment is abolished save for those guilty of serious prison offences while serving their punishment.[1] In the last case, further imprisonment is not an effective deterrent to one who has already been sentenced for life. In the other cases, there is great difference of opinion. Is corporal punishment the effective deterrent it is claimed to be? Does it brutalize the prisoner?[2]

There has been a gradual decrease in the number of offences for which the penalty is death. In the time of George III there were at least 220 capital offences.[3] The agitation for reform was assisted by the bankers who realized that the sentence for forgery made it too difficult to secure a conviction.[4] Today a growing number urge that capital punishment should be entirely abolished, although some still support it as the appropriate penalty for murder and treason. In England, capital punishment was abolished in 1965 for an experimental period of five years,[5] and this was made permanent in 1970. In America it has recently been argued that the death penalty is unconstitutional as a cruel and unusual punishment.[6]

It is now realized that, if public opinion regards the punishment as out of all proportion to the nature of the offence, the law defeats its own object, since even the courts may encourage evasion of the law. There is no need to recall the pious perjury of juries—thus Joseph Court was indicted for stealing goods valued at £300 and the jury found him guilty of larceny of goods to the value of 39 shillings in order that the conviction should not carry with it the penalty of death.[7] The frequent spectacle of executions brutalizes a community, and pickpockets plied their trade under the shadow of the gallows during an execution which was intended to be a dread warning to malefactors.

[1] Prison Act, 1952. 15 & 16 Geo. V and 1 Eliz. II, c. 52, § 54 and Schedule 4.

[2] See *Report of the Departmental Committee on Corporal Punishment* (1938), Cmd. 5684, reviewed 2 *Mod. L. R.* (1938), 54; *Corporal Punishment: Report of the Advisory Committee on the Treatment of Offenders* (1960), Cmd. 1213; J. W. J. Edwards, *Corporal Punishment in Northern Ireland* (1956), *Crim. L. R.* 814; C. H. Rolph, *Common Sense about Crime and Punishment* (1961), ch. viii.

[3] L. Radzinowicz, *History of English Criminal Law*, 3–5.

[4] Ibid. 592.

[5] Murder (Abolition of Death Penalty) Act, 1965: see also the Home Office publication, *Murder 1957–1968*.

[6] A. J. Goldberg and A. M. Dershowitz, 83 *Harv. L. R.* (1970), 1773.

[7] J. Hall, *Theft, Law and Society*, 97.

Imprisonment of offenders, if enough offenders are caught and convicted, undoubtedly has a deterrent effect on many others, but it is impossible to be satisfied with the actual results to the criminal himself. McClemens J. has written: 'As each year passes, . . . I become more convinced of the sterile and crimogenic qualities of imprisonment.'[1] To quote an understatement by Sir Alexander Paterson: 'I gravely doubt whether an average man can serve more than ten continuous years in prison without deterioration.'[2] The percentage of persistent offenders is a sad commentary on the effectiveness of a prison sentence. In the U.S.A. the Wickersham Commission writes that it would not be surprised to learn that 60 per cent of the persons received in prison are recidivists.[3] Although a large proportion of 'first-timers' are not convicted again, 'the probability of relapse increases with the number of previous sentences, and a substantial part of the prison population consists of a "stage army" of individuals who pass through the prison again and again'.[4]

There is, however, a welcome recognition of the need to individualize the penalty—not to let the punishment fit the crime, but the particular criminal.[5] Although the staple sanctions are still fine, imprisonment, and death, much research is being carried out and English penal policy over the last few years has been very 'bold, consistent and experimental'.[6] There is decreasing faith in the efficacy of imprisonment as a satisfactory method for all cases. Out of 100 punishments, the year 1900 shows 49 of incarceration, but by 1959 the figure had dropped to 14; in 1900 there were 17 cases of conditional releases, whereas in 1959 this method was used in 43

[1] 43 *A.L.J.* (1969), 358.

[2] *Memorandum to the Select Committee on Capital Punishment, 1930.*

[3] The *Report of the Persistent Offenders Committee* (1932), Cmd. 4090, states that in 1930, of the 39,000 sentences of imprisonment, 26,000 were imposed on persons who had previously been found guilty of offences: cited L. W. Fox, *The Modern English Prison*, 167. At 206, however, Fox points out that to get a true picture it is necessary to separate out the convictions for drunkenness which enormously raise the total of recidivists. Ignoring drunkards, in 1931, 51 per cent of the men and 47 per cent of the women were known to have been in prison before. In 1955, 35,000 recidivists came before the English courts; in 1965, the figure had risen to 90,000: McClintock and Avison, *Crime in England and Wales*, 247.

[4] 1932, Cmd. 4090. For a comparative survey see N. S. Timasheff, 30 *J. of Crim. Law and Crimin.* (1939), 455; G. K. Brown, 23 *Can. B. R.* (1945), 630; N. Morris, *The Habitual Criminal.*

[5] An interesting study of the sympathetic attitude of the courts to immigrants who may not fully understand the British way of life is that of F. O. Shyllon, 34 *Mod. L. R.* (1971), 135.

[6] L. Radzinowicz, 3 *Mod. L. R.* (1939), 127 and 75 *L.Q.R.* (1959), 381; *Penal Reform in England* (eds. L. Radzinowicz and J. W. C. Turner).

cases. Whipping fell from 7 to 0·2 per cent,[1] and by 1948 it had been abolished save for prison offences.

