JURISPRUDENCE IN THE CRIMINAL LAW.

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"IN perhaps no branch of the law has so little work of scientific value been done as in that dealing with crime and criminals."[1] Such is the judgment of an English jurist upon the Criminal Law of his own country as compared with other branches of the law. Nor possibly will the judgment of any Continental jurist be more favourable when he compares the theory of the English Criminal Law with that of his own country. Very different, however, must the conclusion be if the practice of the Criminal Law be taken as the basis of the comparison. In a valuable comparative study of English and Italian Criminal Law recently contributed by Dr. Stallybrass to this *Journal*[2] we read that "England's glory is that, thanks to the integrity and ability of her judges, the high standard of honour and public spirit of her bar, the practical common sense of her citizens, who serve upon her juries, and the efficiency of her police, there is no country in the world where an innocent man is less likely to be convicted or a guilty man is less likely to escape punishment for his crime. The genius of the Italian is for theory; the genius of the Englishman is for practical administration."[3] And Dr. Stallybrass concludes his study with a quotation from Pope much favoured among Englishmen: "Whate'er is best administered, is best."

English and Continental Penal Theory compared.—It is, consequently, not allowable to compare English with Continental Criminal Law without reference to the course of criminal proceedings in England. The English Criminal Law has been far more influenced by its judicial administration than has that of the Continent in which the strict separation of questions of substantive law from those of procedure, and in particular the question of guilt from that of its proof, has become, one might say, almost an article of faith. Circumstances in which the English Criminal Law seems to the Continental jurist to be behind the times are to be attributed as a rule to the peculiar features of the English criminal proceedings, to the utilization of the jury, to the Law of Evidence or to the system of "judge-made law." Law which is to be applied by a jury must consciously

[1] 51 L.Q.R. at p. 709.

[2] "A comparison of the general principles of Criminal Law in England with the 'Projetto definitivo di un nuove Codice Penale' of Alfredo Rocco," *Journ. Comp. Leg.*, Third Series, vol. xiii, pt. iv, pp. 203 ff.; vol. xiv, pt. i, pp. 45 ff.; pt. iv, pp. 233 ff.; vol. xv, pt. i, pp. 77 ff.; pt. iv, pp. 332 ff.

[3] *Journ. Comp. Leg.*, Third Series, vol. xiii, pt. i, at p. 203.

abandon certain refinements which a lay judge would be certain to find it difficult to grasp. The Law of Evidence makes necessary stronger emphasis upon the external aspect of the crime in comparison with the mental processes of the doer which led up to it, which are far more difficult to establish by the methods of proof allowed. The system of precedents also involves a risk that by a legally binding decision the progressive development of legal thought will find itself cut short as regards some subject or another. Thus it happens that the contemporary English Criminal Law seems to Continental jurists frequently to have stopped short at a point long since passed in Continental legal history.

This last point is worth some further attention. The majority of legal questions are such as may well be envisaged differently according to the varying conceptions of national or social life and which can only be settled by a decision declared to one effect or another. In such cases there must in the interests of the stability of the law be a binding declaration either by the legislator, as would be the case on the Continent, or by the judge, as would be the case in the Anglo-Saxon world. But there are other legal questions which are susceptible of a single solution, capable of progressive explication with the advance of legal science. In these cases a legally binding decision by legislator or judge is only a bar to further progress. The Continental legislator is accustomed in such cases to abandon any attempt to lay down a rule and " die Frage der Wissenschaft zu überlassen." In corresponding cases the Precedent system is doubly bound to have in readiness means to overrule an obsolete precedent. The stability of the law is not imperilled in either event, since the issue concerns a question as to which a single established scientific decision is possible and practicable.

Positivism or Jurisprudence.—It is not less difficult to determine which conceptions of the Criminal Law are apt for a single solution and which demand a positive declaration. In view of the lack of positive rules the older German science of the Criminal Law was compelled to develop its General Part deductively on the basis of general considerations as to the ultimate purposes of the Criminal Law. Anselm Feuerbach (1775–1833), who re-created German penal science, termed the General Part of the Criminal Law the " philosophical part." English penal science was from of old of a far more positive character. This might well be the case since it was able to appeal to binding precedents for the decision of countless special cases. But a development of conceptions of Penal Law independent of positive legal pronouncements was not entirely lacking. " Jurisprudence," *i.e.* the study of general legal ideas, has long since undertaken the task of presenting the principles of criminal liability as inferences from a rule of right reason. Bentham, in his *Principles of Morals and Legislation*, was a pioneer of this way of thinking. This book, first published in 1789, attained in its psychological analysis of penal conceptions a degree of refinement which left far behind the Continental criminal science of the time. Austin's amplification of the same thesis

