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THE JOURNAL OF CRIMINAL SCIENCE

VOLUME ONE

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THE JOURNAL OF CRIMINAL SCIENCE

A COLLECTION OF PAPERS ISSUED FROM TIME TO TIME
UNDER THE AUSPICES OF THE DEPARTMENT OF
CRIMINAL SCIENCE, FACULTY OF LAW
UNIVERSITY OF CAMBRIDGE

EDITED BY

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VOLUME ONE

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EDITORIAL NOTE

THE present publication arises out of a venture initiated by the Cambridge Department of Criminal Science some six years ago. It was then that in collaboration with the *Canadian Bar Review* the Department sponsored a series of short reports on problems of immediate interest in criminal science. Twelve reports appeared in the *Canadian Bar Review* and afterwards in pamphlet form. The welcome extended to this series—almost all the pamphlets are out of print—encouraged us to embark on a somewhat more ambitious scheme.

The *Journal of Criminal Science*—the first volume of which we now present—will appear from time to time. Its aim is to present material which will be of use both to those who take part in the administration of criminal justice and to all who are interested in the impact of crime on modern society.

The enterprise has been well supported and we take this opportunity of expressing to the authors whose contributions constitute this present number of the *Journal* our gratitude for their valued help.

We are happy to announce that arrangements have been made to include in our next number articles by Professor P. Logoz, Judge of the Federal Tribunal of Switzerland, by Professor Magnol, Dean of the Faculty of the University of Toulouse, and by Dr H. Edelston, Director of the Bradford Child Guidance Clinic.

We also record our acknowledgments to Messrs Macmillan and Co., the publishers of our *English Studies in Criminal Science*, who despite present difficulties, have made it possible for this *Journal* to appear.

LEON RADZINOWICZ. J. W. C. TURNER.

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THE RESPONSIBILITY OF CORPORATIONS UNDER CRIMINAL LAW

By SIR ROLAND BURROWS, K.C.

Recorder of Cambridge

A CORPORATION is a mere legal institution, having no real existence, and has been devised for reasons of convenience as having rights and being subject to duties on the analogy of a human being. If a corporation has members, its personality is quite distinct from theirs.

Corporations are classed as corporations sole and as corporations aggregate. The former are really personified offices; the latter are composed of members who may or may not have a voice in the management of affairs. There is really no compelling reason why a corporation should have members at all, but one thing is essential, viz. that there should be some individual or group of individuals who are entrusted with the exercise of its functions, because no corporation can operate without human aid. All its activities, whether lawful or not, must be effected through the agency of human beings.

As the law does not countenance the formation of corporations for unlawful purposes, and their acts and omissions are necessarily those of some individual or individuals, it would be a simple and logical deduction to say that no corporation can do or authorise an unlawful act, and individuals who may commit such an act in relation to the corporation's affairs are alone the offenders. It is true that no such individuals can escape the consequences of their acts by alleging that they did them on the authority and on behalf of a corporation (or indeed anyone else), but it has never been true that a corporation is not considered to be liable in some form or another for such acts.

During the whole course of the history of English law there have been corporations, but until the nineteenth century their number was comparatively small and their importance relatively slight. In medieval times there was rarely any need to examine their essential characteristics in any detail. It was, of course,

perceived that a corporation aggregate could not do homage or swear fealty, and if a corporation sole, such as a bishop, could, it was probably because such an office was not conceived of as an entity apart from the actual holder until Tudor developments. A bishop who committed treason against a Plantagenet king found that his person and his lands were seized without regard to the fact that the office of Bishop had done no wrong although the actual holder had. With regard to corporations aggregate, misconduct might lead to forfeiture, either of their status as such or of franchises vested in them, and the members who were guilty of the misconduct were answerable in their own persons. This probably was a sufficient sanction. The management of a corporation aggregate almost necessarily calls for the co-operation of two or more individuals, but this circumstance does not appear to have played any great part in developing the law of conspiracy.