In the case of all offenders dealt with in the higher courts in 1965, 40 per cent were imprisoned, 20 per cent were sent for Borstal training to a detention centre or an approved school, 5 per cent were conditionally discharged, 17 per cent placed on probation, and 15 per cent fined.[2] 'The prison population has been thinned out by at least three quarters: from 145,000 before the First World War to 35,000.'[3]

It is hasty to say that, since the use of imprisonment is receding and the incidence of crime is increasing, the first fact is the cause of the second. 'A penal philosophy based on principles of reformation does not appear to have a direct connection with the upward trend in crime. Reformative measures, even today, are applied to only a small proportion of offenders found guilty.'[4]

One thing that has reduced the incidence of imprisonment is that it is generally recognized that the short prison sentence has many disadvantages and few counterbalancing benefits. The stigma of prison life causes loss of self-respect, the influence of other prisoners may corrupt what good there is, and the period is not long enough for the prison authorities to follow any constructive policy aimed at reform.[5] It is true that classification of prisoners attempts to avoid the worst results of moral pollution, but even the extensive schemes of modern prison administration cannot secure complete success. In 1948 this was recognized by extending the power to fine even to cases of felony.[6]

Yet, until more data are available, the imposition of sentences can depend only on the 'merest empiricism'.[7] The common law reliance on judge and jury has secured an impartial tribunal for the determination of the guilt of the prisoners, but it does not necessarily follow that this method should be used for the decision of the separate question of the type of treatment which should be applied to the prisoner. Glueck suggests that the trial judge should be aided in his deliberations on sentence by a board consisting of a psychiatrist or

[1] L. Radzinowicz, 55 *L.Q.R.* (1939), 273.

[2] The percentages have been rounded off: McClintock and Avison, *Crime in England and Wales*, 258.

[3] L. Radzinowicz, 75 *L.Q.R.* (1959) at 397.

[4] McClintock and Avison, op. cit. 60.

[5] 'The grim and costly cycle of law enforcement provides temporary alleviation without effecting a cure': *Victorian Report on Penal Establishments*, 5129/49.

[6] Criminal Justice Act, 1948, § 13: the power is in lieu of, or in addition to, any other punishment laid down.

[7] Dr. R. D. Gillespie, 7 *Medico-Legal and Crim. R.* (1939), 153 at 155.

psychologist and a sociologist or educational expert who would consider not only the individual needs of the prisoner but also the general interests of society.[1] Most modern systems, however, tend to leave the judge to his traditional methods but to require him to fix minimum and maximum limits to the sentence imposed, and so to leave room for discretion to be exercised by an expert board with power to determine the particulars of the correctional process whether by use of 'parole' or otherwise. Baroness Wootton suggests that the court should be confined to determining the facts, and that treatment of the convicted should be determined by a panel of experts.[2] Interesting comments on this proposal are made by Barry J., a judge with over twenty years' experience.[3]

Discharge is a method that is increasingly used. In England the court has power to discharge without penalty, if after considering all the circumstances it is felt to be expedient to do so. As an alternative, the court may discharge the defendant conditionally subject to his committing no offence for the next twelve months. If the prisoner commits no further offence during the set period he escapes punishment; but if he commits another crime, he also renders himself liable to a sanction for the first. In addition to being 'bound over', the prisoner may be placed under the care of a probation officer for three years. If the officer is skilled and energetic, and possesses the necessary understanding of human nature, he may be able to exercise a decisive influence by finding the prisoner a post and giving him warning of unfortunate associations before they are a cause of relapse.[4] There is power to fine for breach of a probation order

[1] *Crime and Justice*, 225–6. For examples of discrepancies in sentences in the U.S.A., see M. F. McGuire and A. Holtzoff, 20 *Boston Univ. L. R.* (1940), 423: for violation of the liquor laws during 1935, the average sentence of imprisonment imposed by one judge was 815 days, the average sentence imposed by another was 40 days. H. Mannheim, *The Dilemma of Penal Reform*, ch. vi; N. Morris, *Sentencing Convicted Criminals* (1953), 27 *A.L.J.* 186; H. E. Lane, *Illogical Variations in Sentences of Felons Committed to Massachusetts State Prison* (1941), 32 *J. Crim. Law and Criminology*, 171; Winifred A. Elkin, *The English Penal System*, 270–1; P. W. Tappan, *Crime, Justice and Correction* (1960), 441–6, 453–5; E. Green, *Judicial Attitudes in Sentencing*.

[2] *Supra*, § 80. The growing interest in the problem of sentencing is shown by the fact that the Vinerian Professor chose 'Paradoxes in Prison Sentences' as the title of his inaugural lecture: Rupert Cross, 81 *L.Q.R.* (1965), 205.

[3] *The Courts and Criminal Punishment* (1969), 41.

[4] Dr. East points out that of 2,311 people placed on probation, 70 per cent had not committed an indictable offence within 3 years: 8 *Medico-Legal and Crim. R.* (1940), 196. *Practical Results and Financial Aspects of Adult Probation in Selected Countries* (U.N. Department of Social Affairs, N.Y. 1954); M. Grünhut, *Probation and Related Measures* (1951); *The Results of Probation*, ed. L. Radzinowicz (1958)—this report of the Cambridge Department of Criminal Science gives 73·8 per cent success for adults and 62·4 per cent success for juveniles.

in addition to the sanction of being sentenced for the original offence.