is in essence founded on Bentham. In his sketch of the General Part of a Criminal Code he has epitomized his conclusions.[1] Clark's *Analysis of Criminal Liability*, 1880, again stands in close relation to Austin's work, while the important book of Stroud on *Mens Rea* (1914) may truthfully be said to apply the methods of Jurisprudence though his results more than those of his predecessors are founded inductively on Case Law. Clark on the other hand is characterized by the use of a method peculiar to himself; he makes a comparison of the penal conceptions worked out by him with their "mathematical congeners."[2] In this, indeed, he does not treat either of these as based on an *a priori* foundation, but regards them as being proved to be "necessary in actual experience." Though it is not certain whether Clark is right in pronouncing against the *a priori* foundation of both these conceptions, yet what is important for us in the present connexion is that he considers his penal principles as demonstrable in the same way as are mathematical truths.

These views, however, are strongly opposed to those of the leading English criminal lawyer of his time, Sir James Fitzjames Stephen. Stephen was at once Benthamite and Austinian.[3] His interest in reforms and efforts in that direction exhibit his Benthamite leanings. His relentless positivism attracted him to Austin. "Respect for hard fact: contempt for the mystical and dreamy; resolute defiance of the *a priori* school who propose to overrule experience by calling their prejudices intuition": such are the phrases in which his attitude is defined by his brother.[4] Austinian positivism made him a persistent opponent of the views of Clark, though these, nevertheless, had their immediate origin in Austin. To Stephen, they seemed merely a kind of *a priorism*. He does not indeed mention Clark by name, but assuredly had him in view when, not long after the appearance of his book, he remarked: "General theories as to what ought to be the conditions of criminal responsibility may not be useless, but they must depend on the tastes of those who form them and they cannot, so far as I can see, be said in any distinct sense to be either true or false."[5] The same note is sounded, though less violently, in a review of Stroud's book on *Mens Rea* by Stephen's most significant literary successor.[6]

Which are we to follow: the positivists in penal law or the champions of analytical jurisprudence? German efforts after a "philosophical" General Part have left us with a multitude of disputed questions, which are just as little likely to be so settled by scientific methods as is the conflict between the different theories as to the ends of punishment upon which they depend. It has come to be accepted that some disputed

[1] *Lectures on Jurisprudence*, 3rd ed., p. 1086.

[2] *Op. cit.*, pp. 109 ff.

[3] See his admirable review of the works of Austin and Maine in *Edinburgh Review*, Oct. 1861.

[4] *Life of Sir James Fitzjames Stephen*, by Leslie Stephen (1895), at p. 309.

[5] *Hist. Crim. Law* (1883), vol. ii, at p. 96.

[6] Kenny in L.Q.R., vol. xxxi, at p. 451.

questions, such, for instance, as that concerning the culpability of the impossible attempt and the differentiation of the forms of participation, can find a single solution only by the will of the legislator. In other departments, however, German penal science has, by progressive steps and notwithstanding the silence of the written law, arrived at a generally accepted understanding. Thus in essentials there is agreement as to what constitutes an act and what an omission, as to what is the connotation of intention (*Absicht*), malice (*Vorsatz*), knowledge (*Wissentlichkeit*) and of conscious rashness and unconscious "negligence" (*bewusste oder unbewusste Fahrlassigkeit*).[1] It is noteworthy that English jurisprudence quite independently of German penal science has reached surprisingly similar results. It is for the German criminalist an intellectual pleasure of a rare kind to recognize indubitably in the definite conceptions of Bentham, Austin and Clark, though under other names, the identical ideas which have been reached by their own labours. This harmony may indeed be taken as proof that at any rate the conceptions of Act and Fault (*Schuld*) are attainable by scientific cognition without need of a positive legal pronouncement. It is, however, more difficult to explain this fact if at least "natural law" explanations are rejected. Perhaps the explanation is to be found in the circumstance that the conceptions of Act and Fault are not dependent upon the conflict of opinions as to the purpose of punishment, because they are conformably required in like manner whatever view of the purpose of punishment be adopted. "Precisely the same knowledge on his (the criminal's) part is required to account for any rational exercise of (such) vengeance, which we shall see to be required in order that punishment may effect its other, the deterrent or preventing end."[2] This explanation may be correct or not, the fact of a unified understanding of definite penal conceptions remains in any case indisputable. In Anglo-Saxon penal science a movement towards the deepening of the study of the problem of the Mens Rea is already beginning. "The time has surely come when we need to clarify our thinking on the fundamental problems of volition and motive and the relevance of fault and liability."[3]