The matter of procedure has been an obstacle in the development of doctrine on the subject of the criminal liability of corporations. An accused person, speaking generally, could only be tried on indictment and in case of treason and felony the appropriate penalty was usually death. A corporation could only appear by attorney in the Court of King's Bench, and consequently could not be tried at assizes or quarter-sessions, and if charged with treason or felony could not if convicted undergo the prescribed punishment. *Lex non cogit ad impossibilia.* For practical purposes there is no difference between being incapable of crime and not being punishable for crime. It is not surprising therefore that it has been stated over and over again that a corporation is incapable of committing treason or felony.

During the nineteenth century, the problem of the responsibility of corporations for acts done in a particular state of mind was discussed in connection with liability for tort, and as tort and misdemeanours have many resemblances the criminal liability of corporations was at first developed almost as a rider to responsibility for tort, but later, owing to the great increase of modern trading companies and the contemporaneous development of summary jurisdiction following the legislation of 1848, this form of vicarious responsibility has in the majority of cases been discussed in relation to offences which have little or no connection

with indictable crimes. Recently, the responsibility of companies for their servants' misdeeds has been shewn not to be limited to offences which do not require a specific form of *mens rea*, and has been declared to exist with regard to common law misdemeanours. The principle that a person is not criminally liable for a criminal act committed by a servant or agent unless the principal can be shewn to have instigated or connived at that act has not been followed. A company by its nature cannot instigate or connive at an act except by the mind and action of a human being, and "scope of employment" which has played a necessary part in the law of tort has been invoked to justify the imposition of responsibility on both corporations and individuals. In this connection, it does not appear that much, if any, importance has been attached to the function that the corporation was created to fulfil or to the distinction between something which can be called the act of the corporation and something which is an act done on behalf of the corporation. The courts have been concerned with that aspect which deals with the authority given to a servant or agent to act on behalf of the corporation and the scope of that authority. The circumstances that a company may be the instrument used by the real offender to facilitate or cloak his criminal activities was relied on in 1915, but in one or two cases the fact that an offence was part of a fraud on the company has not availed to prevent it being fined for the act of its authorised servant. The reason for this appears to be that the courts have arrived at their conclusions by way of that class of offences that may be said to be breaches of absolute duty and by applying to that class the principle that the act of the servant within the scope of his authority is imputable to the principal in certain classes of crimes as well as in contract and tort. Nevertheless the principle has been applied to acts which are punishable only if done in a particular state of mind or with a particular intention.

No attention has been paid to the point that a corporation created for public purposes may be impeded in carrying out its duties if subjected to that responsibility, or to the point that members who are beneficially interested but not entitled to take part in management may be damnified if the company is responsible for the misconduct of those entrusted with the actual

doing of the company's business. It may be said that the members should choose the managers with more care, even in the case of local government, but there are corporations and companies where in fact or in effect the persons who are financially interested have no say in selecting the management, and in any case cannot effectively control the appointment or conduct of the company's servants or agent. I have found no trace of any distinction drawn between responsibility for the board of directors and that for servants. That there is a distinction between the company and its board of management is well known to the judges, as witness the judgment of Rowlatt J. in *Orpen* v. *Haymarket Capitol* (1931) 145 L.T. 614 at page 617, and consequently it must be assumed that the courts have designedly made no distinction in this respect, either between the company and its board or between the board and others acting on the company's behalf.

It is time to turn to the cases. It must be remembered that at common law the penalty for treason and felony (except petty larceny) was death. It is true that many felonies were clergyable, but this point has no more relevance to the position of corporations than the doctrine of marital compulsion. It being obvious that a corporation could not be punished, no prosecution for treason or felony is to be expected. Dicta to this effect are numerous. Thus, in the *Case of Sutton's Hospital* 10 Rep 1 (which was not an indictment) Lord Coke observed at 32b, "A corporation aggregate . . . rests only in intendment and consideration of the law. . . . They cannot commit treason nor be outlawed nor excommunicate, for they have no souls; neither can they appear in person but by attorney. 33 Hen, 8 Bro. Fealty. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear. Plow.Com. 213 and *the Lord Berkeley's Case;* it is not subject to imbecilities, death of the natural body and divers other cases." In the Court of Chancery there was a difficulty in interrogating a corporation made a party to the suit, and in *Wych* v. *Meal* (1734) 3 P. Wms 310 Talbot L. C. said that an official of a company could be ordered to make discovery, since the company could only answer under its common seal, and, however false such an answer might be, there would be no remedy for perjury; and this was adopted in *Dummer* v. *Chippenham Corporation* (1807) 14