Parole is conditional release from prison. In some states in America when a prisoner is approaching the end of the minimum sentence imposed, the prisoner automatically comes before a Board of Parole which has the power to release him under certain conditions. The prisoner, if released, is placed under the control of a parole officer whose function it is to afford such help as may be necessary or possible. In some cases the system has worked well, the main criticism being that too often parole boards are amenable to political pressure.

Corrective training and preventive detention are devised to afford protection to society from habitual offenders and to assure longer periods for reformative treatment. If a person not less than twenty-one years of age is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and has been convicted since the age of seventeen on two previous occasions of offences punishable with such a sentence, the court may pass a sentence of corrective training. If the offender is over thirty and it is a fourth offence,[1] then the sentence may be preventive detention from five to fourteen years.[2]

Clinics may be necessary for the treatment of those who are guilty of certain sexual offences, e.g. in cases of indecent exposure imprisonment is rarely successful. Illinois has made it compulsory to refer all psychopathic criminal sexual offenders to a board of psychiatrists for examination and report,[3] and there is a growing use of the psychiatrist in progressive countries.[4] By the Criminal Justice Act, 1948, the court, in making a probation order, may require that the defendant shall submit for a period not exceeding twelve months to treatment by a duly qualified medical practitioner with a view to the improvement of the offender's mental condition.[5] The order may compel treatment as a resident patient. A court of summary jurisdiction may remand a convicted person in order to enable a medical report to be given on his mental condition.[6] In the hope of increasing the chance of successful treatment, criminal lunatic asylums are now to be called Broadmoor institutions and a criminal lunatic is to be termed a Broadmoor patient.[7] These

[1] The offences specified are those that create liability to imprisonment for two years or more.

[2] Criminal Justice Act, 1948, § 21.

[3] 39 *Col. L. R.* (1939), 534.

[4] D. Carroll, 8 *Medico-Legal and Crim. R.* (1940), 182; L. S. Selling, 30 *Minn. L. R.* (1946), 416.

[5] § 4.

[6] § 26.

[7] § 62.

changes may seem to some a mere matter of terminology but it is an important symptom of the revolutionary change that has taken place in the attitude of society towards the problem of the prevention of crime.

Juveniles. It is perhaps in the treatment of juvenile delinquents that the greatest strides have been made in the twentieth century. The importance of the problem is shown by the fact that in 1961 half of those found guilty of indictable offences were under twenty-one years of age.[1] The institution of juvenile courts introduced a new approach.[2] In America these courts frequently have psychiatrists attached to them, in order to deal with cases where the real cause of crime seems to be some maladjustment to society. If the juvenile delinquent can be examined at an early age, there is more chance of employing effective methods. Thus home influence, a nagging mother, the desire of the physically inferior to 'show off', favouritism shown by the parents to another child, lack of means of self-expression—any of these may be causes predisposing to crime. It is not suggested that all cases of juvenile delinquency are easily solved—the psychiatrist would be the first to admit that in many cases there is little prospect of success. But the results in more favourable cases justify the attempt to prevent youth from embarking on a life of crime.[3]

If we are to avoid sending juveniles to prison, other institutions must be created. As early as 1908 Borstal institutions were set up for those between the ages of 16 and 21 years, the object being to give mental, moral, physical, and industrial training of a strenuous kind.[4] The emphasis is put, not on repression, but on building up self-respect and self-reliance; as in other cases, what is really conclusive is not the system but the personality of those who control it. In 1929, 71 per cent of the lads whose first experience of institutional treatment was that of Borstal showed the success of the system; but of those who had already endured a prison sentence before entering Borstal only 55 per cent were made into satisfactory citizens.[5] These figures seemed to show the danger of prison for the young

[1] Barbara Wootton, *Crime and the Criminal Law*, 10.

[2] L. Page, *Crime and the Community*, 225 et seq.

[3] This is clearly recognized by the courts. Thus only 19 per cent of males convicted in England and Wales under the age of 21 of indictable offences were sentenced to imprisonment: of those over 21 the percentage is 70: 1948, Cmd. 7428. These figures are for courts higher than magistrates' courts.

[4] *Young Offenders Committee* (1927), Cmd. 2831, 95, cited L. W. Fox, *The Modern English Prison*, 181; see also S. Barman, *The English Borstal System*.

[5] Cited L. W. Fox, op. cit. 194; L. Page, *Crime and the Community*, 235.

offender, and a satisfactory measure of success for the Borstal method where it can operate on youths who are not already embittered by a prison sentence.[1]

The Criminal Justice Acts, 1948 and 1961, and the Homicide Act, 1957, pay particular attention to the punishment of juveniles. Sentence of death shall not be pronounced or recorded, if the prisoner was at the time of the offence under the age of eighteen years.[2] Courts of summary jurisdiction, of assize and of quarter sessions, cannot sentence to imprisonment a person under seventeen years.[3] This is subject to the overriding principle that no court shall sentence to imprisonment any person under twenty-one years unless it is of opinion that no other method of punishment is appropriate. Power is given to issue an Order in Council prohibiting courts of summary jurisdiction from imprisoning any person under twenty-one years of age. Where a person under twenty-one years is remanded or committed for trial, if under fourteen he shall be sent not to prison but to a remand home: if over fourteen and under seventeen, he shall be sent to a remand home unless the court certifies that he is of too unruly a disposition: if over seventeen he shall be sent to a remand centre if one is available.[4] All these measures show a laudable desire to save the juvenile from the contamination of imprisonment. As alternatives to prisons, detention centres are created for those between fourteen and twenty-one.[5] For those over seventeen the maximum period is six months if certain other conditions are satisfied; for others the maximum is three months. A milder penalty is to order the offender to be present at an 'attendance centre'. The hours of attendance are to be arranged so as not to interfere with school or working hours. It is a method by which the leisure of the offender is used for reformative treatment.[6]

Although it is not a 'punishment', the use of the caution by the police is a useful technique—this requires much tact and judgment in police circles. In 1965 nearly 28,000 cautions were given.[7]

[1] H. Mannheim and L. T. Wilkins, *Prediction Methods in Relation to Borstal Training* (1955, London, H.M.S.O.), 110–13; but the 'open' Borstals seem to have a better record than the closed; Winifred A. Elkin, *The English Penal System* (1957), 267, 273.