In yet another field of penal study has science brought about a unified understanding. The main effort of German penal science in the last decade has been directed to secure the foundation of a clarified system of Criminal Law, and in this it has achieved far-reaching agreement. English jurists, in particular Clark and Stroud, have also turned their attention to these questions; they have carefully distinguished the several hypotheses of criminal liability and separated out numerous exemptions from responsibility which according to the traditional presentations are

[1] [The English translation of these German terms can only be approximate in meaning. See, more fully, "Mens Rea in German and English Criminal Law," *Journ. Comp. Leg.*, Third Series, vol. xviii, pt. i, pp. 78 ff.—EDITOR.]

[2] Clark, *op. cit.*, pp. 5 ff. See also Kantorowicz, *Tat und Schuld* (1933), p. 5.

[3] R. C. Auld, *Toronto Law Review* I (1930), vol. i, at p. 219.

usually treated under one head, among the several hypotheses from which they are exceptions. English penal science has hitherto bestowed little attention upon their efforts. But the above-cited articles of Dr. Stallybrass indicate already how much English Criminal Law may profit by its presentation in accordance with the categories of a Continental system.

The Offence in English Penal Science.—In English penal science the idea of the offence is usually expounded with reference to the maxim *actus non facit reum, nisi mens sit rea*. The exposition proceeds along two lines: *actus*, as the objective act or omission which forms the nucleus of the offence, and *mens rea*, the subjective fault. As the *mens rea* is normally deemed to be present, its absence must be established by the accused: it is in general not so well shown in what hypotheses *mens rea* is present as in what hypotheses it is absent. It is usual to describe these as " excuses " and to enumerate them under the heading " Exemptions from responsibility." As such we find treated not only cases in which *mens rea* is excluded, like infancy, insanity, threats, mistake, but, mixed up rather casually with these are cases in which the act is not merely excusable but justified, like the case of necessity. " It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be *justified* in breaking it."[1] Moreover, the cases of exemption are not exhausted in this section of the General Part. In particular a further series turns up in the discussion of homicide. In this connexion they are divided into justifications and excuses. As excuses are mentioned " chance medley " and " misadventure " and, in Foster's words, it is usual to emphasize the fact that excusable homicides are not innocent but culpable and are only excusable " through the benignity of the law." This may also be true in the case of " chance medley " if, for example, one who in a " sudden combat " kills his opponent in self-defence was, in common with him, responsible for the struggle.[2] But it is, surely, not true in the case of misadventure, which, like the excuses treated in the General Part, involves complete freedom from culpability. Misadventure is indeed strictly to be taken as a special case of ignorance or mistake: in these latter instances indeed, our thought rests primarily on error as to the accompanying circumstances, but they also include cases in which the error is one as to the consequences and, when the lack of foresight as to the consequences is excusable, there is misadventure.[3] However this

[1] Stephen, *Hist. Crim. Law* II, at p. 109.

[2] But Dr. Stallybrass (*loc. cit.*, vol. xiv, at p. 242) remarks with justice that in the case of sudden quarrels " the excuse on the ground of provocation becomes almost inextricably confused with the defence of self-defence " (a case of justification). Francis Bacon, in his *Maxims of the Common Law* (Regula V) indeed considers not even *seipsum defendendo* as a matter of justification, " because quarrels are not presumed to grow without some wrongs either in words or deeds on either part, and the law . . . supposes the party that kills another in his own defence not to be without malice."