Ves 245. In the King's Bench there was the difficulty that a corporation could not enter into a recognisance. As Coleridge J. pointed out, in *R.* v. *Mayor etc. of Manchester* (1857) 7 E & B 453 at page 458, if the corporation had been the prosecutors seeking to remove an indictment into the Court of King's Bench, "there would have been a difficulty in strictly complying with the statute (which required a recognisance) because they could not enter into a recognisance, although we are aware that in practice this is evaded by one or more members of the body entering into one for them: evaded, we say, rather than overcome". It may be remarked that in 1926 the court saw no difficulty in the way of a corporation entering into a recognisance but held that one entered into by its clerk, not stated to be on its behalf or binding on its property, was not sufficient (*Leyton U.D.C.* v. *Wilkinson* 43 T.L.R. 35). In *Pharmaceutical Society* v. *London & Provincial Supply Association* (1880) 5 App. Cas 857 Lord Blackburn observed, at page 869, "I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death, if that be the punishment for the crime; and so, in those senses, a corporation cannot commit a crime." Again in *Pearks Gunston and Tee* v. *Ward* (1902), 2 K.B. 1 Channell J. at page 11 said; "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence."

This requirement of *mens rea* or anything involving a state of mind has caused a great deal of hesitation. In *Metropolitan Bank* v. *Pooley* (1885) 10 App. Cas 210 Lord Selborne had, at page 218, expressed the view that a company in liquidation could not be guilty of maintenance. This observation was not supported by any reasoning, but the context suggests that Lord Reading was right in suggesting (in *Neville* v. *London Express* (1917) 1 K.B. 402) that Lord Selborne was really only relying on the very limited authority of a liquidator, who would certainly not have the right to maintain another person's action and did not refer to a company as a going concern. In *Hawke* v. *Hulton* (1909) 2 K.B. 93, a company was held to be not liable under section 41 of

the Lotteries Act, 1823, as the penalty was that offenders should be rogues and vagabonds and punished by imprisonment and whipping.

In *R.* v. *Cory Brothers & Co.* (1927) 1 K.B. 810, Finlay J. quashed an indictment against a company for manslaughter. The point argued was whether section 33 of the Criminal Justice Act, 1925, which made new rules as to indicting a corporation (as a result of the decision in *R.* v. *Daily Mirror Newspapers* (1922) 2 K.B. 530 that a corporation could not be committed for trial, because it had no body to be taken into custody), had merely made changes in procedure or had altered the substantive law. The decision that the section merely made changes in procedure was clearly right. Finlay J. stated that the rule was that an indictment would not lie against a corporation for felony or misdemeanour involving personal violence. Manslaughter may be punished by inflicting a fine, and a company obviously can pay a fine. For this reason the court in *R.* v. *I. R. C. Haulage* (1944) K.B. 551 suggested that, so far as manslaughter is concerned, the decision in *R.* v. *Cory* might be reviewed.

A curious point arose in *D. & L. Caterers* v. *D'Ajou* (1945) K.B. 364. Slander as a rule requires proof of special damage, but one exception is the case where the words impute a criminal offence which is punishable corporally. In spite of the fact that a company cannot be so punished, Stable J. had decided that a company so slandered could recover damages, even in the absence of proof of special damage. The Court of Appeal upheld the judgment without finding it necessary to decide this point. Lord Goddard remarked, at page 366, "If one said of a company 'it is a murderer' or 'it is a forger' I have no doubt that the company could not bring an action, because a company cannot forge and a company cannot murder." In so saying, Lord Goddard had in mind previous decisions. In *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859) 4 H. &. N. 87 at page 90, Pollock C. B. had said "It (a company) could not sue in respect of an imputation of murder or incest or adultery, because it could not commit those crimes (*sic*). Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may." This pronouncement had been treated as decisive in *Mayor etc. of*

Manchester v. *Williams* (1891) 1 Q.B. 94, where an action was brought on an imputation of corruption.