[2] § 9 (3) of the Homicide Act, 1957.

[3] § 17 of Criminal Justice Act, 1948, as amended by § 2 (2) of Criminal Justice Act, 1961.

[4] § 27 of Criminal Justice Act, 1948.

[5] § 4 of Criminal Justice Act, 1961.

[6] § 19 of Criminal Justice Act, 1948, as amended by the 1961 Act.

[7] McClintock and Avison, *Crime in England and Wales*, 155. The practice is mainly confined to juveniles.

The most satisfactory way to deal with the problem of crime is to take such preventive measures as are possible. One of the greatest achievements of the medical profession has been the preventive measures which have so greatly reduced the incidence of plagues which once were allowed periodically to ravage the community. An increase in the social services and a raising of the standard of life will help to prevent the ravages of those crimes the cause of which is economic. The making of life more interesting will do something to remove the motives of those who seek in crime satisfaction for that love of adventure which a 'respectable' life fails to give. The treatment by psychiatrists of those schoolchildren with an unsatisfactory adjustment to society may reduce the number of potential criminals. Preventive measures are expensive, but so is the cost of crime to the community. It has been estimated that in the years following the 1939–45 war, crime detection required an outlay for Britain of £24,000,000 a year.[1] But though these methods may help, we cannot hope to destroy crime any more than we hope to destroy disease. A weak character will fall in moments of great stress or temptation, and the most that can be done is to treat such cases in an enlightened and scientific manner, as a doctor does the sick. But the fundamental difference is that sickness is its own deterrent, whereas the law must not only 'cure' a criminal, but also deter others from pursuing a course which will result in ill-gotten profit.

§ 82. Analysis of Criminal Liability

The general maxim to which lip-service is paid is *actus non facit reum nisi mens sit rea*. On this basis the law requires both a wrongful act and a guilty mind. Few systems apply the maxim in a sense which would require ethical guilt. Thus ignorance of the law is, in general, no defence,[2] and the highest motive is not a justification for an infraction of the law.

German criminal law is much more developed than English law

[1] H. T. F. Rhodes, *The Criminals we Deserve*. In Canada it has been estimated that 188 recidivists cost the State four and a half million dollars: S. K. Jaffary, 27 *Can. B. R.* (1949), 1021.

[2] Most systems of law adopt this doctrine. An exception is the Ethiopian Penal Code issued in 1941. Penalties are remitted to some extent in favour of the weak and forgetful who are unable to keep on remembering the law, the poor man who is unable to know the law, and the foreigner who has never heard of it: even the countryman (who does not know the Amharic language) is not forgotten: 8 *J. of Crim. L.* (1944), 318. Cf. the Roman law doctrine of persons *permissum est ius ignorare*.

on its theoretical side and distinguishes various forms of *mens rea*.[1] First there is a fundamental distinction between *Vorsatz* (*dolus*) and *Fahrlässigkeit* (*culpa*). *Mens rea* requires both a will directed to a certain end and knowledge as to the consequences that will follow from a particular act.[2] Concrete examples will make the German approach clearer. A wishes to shoot B and sees him so far away that he thinks it is almost impossible to hit him. Nevertheless A attempts the shot and kills B. A is guilty of the gravest form of *mens rea* (so long as he realized that there was any possibility of causing death), for he deliberately intended the result and he desired it for itself.[3] If the prisoner reluctantly intends to kill his friend in order to marry the friend's wife and adopts means which he knows must bring about death, this may be described as *dolus directus*. Here knowledge of consequences is stronger than in the first instance, but the element of will is weaker since the death is not desired for itself. To English law, this distinction seems rather unnecessary. In the latter case the prisoner desires to bring about the death—why should the law worry as to the motives which led a wrongdoer to achieve this particular act? Few commit a crime for its own sake, but for other ends, and although the reason for which a crime is committed may be important in the case of treatment, nevertheless, so far as liability is concerned, is it necessary to distinguish between those who knowingly commit a breach of the criminal law?[4] A third degree of *mens rea* in German law is sometimes called *dolus eventualis*. For example, A has carnal knowledge of a girl not yet sixteen years of age: he is ignorant of her age, but is not willing to allow the possibility that she is under sixteen to deter him. On the other hand, if A wrongly came to the conclusion that she was sixteen, and so thought he was within the law, the Germans would term this conscious negligence—that is, the actor recognized the possibility that the act was wrongful, but committed it only because he thought it was lawful. It would be unconscious negligence if the actor did not realize at all that his act was wrongful. It is naturally rather difficult to draw a clear line between *dolus eventualis* and conscious negligence, for in both the prisoner is in a state of doubt. It is hard to say after the event whether he was willing to run the risk of his belief being unfounded.