[3] So also Dr. Stallybrass (*loc. cit.*, vol. xiii, p. 214.) " Such cases seem properly to rest upon the absence of a *mens rea* rather than of an *actus reus*."

may be, the excuses in the case of homicide are related like the exemptions in the General Part to the question of *mens rea* which in the case of the exemptions is entirely absent and in the case of these excuses is present in so minor a degree that it may pass unnoticed. The cases in which guilty mind is quite absent or nearly so must on the other hand be contrasted with those of justifiable homicide, such as execution of the law, self-defence, consent, as belonging to an entirely different category. The contrast becomes confused if as the fundamental difference between the two we emphasize the circumstance that in the case of excuses " the very name imports some fault " while in the case of justifications " no kind of fault, not even in the minutest degree," is present (Blackstone). This emphasis upon a secondary distinction gives rise to the error that it is the same mark of delinquency which in the case of justifications is wholly and in the case of excuses is in part lacking. In truth, however, it is quite another mark which is lacking in justification from that which is present in a minor degree as regards excuses. Clark characterizes them justly in opposing circumstances of an external character the presence of which makes the act " not criminal at all," to those which exclude or diminish fault and which relate to the consciousness of the doer.[1] Yet more significantly Stroud says of the justifications: " that which at other times or on other occasions would be wrong and criminal, is, subject to definite restrictions, made right and lawful." [2] Besides the *actus* and the *mens rea* there exists a third mark of delinquency excluded where justification is present, namely illegality. Stroud as well as Clark, consequently, disassociate justifications from the peculiar connexion with killing and find place for them in the General Part.[3] But this does not enable them to free themselves entirely from the existing confusion. Clark puts excuses also in the new class to which he consigns justifications; Stroud even calls justifications " occasional excuses " and classes them systematically in the same category with the four real excuses which are grounds for excluding or reducing fault. Once again we are back in the confusion of ideas which in a very famous judgment is brought out with epigrammatic distinctness: " unless the killing can be *justified* by some well-recognized *excuse* admitted by law." [4]

Distinction between Justification and Excuse.—A sharp distinction between justifications and excuses has not been attained for the obvious reason that no great importance has been attached to it. In earlier times the excusable homicide was distinguished from the justified homicide by the exceptional legal results which followed, namely forfeiture and deodand. Forfeiture was abolished in 1828 and deodand in 1846. Since

[1] *Op. cit.*, p. 14.

[2] *Op. cit.*, p. 282. So also Mr. Perkins in *Yale Law Journal*, vol. xliii (1934), p. 541, note 39, demands clear distinction between justifications and excuses.

[3] So also Dr. Stallybrass, *loc. cit.*, vol. xiv, pp. 233 ff.

[4] *R.* v. *Dudley and Stephens*, L.R. 14 Q.B.D. 273 (*The Mignonette Case*). See also *R.* v. *Prince*, 2 C.C.R. 154 per Denman J.: " such an *excuse* as being proved would be a complete *justification* for the act."

excusable homicide thus came to be as completely exempt from punishment as justifiable homicide it seemed that " the importance of the distinction has now disappeared " and that " the homicides which down to that time had been classed as excusable ceased, thenceforward, to differ at all in their legal consequences from such as were fully justified." [1] But this supposition is not correct ; in at least four relations justifiable and excusable acts have different legal consequences. In all four cases the acts in which the element of fault is reduced to the extent of exemption from punishment, on the one hand, balance those from which, on the other hand, fault is excluded. Only in the case of the antiquated excuse of " chance medley " does it remain doubtful whether it should be classified with the other excusable offences or with the closely related justification of " self-defence." The following are the four differences between justifications and excuses :

1. In the first place, there is no right of self-defence against a justifiable act. Thus no right of self-defence exists as against an act done in defence of oneself. On the other hand if the act is merely excused and in consequence the fault is only excluded or reduced but the act remains illegal, a right of self-defence against the act does exist, *e.g.* against the act of an insane person.

2. Further, ignorance and mistake indubitably exclude intention if they relate to a circumstance of a justifying character, but not if they relate to one which would merely exclude or reduce fault. A person who erroneously believes himself to be attacked and consequently entitled to defend himself acts without intention and, provided that his mistake is not due to inadvertence, without fault. But if a person committing a later act believes himself to be insane in consequence of an earlier acquittal on that ground, or if, in consequence of a mistake as to the day of his birth, he believes himself to be under the age of criminal responsibility, he cannot make use of the defence of mistake.[2]

3. The principal in the second degree and the accessory before the fact is not liable to punishment if the principal's act was justifiable, but is punishable irrespective of the fact that the principal has an excuse. The participator in the self-defence of another is himself justified, but the participator in the crime of an insane person is liable to punishment as

[1] Kenny, *Outlines* (13th ed. 1929), pp. 104, 107.