As the authorities agree that a corporation cannot commit treason or felony or any misdemeanour involving personal violence, usually giving the reason that such offences were physically impossible, but also relying upon the impossibility of inflicting the only lawful punishment and again also on occasion upon the view that a corporation is incapable of *mens rea*, it is not surprising that there are dicta of wider import. Thus in *Anon* (1702) 12 Mod. 559, Holt C. J. is reported to have said, "A corporation is not indictable, but the particular members are." That is undoubtedly true of some crimes, but, as the words cited constitute the whole report, it is impossible to speculate what limitation, if any, Lord Holt meant to be placed on his words. The series has not the highest reputation and Holt himself once wondered what posterity would think of the judges of his time when reading these "skimble skamble reports". It is probable that he had in mind the decision in the *City of London Case* (1682) 2 Show. 263 where, in proceedings brought to forfeit the City's Charter, Finch S. G. in his argument had cited Y.B. 21 Edw. IV that a corporate body cannot commit a battery or do a personal wrong, but contended that otherwise it could do a corporate act that was illegal, and in fact by presenting a petition had committed sedition. The Charter was forfeited but was restored in the closing stages of James II's reign and the decision was later declared by statute to be erroneous. If Lord Holt really did say what appears in the report, he was not alone, for as late as 1851 Shadwell V. C., in *Two Sicilies* (*King*) v. *Willcox* 1 Sim N.S. 301 at page 335, observed, "the general law of England was that a corporation could not be indicted for crime." It is a pity that the V.C. had not consulted on the point the judge whom he says he had consulted on the construction of the Foreign Enlistment Act then in force (59 Geo. III c. 69 s. 7). It had very recently been decided that a corporation could be indicted, as in 1842 the Court of Queen's Bench had so ruled on demurrer in *R.* v. *Birmingham & Gloucester Rly* 3 Q.B. 223. Referring to the dictum of Lord Holt, Patteson J. who delivered the judgment of the court, said at page 232, "What the nature of the offence was to which the observation was intended to apply does not appear;

and as a general proposition it is opposed to a number of cases which shew that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots and assaults." These cases must have been rare, as the report shews, for there was great uncertainty as to the proper procedure. The decision was that a railway company, a corporation by statute, was indictable for a nonfeasance which was a breach of a statute. In 1846 it was held that the same applied to an indictment for misfeasance in *R.* v. *Gt. N. of England Rly* 9 Q.B. 315. The jury had returned a verdict of guilty and the defendants had moved the court on the grounds that a corporation could not be criminally liable for such an offence. The court refused the motion. Lord Denman C. J. at page 326 remarked, "Some dicta occur in old cases 'A corporation cannot be guilty of treason or felony'. It might be added 'of perjury or of offences against the person'. The Court of Common Pleas lately held that a corporation might be sued in trespass (*Maund* v. *Monmouthshire Canal Co.* 4 M & G 452); but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them and are violations of the social duties that belong to men and subjects. A corporation which, as such, has no such duties cannot be guilty in these cases; but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large." He added another reason, which indicates the change that had taken place in the size of companies and in the importance of their operations, viz. that the persons authorising the acts are not known to the public and the persons actually carrying them out are usually not able to make adequate reparation. It will be observed that Lord Denman was thinking of specific acts specifically authorised, and is not concerned with the scope of the servant's authority or with the question whether the act was done in furtherance of the company's interests or supposed interests. His criterion was apparently whether, having regard to the circumstances, the company could be said to have a duty towards the public which has not been fulfilled. It was not a case where *mens rea* was needed, and one may infer that he would, if need be, have considered the matter afresh on that point.