[1] H. Mannheim, 17 *J. Comp. Leg.* (1935), 82, 236, to whose treatment the following paragraph is indebted.

[2] *Supra*, § 68.

[3] *Absicht*.

[4] This, at any rate, is the practical approach of the common lawyer; but German writers regard the English theory of *mens rea* as very undeveloped.

In English law, if the prisoner believed that the girl was over sixteen, that would be regarded as a mistake of fact; but the precise effect of this particular error upon the existence of *mens rea* has caused great dispute.[1]

One of the theoretical difficulties of German law is that the doctrine of *mens rea* is based on will, and yet negligence is treated as a form of *mens rea*. In criminal matters a subjective theory of negligence is, on the whole, adopted. There is normally, however, a lighter punishment if the *mens rea* consists of negligence alone, and for some crimes the graver forms of *mens rea* are essential.

In English law the test is rather more external. Firstly, the exact degree of subjective guilt required varies in the different offences and it would perhaps be more exact to talk of *mentes reae* than of *mens rea*.[2] Secondly, in some crimes the test of *mens rea* is objective and not subjective. Thirdly, there is an increasing number of crimes where *mens rea* is not required. To illustrate the first point, in bigamy it is a defence that the prisoner honestly thought her husband was dead,[3] whereas in a charge of abducting a girl under the age of sixteen, an honest and reasonable belief that the girl was over sixteen is no defence.[4] Lord Esher (then Brett J.), dissenting, thought that *mens rea* required an intent to commit a criminal offence, but the majority decision was that in this particular case such an intent was unnecessary. Some judges considered that an intent to commit a tort was sufficient, others that it was sufficient if the prisoner intended to commit a moral wrong even though he believed that he was not breaking the law.

Now let us discuss the second point—the use of an objective test. A court can judge the state of a man's mind only by making inferences from his conduct. We have already analysed intent into foresight of consequences and a desire to bring them about. Holdsworth writes: 'we must adopt an external standard in adjudicating upon the weight of evidence adduced to prove or disprove *mens rea*. That, of course, does not mean that the law bases criminal liability upon non-

[1] Cf. *R.* v. *Prince* (1875), L.R. 2 C.C.R. 154: this was a case of abduction and not of carnal knowledge.

[2] J. F. Stephen, *H.C.L.* ii. 95. But see J. W. C. Turner, 6 *Camb. L. J.* (1936), 31 at 38, and G. Williams, *Criminal Law, The General Part* (2nd ed.), chs. ii–v.

[3] *R.* v. *Tolson* (1889), 23 Q.B.D. 168; *R.* v. *Bonnor*, [1957] V.R. 227; *R.* v. *Broughton*, [1953] V.L.R. 572; and N. Morris, *The Burden of Proof in Bigamy* (1955), 18 *Mod. L. R.* 452, and cf. the prevailing rule in the U.S.A. as to strict liability for bigamy, see R. A. Anderson, *Wharton's Criminal Law and Procedure* (1957), vol. ii, §§ 705 and 720.

[4] *R.* v. *Prince* (1875), L.R. 2 C.C.R. 154.

compliance with an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence.'[1] Moreover, even if the circumstances are not such as to prove intent, a confession may make the prisoner liable—in this case the law does consider subjective factors.[2] In most crimes there is not any great difficulty. Larceny requires an intent permanently to deprive the owner of the chattel, and whatever may be the reasonable inference from the prisoner's conduct, if he can prove that he only wished to borrow the chattel, the offence is not committed. Rape or burglary cannot be accidentally or negligently committed —the very definition requires a subjective intent.[3] In *R.* v. *Steane*,[4] Lord Goddard emphasized that, where a particular intent is a necessary ingredient of an offence, the intent may be proved by the Crown by an external standard: but this may be rebutted by the prisoner by evidence of his real intent. Since the onus of proof is on the Crown, the jury must acquit if they are in doubt. In murder and manslaughter, however, the problem is more complicated. Thus in murder it is not necessary that the prisoner should actually desire that death should be a result of his act: if he foresees death as a likely consequence of his act he is liable. But the law goes farther than holding a man guilty for mere foresight without desire, for it may ask what would a reasonable man have foreseen had he been in the position of the prisoner? Once this criterion is applied, we may go far from a purely subjective test. 'Unlawful homicide with malice aforethought' may seem to define subjective requirements, but the 'arbitrary symbol'[5] of malice may be satisfied by proof that the prisoner intended only to hurt, but by means intrinsically likely to kill,[6] or even intended to do an act intrinsically likely to kill although with no purpose of inflicting any hurt at all. Turner considers that, with two exceptions,[7] in murder the jury must be satisfied that the prisoner foresaw that his conduct might cause the death of some

[1] *History of English Law*, iii. 374.

[2] J. Hall, *General Principles of Criminal Law*, 220–1.

[3] J. W. C. Turner, 6 *Camb. L. J.* (1936), 31 at 39: 'No one could reasonably contend that a man, in a fit of inadvertence, could make himself guilty of the following crimes ... arson, burglary, larceny, rape, robbery, perjury, breaking prison, conspiracy; or of incitement or attempt.'

[4] [1947] 1 All E.R. 813.

[5] C. S. Kenny, *Criminal Law* (15th ed.), 153. If A, intending to kill, aims a pistol at B but kills C, he is in English law guilty of the murder of C. In German law the killing of C is only regarded as a killing due to negligence—one that lacks the graver forms of *mens rea*. This illustrates the differences in approach between the two systems.