[2] Stephen J. in *R.* v. *Tolson*, 23 Q.B.D. 168, referring to the well-known opinions of the judges in *McNaghten's Case :* " It is stated that if, under an insane delusion one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused." He adds : " This could hardly be if the same were not law as to a sane mistake." Both statements are in two respects inaccurate : (1) the erroneous apprehension of an excusing fact is never an excuse ; (2) the mistaken apprehension of a justifying fact is always an excuse, never a justification. In the rules laid down by the judges in *McNaghten's Case* (10 Cl. & Finn.) the corresponding passage is otherwise worded : " He must be considered as to responsibility as if the facts as to which the delusion exists were real," which indeed at least impliedly comprises the first inaccuracy.

such. Unfortunately the English, like the German Criminal Law rejects this distinction, and further, if *mens rea* cannot be attributed to the principal in the first degree, the participation cannot be punished.[1] "For there will be no foundation on which the accessory crime can rest." But yet, in spite of its disinclination to treat complicity in an innocent act as punishable, the English Criminal Law like the German and by the same roundabout way does succeed in punishing such complicity by treating the guilty party as an indirect principal. "If an offence be committed through the medium of an innocent agent, the employer, though absent when the act was done, is answerable as principal,"[2] *i.e.* as a principal in the first degree. In a true sense, indeed, is this third difference between justifiable and excusable offences current law.[3]

4. There is another difference, which, however, need here only be mentioned. The consequences which follow in private law from justified and from excusable offences are different. Civil damages cannot be claimed if the act is justified.

Doctrine of Necessity.—Some well-recognized practical consequences are therefore bound up with the distinction between Justification and Excuse. But it also serves to illuminate some questions of doctrine which are still somewhat obscure. The doctrine of necessity, for instance, is so far obscure that it is not clear whether it would be regarded as a form of justification or as a mere excuse. A passage has already been cited from the judgment in the *Mignonette Case* which shows that the distinction between the conceptions of justification and excuse is yet to seek; the whole tenor of the judgment shows this clearly. The doctrine of necessity is sometimes so conceived as to suggest[4] that the act is excusable by reason of the severity of the temptation to which the doer was subjected; at other times, however, justification is made to depend upon the value of that which was destroyed as compared with the value of that which was saved.[5] It is impossible to escape the impression that the erroneous assumption that acts such as those in the *Mignonette Case* might be treated as *justified* brought it about that the court could not bring itself to regard them as *excusable* and preferred rather to leave their equitable treatment to the sovereign's mercy. In general the impression is that the strong reluctance of the English Criminal Law to recognize necessity as an excuse

[1] *R.* v. *Taylor and Price*, 8 C. & P., 616. As opposed to this view see particularly the outstanding book by Kantorowicz, *Tat und Schuld* (1933).

[2] *Reg.* v. *Manley*, 1 Cox 104.

[3] I am, of course, aware that the importance of the distinction between the various forms of complicity is small in the English law.

[4] "It must not be supposed that in refusing to admit *temptation* to be an *excuse* for crime it is forgotten how terrible the temptation was. But a man has no right to declare *temptation* to be an *excuse*."

[5] "By what measure is the *comparative value* of lives to be measured? Is it to be strength or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will *justify* him in deliberately taking another's life to save his own."

has its origin in the dread lest weakness and cowardice should seem thus to be justified. In actual fact we may distinguish two points of view from which acts done under the plea of necessity may be treated as free from punishment, giving rise to two very different cases of necessity. In the first case the necessity may arise from a danger of such magnitude that the instinct of self-preservation would overwhelm the sense of duty even for men not in general faint-hearted. This is the "necessity" which makes the act excusable. But on the other hand, we may treat as a case of necessity one in which a valuable common interest which is endangered is preserved by the sacrifice of some less valuable interest. In such cases the gratitude of the community is due to the person who acts; the act is not merely pardonable, but praiseworthy. This is the "necessity" which justifies the act. Under which conditions each form of the case of necessity is to be recognized as a ground for freedom from punishment will not here be made the subject of particular inquiry.[1] It was only desirable to point out how profound is the influence which may be exercised by apparently purely theoretical distinctions such as those between justification and excuse.

We will, however, pursue the same line of argument with reference to the third fundamental characteristic of an offence.