The question whether a corporation is capable of *mens rea* is unarguable. The real point is whether, in cases in which *mens rea* is essential to the offence, the *mens rea* of an agent or servant acting within his authority can be imputed to that corporation under whose authority he is acting. So far as civil liability in tort is concerned the point was dealt with by Lord Lindley in the Privy Council in *Citizens Life Assurance Co.* v. *Brown* (1904) A.C. 423 at page 426, "There is no doubt that Lord Bramwell held strongly to his opinion (*Abrath* v. *N.E.R.* 11 App Cas 247 at page 250) that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth in *Addie* v. *Western Bank of Scotland* (L.R. 1 H.L.Sc. 145) had expressed a similar opinion as to the liability of companies for frauds. But these opinions have not prevailed. . . . If it is once granted that corporations are for civil purposes to be regarded as persons, i.e. as principles acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. . . . To talk about imputing malice to corporations appears . . . to introduce metaphysical subtleties which are needless and fallacious."

This, however, relates to civil liability. There is a difference where an ordinary individual authorises someone to do acts which can be done perfectly lawfully and the agent or servant in fact does them in such a way as to commit a crime. It does not follow that the principal is, or should be, criminally responsible. The approach to the problem shews that judges did think of the imputation of malice as being in some respect analogous to liability to indictment. Thus in *Whitfield* v. *S.E.R.* (1858) E.B. & E. 115, Campbell L. C. J. at page 121 said, "Considering that an indictment may be preferred against a corporation aggregate, both for commission and omission to be followed by fine, though not imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."

In actions or prosecutions for libel, it had been held that the proprietor of a newspaper was responsible for what was printed, whether he knew of it or not, and in such a case a corporation could not logically be distinguished from a principal,

who was a human being. In *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass* (1939) 2 K.B. 395, the Court of Appeal affirmed the criminal responsibility of a company for libel by upholding a contention that a company could successfully object to answering an interrogatory on the ground that the answer might tend to incriminate it. Du Parcq L. J. in delivering the judgment of the court said, at page 408, "It was further contended that a corporation cannot be indicted for libel. It is not in doubt that a limited company is responsible, in a civil action, for a libel published by one of its officers, and that it is capable of malice; see *Citizens Life Assurance Co.* v. *Brown* (1904) A.C. 423. It follows that it is possible to prove against a limited company all the constituent elements of the crime of publishing a defamatory libel: compare *R.* v. *Wicks* 25 Cr. App. R. 168. It seems to us, therefore, to be in accordance with principle to hold that a limited company may be indicted for libel, and this has the strong support of the well known dictum of Lord Blackburn in *Pharmaceutical Society* v. *London and Provincial Supply Association* 5 App. Cas 857, 869, 870." (This last mentioned case will be discussed later.)

Libel is a common law misdemeanour, and consequently, when in 1943 a motion to quash, so far as concerned a company, an indictment for conspiracy was made at the Kent Assizes, I felt bound to refuse it, as conspiracy is another common law misdemeanour. This refusal was upheld by the Court of Criminal Appeal. *R.* v. *I.R.C. Haulage* (1944) K.B. 551. It was there stated that it is a question in each case whether there is evidence to go to the jury "that the criminal act of an agent, including his state of mind, intention, knowledge or belief, is the act of the company".

There the matter rests so far as indictable offences are concerned. It is clear that some offences cannot be imputed to a corporation. These include such offences as are punishable only corporally, and the most general form of the principle suggests the rule that a corporation cannot commit treason or felony or any misdemeanour that involves personal violence or can only be committed by a human being, e.g. perjury. But, as the cases already cited and those shortly to be referred to strongly suggest, there is another principle, that appears to be or about to become

dominant, that crime may be imputed to a corporation if, on the evidence, the act is the act of the corporation. In that case, it is necessary to examine the constitution of the company and the authority conferred on the agent. This does not exonerate the actual perpetrator (*Dellow* v. *Busby* (1942) 2 All E.R. 439, if indeed any authority is needed) but adds another delinquent. Beyond all question, the view that a corporation is incapable of crime has been rejected.