[6] Cf. *R.* v. *Halloway* (1628), Cro. Car. 131.

[7] Death caused in resisting arrest by an officer of justice and death caused in the commission of a felony involving violence.

person,[1] but many of the cases seem to be in conflict with this. It is true that in *Woolmington* v. *Director of Public Prosecutions*,[2] the Lord Chancellor said that throughout the web of the English criminal law one golden thread is always to be seen—that the Crown must prove the prisoner's guilt which includes 'malice'. But the defence in this case was that the gun went off by accident and the court merely decided that it was not enough for the Crown to prove the killing and then leave to the prisoner the onus of proving as a defence the events that led to the firing of the gun. 'Malice may be implied where death occurs as the result of a voluntary act of the accused which is intentional and unprovoked'—this quotation is from the judgment which is sometimes supposed to reject the objective test. The real issue was whether there was a voluntary act—not what malice should the law assume where an act is intentionally done. But the case is important as being another defence of the prisoner against a presumption that the act was voluntary. It has been held that if A does a voluntary act which is intrinsically likely to kill or to cause grievous bodily harm, it matters not whether he foresaw the possibility of serious injury. The law requires a man to know at his peril the teachings of common experience, and he is deemed to foresee that which a reasonable man would foresee.[3] This decision has been severely criticized,[4] and has been rejected by the High Court of Australia,[5] and now the legislature has intervened to undo the mischief.[6]

English law does not distinguish between different degrees of murder, but certain American states have set a neat problem for the courts in their definition of the degrees of homicide. It is homicide in the first degree if the prisoner acted from a deliberate or premeditated design, in the second degree if there was a design to kill, but without deliberation or premeditation. How long does premeditation take? Is it enough to deliberate as one pulls the trigger? Some courts have answered in the affirmative in spite of the apparent desire of the statute to distinguish between planned killings and hasty acts.[7]

[1] *Camb. L. J.* (1936), 31 at 53.
[2] [1935] A.C. 462 at 481.
[3] *Director of Public Prosecutions* v. *Smith*, [1961] A.C. 290.
[4] G. Williams, *Constructive Malice Revived* (1960), 23 *M.L.R.* 605; (1961), 77 *L.Q.R.* 1 (note); and J. L. Travers and N. Morris, *Imputed Intent in Murder* (1961), 35 *Aust. L. J.* 154.
[5] In *Parker* v. *Queen*, [1963] A.L.R. 524, Sir Owen Dixon C.J., stated that *Smith's Case* should not be used as authority in Australia at all.
[6] Criminal Justice Act, 1967, s. 8.
[7] J. K. Knudson, 24 *Washington Univ. L. Q.* (1939), 305.

The exact degree of *mens rea* required for manslaughter has also been a subject for dispute. It is recognized that for manslaughter it is sufficient to prove criminal negligence without intent.[1] In tort, the test is the conduct of a reasonable man, but criminal liability requires some greater degree of negligence which is difficult to define precisely. Turner suggests that the prosecution must prove (in addition to the *actus reus*) that the prisoner was 'indifferent or reckless as to the obvious risk of bodily harm to which his conduct was exposing someone'.[2] Elsewhere he states that it must be shown that the prisoner foresaw that his conduct might cause physical harm to someone.[3] The confusion in the cases has arisen from a defect in analysis. Theoretically, recklessness is no more a degree of negligence than is intent. The analysis of recklessness should emphasize awareness of increasing the danger as contrasted with negligence which stresses mere inadvertence. To treat recklessness merely as gross negligence inevitably leads to theoretical difficulties.[4] Holmes, however, concludes that the law adopts a purely external test and finds one difference between murder and manslaughter to be the degree of danger shown by experience to attach to the act in the given state of facts.[5] 'In such cases the *mens rea*, or actual wickedness of the party, is wholly unnecessary and all reference to the state of his consciousness is misleading if it means anything more than that the circumstances in connection with which the tendency of his act is judged are the circumstances known to him.'[6] And the law may even assume that a man knows the facts which a reasonable man in his position should know. But Holmes's theory cannot today be accepted with any confidence.

The old rule that death, caused accidentally in the commission of a felony, is murder was indefensible. But juries show a well-rooted dislike of such constructive murders, and in this particular instance

[1] See the decision of J.C. in *Palmer* v. *Reginam*, [1971] 1 All E.R. 1077. In 'voluntary manslaughter'—killing which is not murder only because there is provocation—the test is objective in the sense that the provocation must be such as would have deprived a reasonable man of self-control, but subjective in the sense that, if the prisoner is of superior character and did not lose his self-control, it is no defence that the reasonable man would have done so: J. Hall, *General Principles of Criminal Law*, 185.

[2] 5 *Camb. L. J.* (1933), 61 at 70–1.

[3] 6 *Camb. L. J.* (1936), 31 at 50.

[4] J. Hall, op. cit. 232, and see G. Williams, *Criminal Law, The General Part* (2nd ed.), 54; and cf. *R.* v. *Bates*, [1952] 2 All E.R. 842.

[5] *The Common Law*, 59.