Doctrine of "Typicity."—Illegality, *i.e.* absence of justification, and Guilt, *i.e.* absence of excuse, are attributes of a substantive thing, namely of the *actus*, if we adhere to the adage: *actus non facit reum, nisi mens sit rea.* The offence is an illegal (*rechtswidrige*), guilty (*schuldhafte*) action. But such an action may be defined even more narrowly. Not every illegal, guilty action is punishable; rather is it the case that actions which are punishable, such as murder, manslaughter, rape, larceny, burglary, are defined in detail in common or in statute law. The definition of a particular form of offence is, in German criminal science, termed *Tatbestand des Verbrechens*,[2] an untranslatable phrase, or type of the offence (*Typus des Verbrechens*). The action which constitutes the nucleus of the offence is thus, to put it more precisely, the materialization of the *type* of a certain kind of offence. This is termed "typicity" (*Tatbestands-mässigkeit*).[3] This "typicity" is the essential mark of the offence. The first question to be asked when the issue is raised as to whether an action is an offence is whether it comes within any of the special crime categories of common or statute law. Until this is settled

[1] To the Continental jurist it seems strange to find the problem of necessity described as "not of supreme importance in English law" since merely nominal punishment or pardon is possible (Stallybrass, *Journ. Comp. Leg.*, vol. xiv, pt. iv, p. 237). In my opinion this attitude depreciates the ethical significance of a conviction even followed only by nominal punishment or no punishment at all.

[2] This conception is a development from that of the *corpus delicti* mentioned by Austin in Lecture 24.

[3] Kantorowicz (*loc. cit. supra*) discusses the systematic relation between typicity and illegality on the one hand and fault (*Schuld*) on the other. I agree with his views, but for the sake of simplification avoid details here.

there is no purpose in raising the question of illegality or guiltiness. Once established, the fact that the act was of an illegal and of a guilty character requires normally, according to English law, no further demonstration; the presence of these characteristics is presumed;[1] the onus of proof of justification or excuse falls regularly on the defendant. Yet, in another aspect, the typicity is fundamental for the *mens rea*: the "type" of the offence is decisive for the question as to which characteristics and consequences of his act must have been known and foreseen by the doer for its commission to be treated as intentional.

Scope of Intention in English Law.—This principle is also recognized in a limited manner by the English law. The "type" of homicide is so conceived as to include the killing, in general, of a reasonable creature, *i.e.* of any human being whatsoever. He who willed to kill a human being and has killed a human being is accordingly guilty of an intentional homicide, of murder even though, indeed, because of an exchange of the persons or a deviation of the assault a human being other than the one intended was killed.[2] He is also guilty if he willed to kill no particular person but any chance wayfarer. This latter form of intention is termed "universal malice" or "malice against all mankind," but in essence the intention of every murderer so far as it is legally relevant is a "universal malice" or a "malice against all mankind." For the issue is not whether there was an intention to kill a particular human being, but whether there was the general intention, implied in the particular intention, to kill a human being.

Though the English decisions insist that the more special intention is legally irrelevant provided the intention is of the type required for the offence in question, yet they have not required with the same energy that, on the other hand, the intention is insufficient if it be more general than that of the type. Rather is it held throughout that "the guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law."[3] How far the intention may depart from the type as defined by law is a question upon which there is no unanimity. The most conservative view is that the intention need not, indeed, bear upon the particular type as defined by law of the offence in question, but must be directed to some criminal act even if it be one less serious than that now in issue. One who acts with a criminal intention "runs the risk of his crime resulting in the greater crime." Ignorance of facts, accordingly, only excludes intention if "these facts would, if true, make his act no criminal offence at all."[4] A more comprehensive view does not require criminal intention, but allows any illegal intention to

[1] Kenny, *op. cit.*, pp. 40, 41. [In this connexion it is now relevant to consider the important decision of the House of Lords in *Woolmington* v. *Director of Public Prosecutions*, (1935) 25 Cr. App. R. 72.—EDITOR.]

[2] *Rex* v. *Saunders*. Foster's Crown Law, p. 371.

[3] *R.* v. *Tolson*, 23 Q.B.D. 168.