There seems to be no tendency to develop the argument that a corporation in such cases should be regarded rather as an instrument or as a cloak than as an offender. It can be found in *R.* v. *Grubb* (1915) 2 K.B. 683 where a conviction, under what is now the Larceny Act, 1916, section 20(1), was upheld in the case of a man who misappropriated money entrusted to a company which he controlled.

It is in the department of summary offences that the criminal responsibility of corporations has been principally discussed. Since the Summary Jurisdiction Act, 1848, the number of such offences has been immensely increased, and many of them cannot be effectively dealt with if only the actual perpetrator can be dealt with. There are offences of this kind, however, that only a human being can commit, either from their nature or by reason of the prescribed punishment being inapplicable to corporations. In most cases the argument has turned on the interpretation of the section invoked—whether the term "person" used in such a section includes or does not include a corporation. In that regard it is necessary to bear in mind that Lord Brougham's Act in 1850 had not included a definition of "person", but that under the Interpretation Act, 1889, the word "person" prima facie includes a corporation. In view of the fact that the courts did not conceive of a company being indictable save for breaches of statutory requirements, there are many pronouncements that seem to lay down the rule that a company can only be prosecuted for offences where *mens rea* is not essential, the rule was never laid down in such a form as to be binding (i.e. that where *mens rea* is required, a company cannot be prosecuted) and in the latest cases it would appear that, if an act is done for and by authority of a corporation by a person who has the state of mind that the statute or order requires, then the corporation is liable crimin-

ally for such act. The courts have always disclaimed any intention of treating a company which is a principal on any different footing from any other principal. It is certain that many summary offences are created by way of absolute prohibition, but liability has now been fixed upon principals for acts of agents and servants where the state of mind required by the statute or regulations was that of the actual perpetrator alone and in cases where the principal, found guilty, had merely given a general authority.

The judicial pronouncements began with a series of cases where the main point was whether, on construction, a company was liable to prosecution, and this involved an examination not merely of the offence but also of the characteristics of a corporation. In some cases the offence was declared not to involve a corporation and in others that it did. The most important was the decision, already mentioned, of *Pharmaceutical Society* v. *London and Provincial Supply Assn.* (1880) 5 App Cas 857, which was a civil action for a penalty or otherwise it could not have gone beyond the Divisional Court. It turned upon sections of the Pharmacy Act, 1868, which forbade sales of certain drugs except by qualified persons and a company was incapable of becoming qualified. The actual decision amounted to this: that the Act was not violated if the actual transaction were carried out by a qualified person even if he had an unqualified principal. It, therefore, only decides the construction of a particular statute. The Lords, however, dealt with points of principle. Lord Blackburn at page 869, after the words already cited, said, "But a corporation may be fined, and a corporation may pay damages, notwithstanding what Bramwell L. J. said, or is reported to have said, upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action for damages brought against it, for a libel; or that a corporation which commits a nuisance could not be convicted of a nuisance or the like. If you could get over the first difficulty of saying that the word 'person' here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested." The case is important since all the Lords in their reasons used expressions

that shew that, apart from the point of construction, there would have been no ground of principle that rendered a corporation incapable of committing a summary offence or of being liable to a penal action. The same point arose in *Law Society* v. *United Service Bureau* (1934) 1 K.B. 343 where it was held that the word "person" in sections 43 and 46 of the Solicitors Act, 1932, did not include a company. It was obvious that a company could not qualify as a solicitor but that does not seem to be a logical reason for saying that it could not pretend to be one. The actual decision has been reversed by statute. On another point relevant to this discussion, Avory J. said at page 349, "The second (point) is that the words 'wilfully pretends' in section 46 could have no application to a corporate body because 'wilfully' involves some *mens rea* which a corporate body cannot have. I think that that point fails and that a corporate body might 'wilfully pretend' within the meaning of section 46 to be qualified to act as solicitors. It has been laid down over and over again that, where a statute absolutely prohibits the doing of an act, it is sufficient to shew that the person accused did the forbidden act intentionally and that it is not necessary to go further and prove what is called *mens rea* or any intention other than to do the thing forbidden." It may be said that this pronouncement does not distinguish between the individual who does the act and the principal for whom he does it. Whose intention is material when the principal is the person charged?