[6] Op. cit. 75, and Holmes's view was adopted by the House of Lords in *D.P.P.* v. *Smith*, [1961] A.C. 290 at 327; but see *R.* v. *Jakac*, [1961] V.R. 367, and the criticisms noted in footnote p. 384 *supra*.

the law itself has been modified.[1] A juryman still hesitates to convict a motorist of manslaughter, even in the most flagrant cases, because he unconsciously feels there is no broad gulf between himself and the motorist in the dock. There is thus a conflict between the theory of the law and its application by juries, which causes much confusion. Instead of reforming the law, the typical English solution was to create new offences with which motorists might be charged, but from the theoretical angle of the definition of *mens rea*, these have only added to the difficulties.[2] Neither in the case of murder nor of manslaughter can the present English theory of *mens rea* be regarded as satisfactory.[3] It is generally argued that strict rules will protect society, but if these rules are not honestly applied by juries, then there is a divorce between the theory and practice of the law which is full of danger.

The defence of mistake is objectively treated, as it must be proved that the mistake was a reasonable one.[4] A purely subjective theory would recognize necessity as a defence, but this plea is rigidly limited.[5]

The third point was that there is an increasing number of crimes which are defined without reference to subjective guilt—indeed some writers speak of the 'eclipse of *mens rea*'.[6] The growing tendency to use the sanctions of the criminal law as a means of social regulation has led to the creation of many new offences, the penalty for the breach of which is slight and involves no moral stigma. To secure effective enforcement, the Crown need prove only the wrongful act, and the disadvantage of inflicting a fine on a morally innocent defendant is more than counterbalanced by the social gain in securing the observance of certain minimum requirements. In England

[1] See now Homicide Act, 1957. Even before this, the rule was limited to such felonious acts as involve violence to an unwilling victim: A. L. Turner, 1 *Annual L. R.* (*W. A.*) (1949), 295.

[2] Various standards may be applied to the conduct of a motorist: (*a*) Civil negligence—the failure to use the care which would be used by a reasonable man. (*b*) The criminal offence of driving without due care and attention. How far does this differ (if at all) from the civil standard of lack of reasonable care? (*c*) The criminal offence of driving dangerously or recklessly. (*d*) Manslaughter (criminal negligence). Surely if the prisoner causes death by driving recklessly, he has sufficient *mens rea* for manslaughter? P. Dean, 53 *L.Q.R.* (1937), 380; J. W. C. Turner, 5 *Camb. L. J.* (1933), 61; *R.* v. *Stringer*, [1933], 49 T.L.R. 189; *Andrews* v. *Director of Public Prosecutions*, [1937] A.C. 576.

[3] G. Williams, *Criminal Law, The General Part* (2nd ed.), chs. ii–v.

[4] J. Hall, op. cit. 333.

[5] Ibid., ch. xii.

[6] e.g. W. T. S. Stallybrass, 52 *L.Q.R.* (1936), 60. Cf. also F. B. Sayre, 33 *Col. L. R.* (1933), 55.

over half of those convicted of offences are guilty of breaches of traffic laws.[1] But, while we may agree with this approach, it would be unfortunate if the increasing number of such regulatory measures should prejudice the case where the more serious crimes are concerned.[2] Some suggest that to impose a heavy penalty and the stigma of conviction on a person whose conduct has been reasonable brings the law itself into disrepute. But this approach can be exaggerated: the attitude towards rape is hardly likely to be affected by prosecutions under the Pure Foods Act. This problem has arisen mainly with regard to the interpretation of statutory offences where there is no specific reference to *mens rea*. *R.* v. *Tolson*[3] represented a liberal approach, but in recent cases there is an increasing tendency to say that, at least where modern statutes are concerned, omission of any reference to *mens rea* must be presumed to be intentional. Some modern English cases take a very strict view,[4] but the High Court of Australia approves a wider interpretation, Dixon C.J. considering that the absence of a specific reference to *mens rea* does no more than change the onus of proof: instead of the Crown having to prove *mens rea*, it is assumed unless the prisoner can prove his innocence.[5] Generally speaking, this means that honest and reasonable belief by the defendant in facts which, if true, would have made his act an innocent one, will provide a defence, unless a clear legislative intent to the contrary is discovered.[6]

§ 83. Nulla Poena Sine Lege

This maxim really involves four different notions: that the categories of the criminal law should be determined by general rules; that a person should not be punished unless his act is a breach of these rules; that penal statutes should be strictly construed; that

[1] In 1936, 60 per cent were found guilty of traffic offences: ten years later the petrol shortage reduced the percentage to 50.

[2] F. B. Sayre in *Harvard Legal Essays*, 408.

[3] (1889). 23 Q.B.D. 168.

[4] e.g. *Chajutin* v. *Whitehead*, [1938] 1 K.B. 506.

[5] *Maher* v. *Musson* (1934), 52 C.L.R. 100 at 105; see also *Thomas* v. *R.* (1937), 59 C.L.R. 279, where the High Court refused to follow *R.* v. *Wheat*, [1921] 2 K.B. 119. Cf. *R.* v. *Dolman*, [1949] 1 All E.R. 813, and see also *Proudman* v. *Dayman* (1941), 67 C.L.R. 536 and *Bergin* v. *Stack* (1953), 88 C.L.R. 248, where the views accepted by Australian courts are adequately explained. In *R.* v. *Gould*, [1968] 1 All E.R. 849 (C.A. Criminal Division) it was considered that *R.* v. *Wheat* was wrongly decided and that *Thomas* v. *R.* should be followed.