[4] Brett J. (as he then was) in *R.* v. *Prince*, L.R. 2 C.C.R., p. 154.

suffice, even if it be directed to an act which is a trespass, a tort only.[1] Consequently mistake will only exclude intention if, in the circumstances in which the doer believed himself to be acting, the act would not have been a wrong, not necessarily a punishable wrong. Finally an even broader view demands not even an illegal but merely an immoral intent and treats mistake as irrelevant if in the circumstances in which the doer believed himself to be acting his act would have been immoral: "he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which he in fact was committing,"[2] where wrong is not to be understood as "illegal"[3] but as "wrong in itself and apart from positive law," "not only criminal, but also immoral,"[4] *i.e.* contrary to Austin's "positive morality." This treatment has a connexion with the Canon Law doctrine, "*versanti in re illicita imputantur omnia quae sequntur ex delicto*," and has also prevailed on the Continent at an earlier stage in the development of Criminal Law.[5] These principles are also applied in the case of homicide. It has been too little remarked that malice aforethought in murder is only a particular application of the general doctrine that the intention comprises all the consequences, as well those unforeseen as those unforeseeable, which follow an action which in any sense is reprehensible, criminal, illegal or immoral. In the case of murder the inclusion of the unforeseeable consequences in the malice aforethought, *i.e.* in the intention, is restricted to the special case in which there is felonious intent. But all other cases of homicide accompanied by intention in this broader sense constitute manslaughter. The lower limit of manslaughter cannot be established without taking into account this general doctrine as to the imputation of unforeseeable consequences since it is improbable that it will be more narrowly applied here than in the case of less serious offences.[6]

According to each of these three opinions, we are dealing with a presumed intention in relation to an actual offence, with a presumed *mens rea*, or, as the phrase goes, with a constructive crime. "I have a great abhorrence of constructive crime," remarked Field J. (as he then was) as early as 1883.[7] Many examples may indeed be given in which the doctrine leads to an absurdity; of these the most grotesque is that in which a burglar falls into a cellar and is killed, with the consequent verdict of

[1] *R.* v. *Fenton I. Lewin*, 179.

[2] Per Denman J. in *R.* v. *Prince*. His view was shared by eight of the judges, but according to Kenny is only "obiter" (Kenny, *op. cit.*, edition 1933, p. 42).

[3] "I do not say illegal, but wrong," per Bramwell B. in *R.* v. *Prince*.

[4] *R.* v. *Tolson*, 23 Q.B.D. 168.

[5] Mannheim, "Mens rea in German and English Law," *Journ. Comp. Leg.*, vol. xvii, pt. iv, pp. 237 ff.

[6] As against this, Fifoot in *Stephen's Commentaries*, 19th ed., vol. iv, restricts intention in manslaughter more closely. See p. 12: "An intention to commit a tort is enough"; p. 50: "Manslaughter must be confined to cases where the tort in question is one involving the reasonable possibility of physical harm." See also *R.* v. *Franklin*, 15 Cox 163.

[7] *R.* v. *Franklin*, 15 Cox 163.

felo de se.[1] In the case of murder the doctrine may be said to be in retreat since it tends more and more towards a fusion of felonious murder with another case of constructive murder, namely, killing by acts dangerous to life. "I think," said Mr. Justice Stephen, "that instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder."[2] The postulation of a murderous intention can in this case be based on the presumption (which for the rest is only a *presumptio juris*, not *de jure*) "that a sane adult is presumed to intend all consequences likely to flow directly from his intentional conduct."[3] But this limitation of murder merely involves a corresponding extension of manslaughter. For the general rule stands all but undisputed,[4] namely, that the intention does not need to be directed towards the accomplishment of the fact which constitutes the particular offence, but may be directed towards any criminal, or, it may be, any illegal, or, it may be, any immoral purpose.

Yet, notwithstanding criticism, justification of this doctrine is not entirely lacking. On this basis Oliver Wendell Holmes has built up a complete theory of fault in his classical work on *The Common Law*.[5] From the subordination of the individual to the purposes of the community it follows that punishment cannot be measured by the measure of individual fault. The only course open is to take the "average man" as a measure; a man is blameworthy where a man of average capacity would be blameworthy, he must bear the burden of the risk of any deviation from the average which results from his temperament, his ignorance or his folly. In every case of criminal, illegal, immoral intention there is present, says the legislator, a danger of injuries of many kinds which are within the powers of perception of an average man. These must, accordingly, be taken into account by all and sundry.[6] We agree with Holmes that the fault of the individual must be measured by the standard of the average man. But on the one hand, if this is the only standard the lower limit of fault can indeed be fixed, the minimum standard of negligence, but not what is requisite and adequate for the more serious grades of fault and in particular for intention, and this was the very question which Holmes set himself. And on the other hand, the limit of negligence is also brought too low if Holmes seeks to measure not only prudence but also intelligence by the standard of the average man. Stupidity is a

[1] 126 L.T.N. 60. Stroud, *op. cit.*, p. 169. Compare Bacon, *Maxims of the Common Law*, Regula 16.