The next important case after 1880 was *R.* v. *Tyler*, (1891) 2 Q.B. 588. The question there was whether proceedings against a company for a penalty under section 27 of the Companies Act, 1862, was a criminal cause or matter. An Alderman as a Justice for the City had refused to issue a summons and the Divisional Court had discharged a rule *nisi* for mandamus to compel him to do so. If this was a criminal cause or matter no appeal lay. On appeal, this point was taken as a preliminary objection and upheld. The unsuccessful argument was that, as a corporation could not be guilty of a crime, the proceedings could not be criminal. Bowen L. J. said at page 592, "It was first contended . . . that no criminal proceedings can be taken against a company. . . . It would seem contrary to sound sense and reason if such a technical objection could succeed. Where, for instance, a

statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company. The point becomes still more incapable of argument where the statute prescribes the duty in the company itself. How can disobedience to the enactment by the company be otherwise dealt with? The directors or officers of the company, who are really responsible for the neglect of the company to comply with the statutory requirements, might not be struck at by the statute, and there would be no way of enforcing the law against a disobedient company, unless there were in such cases a remedy by way of indictment. It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by way of indictment" and he cited *R.* v. *Birmingham & Gloucester Ry.*, *R.* v. *G.N. of England Ry.* and *Pharmaceutical Society* v. *London and Provincial Supply Association* already referred to. "I take it therefore to be clear that in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law, punishable in the case of a private individual by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by shewing that they are a corporation. That seems to me to be common sense and good law." Kay L. J. agreed.

It will be noticed that Bowen L. J. was speaking in reference to a legal obligation imposed on a company by statute, which presumably provided no express penalty or procedure.

Pearks Gunston & Tee v. *Ward* (1902) 2 K.B. 1 was a case stated in a summary prosecution under the Sale of Food and Drugs Act, 1875, section 6, where the point was whether a company was included in the word "person" which appears in the section. It was held that it was included. Channell J. stated the principle in these words, "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be

guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is that the Legislature has thought it important to prevent the particular act being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely. It seems to me that exactly the same principle applies in the case of a corporation. If it does the act which is forbidden it is liable."

This pronouncement has been cited in numerous judgments since, and has been thought to affirm the criminal liability of corporations only when no *mens rea* is necessary to constitute the offence. One may neglect the stress on the importance of absolute prohibition. The tendency is to prohibit absolutely for reasons which appear to savour rather of administrative convenience than to depend on the importance of the forbidden act.

The limitation to offences not requiring a *mens rea* is consistent with the cases cited in *R.* v. *Tyler*, but there was no clear statement that it is only in such cases that a company could be liable. Still it was so understood. Thus in *Provincial Motor Cab Co.* v. *Dunning*, (1909) 2 K.B. 599 a conviction of a company for aiding and abetting an employee in the offence of driving a car at night without a proper light was affirmed, it being therefore assumed that the offence was actually committed by the driver and not the company. Lord Alverstone C. J. said at page 603, "If a corporation have a large number of cars and act, as they must, by agents, and those agents send out the cars in a way which does not comply with the regulations, in my judgment the corporation are responsible for the penalties imposed thereby. The doctrine that there must be a criminal intent does not apply