[6] See *Proudman* v. *Dayman* and *Bergin* v. *Stack* (*supra*); *Mens Rea in Statutory Offences* (1958), 74 *L.Q.R.* 342.

penal laws should not have a retrospective operation.[1] It is based on the elementary notion of justice that the criminal law should be as fixed and as certain as possible in order that men may know in advance what conduct is criminal. It is felt to be unfair to punish a man for conduct which was not criminal at the time when the act was done—what is demanded is a rule of law as opposed to the caprice of an official.

English law has not specifically adopted the principle. Thus new crimes may be created by statutes with retrospective operation. Theoretically, a statute could delegate to officials the power to declare certain acts criminal and to decide whether or not particular individuals should be punished for committing the acts.[2] Some crimes are defined so broadly that it is not always possible to say in advance how the law will be applied, e.g. criminal conspiracy or offence to the public mischief. But the principle is accepted as a desirable one by most English writers, as can be seen from the criticism of the rather wide formulation in *R.* v. *Manley*[3] of the crime known as an offence to the public mischief,[4] and of the crime of conspiring to corrupt public morals as established in *Shaw* v. *D.P.P.*[5]

The doctrine of *nulla poena sine lege* is regarded in many countries as a vital protection of the subject. Russia, however, rejected the doctrine as a bourgeois relic and the law of 28 June 1935 abrogated it

[1] J. Hall, op. cit., ch. ii; M. Ancel in *Annales de l'Institut de droit comparé* (1936), ii. 245. The principle is recognized, e.g. by the French, Belgian, Jugoslav, Portuguese, Italian, Swiss, Chinese, Chilean, Polish, Colombian, and Uruguayan codes. Nazi Germany was an exception (law of 28 June 1935). S. Glaser, 24 *J. Comp. Leg.* (1942), 29.

[2] In a unitary system on the English model, though, the courts will read such Acts strictly. In federal systems, however, and where there are written constitutions imposing limits on legislative powers the position may well be different even when there is no express constitutional denial of such delegation; see e.g. *The Communist Party Case* (1951), 83 C.L.R. 1; *The Boilermakers' Case* (1956), 94 C.L.R. 254; and *Commissioner of Taxation* v. *Brown* (1958), 100 C.L.R. 32, per Dixon C.J. at 40.

[3] [1933] 1 K.B. 529.

[4] Cf. W. T. S. Stallybrass, 49 *L.Q.R.* (1933), 183. On the other hand, W. S. Holdsworth, 37 *L.Q.R.* (1921), 462 at 467, supports the doctrine of elasticity, as the criminal law should have a power of development. Cf. Evatt J. in *R.* v. *Weaver* (1931), 45 C.L.R. 321. The question of the width of the power of the courts to exploit 'elasticity' in the criminal law without the aid of the legislature remains a live one. In *R.* v. *Newland*, [1954] 1 Q.B. 158, Lord Goddard C.J. emphasized the need for caution and made some critical comments on *R.* v. *Manley* (*supra*); that decision may be justifiable but the dicta are too wide, see *R.* v. *Todd*, [1957] S.A.S.R. 305; *Joshua* v. *R.*, [1955] A.C. 121; [1958] C.L.R. 522–3; A. L. Goodhart, *The Shaw Case: The Law and Public Morals* (1961), 77 *L.Q.R.* 560; J. E. Hall Williams, *The Ladies' Directory and Criminal Conspiracy, The Judge as Custos Morum* (1961), 24 *M.L.R.* 626.

[5] [1961] 2 W.L.R. 897; [1961] 2 All E.R. 446; and see *R.* v. *Quinn*, [1961] 3 W.L.R. 611. See, however, *D.P.P.* v. *Bhagwan*, [1970] 3 All E.R. 97 (H. Lds.) which suggests that criminal conspiracy and offence to the public mischief should be confined to cases already established by the law: see Note, 34 *Mod. L. R.* (1971), 81.

in Germany.[1] The theory of the totalitarian state is that the judge is charged with the duty of protecting the new régime—liberal or democratic scruples as to the rights of the prisoner should not be allowed to hinder the effective execution of state policy. In other words, *nulla poena sine lege* is rewritten so as to read *nullum crimen sine poena.* The old Japanese criminal code stated that only the magistrates should be allowed to peruse it—this takes away the effective protection of the maxim as it makes the law inaccessible.[2]

At first, in Russia, great use was made of analogy to fill the gaps in the criminal law which became, from the point of view of the subject, dangerously elastic, but as the Soviet moved farther from the Revolution the advantages of certainty and predictability in the criminal law were recognized.

The doctrine of *nulla poena* would at first sight seem to require a very rigid criminal law and a severe pruning of the discretion allowed to the court in determining sentence. This would run counter to the theory that the act should be regarded merely as an index to the social danger of the prisoner, and that punishment should be determined by the progress of the prisoner rather than laid down in advance. But we cannot hope to achieve progress by limiting too rigidly the discretion which exists as to penalty. *Nulla poena sine lege* should be adopted strictly so far as we are concerned with the determination of the limits of criminal conduct—but power must be left to a skilled sentencing body to adjust the penalty to the individual offender, although it may be necessary to set maximum limits to possible sentences for each type of crime in order to prevent arbitrariness. Here law must delicately compromise the liberty of the individual with the demands of society, remembering that it is in the individual's own interest that he should be cured and that society demands a policy that will stamp out, as far as possible, breach of the criminal law.

[1] Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conception of a penal law and sound popular feeling shall be punished. If no penal section applies to the case in question, the act shall be punished under the law which applies most nearly to the act.

[2] L. C. Green, *Current Legal Problems* (1948), 188.

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