[2] *R.* v. *Serne*, 16 Cox 311.

[3] Kenny, *op. cit.*, p. 333.

[4] Austin, indeed, speaks of this doctrine as a peculiarity and seeming unreasonableness of the English Criminal Law (Lect. II at p. 1094). See also J. W. C. Turner in *Camb. Law Journal*, vol. vi, pp. 50 ff. (1936).

[5] *The Common Law* (1881), pp. 48 ff.

[6] So also Clark, *op. cit.*, pp. 52 ff.

misfortune, not an offence, and if with Holmes we aim primarily at deterring and decree deterrent punishments against stupidity we are acting much like Dr. Johnson's schoolmaster, Mr. Hunter. "He used," so Johnson told Boswell, "to beat us unmercifully; and he did not distinguish between ignorance and negligence; for he would beat a boy equally for not knowing a thing as for neglecting to know it. . . . Now, Sir, if a boy could answer every question, there would be no need of a master to teach him." It is possible to measure by a normal standard the degree of attention requisite for the anticipation of harm, but the requisite intelligence is measurable only by the capacities of the doer. Holmes, consequently, has not succeeded in establishing the extent of intention or even of negligence in relation to all the consequences of any action performed with a criminal, illegal or immoral purpose.[1]

"The law is concerned to investigate a man's state of mind in relation to the legal character of his acts, not in relation to their ethical or moral character," says Stroud (p. 10). We should go farther: the law is concerned to investigate a man's state of mind not in relation to the law or to the criminal law in general, but in relation to that rule of the criminal law which he has broken. More precisely: ignorance of fact then excludes intention when the action of the doer in the circumstances assumed by him would not fit the type of the offence.[2] The type of the offence in issue will not only describe the punishable act but, by implication, a defined criminal disposition of the mind. The punishment of theft is based upon the existence of a thievish disposition; that of bodily injury, upon a violent disposition; that of rape, upon a lustful disposition, not upon any criminal, illegal or immoral disposition at choice. Appropriately varying penalties are adapted to each particular disposition; it would be contrary to this principle if the punishment designed for a particular act should be made to fall upon a disposition which seeks a less serious, or quite other act. If the doer intending to commit some less grievous form of punishable act in fact commits a more serious form of the same act owing to circumstances which are unforeseen by him and unforeseeable, he will be punishable only for the less serious form. If a person intending to commit an offence, *e.g.* larceny, in fact brings to pass results which accord with the type of a quite different offence such as murder, as a result of circumstances which were not foreseen or foreseeable by him, he cannot be punished for either of these offences, not for murder since the special *mens rea* was wanting, nor for theft if that offence had rested in mere intention, and had not taken form in the overt act which would have constituted an attempt. This limitation of not only the punishable act but of the punishable disposition by reference to the special type of the offence, is a weighty guarantee of the "certainty" of the law.

[1] See also Keedy, 22 *Harvard L.R.*, pp. 84 ff.

[2] In conformity with this see, per Shearman J. in *Allard* v. *Selfridge*, (1925) L.R. I.K.B. 129, "criminal intention or an intention to do the act which is made penal by statute or by the common laws."

" Englishmen are ruled by the law, and by the law alone," said Dicey.[1] " A man may, with us, be punished for a breach of law, but he cannot be punished for anything else," even, we may add, for the bare intention to break some other rule of law or some moral precept. If a disposition blameworthy in some respect or another, but not closely related to the act in fact committed, is made to suffice as a ground for punishment, we are entering the perilous track which leads to a system of punishment of mere thought, a system without fixed limits. A tendency to relax punishment without regard to the type of the offence as established by law, as also the punishment of the disposition without regard to its embodiment in action, have ever been tokens of the downfall of civil freedom in a community. The certainty of law is closely bound up with the idea of definition of the facts which constitute the offence in its two-fold duty of fixing the limits of the acts and the limits of the intention which is punishable.

The purpose of this essay is to show that systematic jurisprudence is more than a general survey designed to ease legal study. Ultimately, as is the case with form generally, the systematic form of the science of law is the matter itself, pregnant with practical consequences and in close relation to the essentials of legal and civic life. Systematic study of law is neglected at the peril of injury to the law itself. This being so, we ask for more jurisprudence in the Criminal Law.

[1] *Law of the Constitution* (8th ed.), p. 198.