to criminal offences of that particular class which arise only from breach of a statutory regulation." But such a regulation may require an act to be done with a particular intent or may excuse it if done in a particular state of mind and the view of Lord Alverstone is shewn to be too narrow by *Chuter* v. *Freeth & Pocock*, (1911) 2 K.B. 832, where the offence did not require *mens rea*, but there was a defence provided if the act were done in a particular belief. The magistrate had inferred that a company was not liable because such a defence could not be open to it. The Divisional Court held the contrary, citing the passage, already given, from Channell J. Lord Alverstone said at page 836, "The magistrate has held that, inasmuch as 'the person' who gives a false warranty is made liable unless he proves that when he gave the warranty he had 'reason to believe' that the statements or descriptions contained therein were true, therefore 'the person' cannot be construed as including a corporation but must be limited to natural persons capable of belief. In my view that is too narrow a construction. Where a person is capable of giving a warranty that person is liable to a fine. There is no reason why a warranty should not be given by a corporation. It can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true. A similar point has been raised in cases concerning the liability of a corporation in actions which, in the case of an individual, would involve an inquiry into a state of mind, such as fraud, libel or malicious prosecution. It is well settled that a corporation may be liable in all those actions."

It will be observed that again the court relied on the analogy of liability in tort, but so far as I am aware this is the first case where the state of mind of a servant or agent has been attributed to a principal in criminal charges. It is true that it arose in connection with an excuse, but it was not long before it was applied to a provision where the offence required a particular intent. In *Mousell Bros.* v. *L. & N.W.R.*, (1917) 2 K.B. 836, the offence charged was the giving of a false account with intent to avoid payment of railway tolls. The defendants were a company and the acts and intent were those of their manager. On case stated, the conviction was upheld. Lord Reading C. J. followed the

ordinary reasoning. He said at page 846, "I think, looking at the language and the purpose of this Act, that the Legislature intended to fix responsibility for this quasi-criminal act upon the principal if the forbidden acts were done by his servant within the scope of his employment. If that is so there is nothing to distinguish a limited company from any other principal." Atkin J. did tackle the problem. He said at page 846, "I see no difficulty in the fact that an intent to avoid payment is necessary to constitute the offence. That is an intent which the servant might well have, inasmuch as he is the person who has to deal with the particular matter. The penalty is imposed upon the owner for the act of the servant if this servant commits the default provided for in the statute in the state of mind provided for in the statute." In other words, the liability of the principal is absolute if he acts by a servant who has the necessary *mens rea.* If this be so, then the same reasoning might be applied to any statute creating a felony or misdemeanour or to any of those modern offences that may be punishable summarily or on indictment. The principle upon which this reasoning is applicable only to summary offences is not easy to formulate. It was applied in 1944 to a case where the employee was engaged in defrauding his employers and made false returns in connection with purchase tax and a conviction of the employers was upheld. *Moore* v. *Bressler* (1944), 2 All E.R. 515, and if a servant carries out his duties in a way which is forbidden both by statute and by his employers, the fact that his employers so forbade him does not avail them (see *Warrington* v. *Windhill Industrial Cooperative Society* (1918) 82 J.P. 149, and *Griffiths* v. *Studebakers* (1924) 1 K.B. 102), and further if the act is done by the servant of an agent and the principal has no control over that servant, liability cannot be avoided (*Brentnall and Cleland* v. *L.C.C.* (1945) K.B. 115). It is difficult again to apply to such cases the principle that a person is not liable for an agent's or servant's crime unless personally implicated.

A similar point to that raised in *Mousell's Case* was before the court in *Director of Public Prosecutions* v. *Kent and Sussex Contractors* (1944) K.B. 146, where a company was prosecuted under a Defence Regulation for having "with intent to deceive made use of a document false in a material particular". The Divisional

Court upheld the conviction. Lord Caldecote said at page 149, "The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. . . . The company by the only people who could act or think or speak for it had done both these things" and Macnaghten J. at page 156 said, "If the responsible agent of a company acting within the scope of his authority puts forward on its behalf a document which he knows to be false and by which he intends to deceive . . . his knowledge and intention must be imputed to the company" which in effect is what McCardie J. had said in *Pratt* v. *British Medical Association* (1919) 1 K.B. at pages 279-80.

The position therefore is that on the cases, a corporation is not capable of committing treason or felony or any misdemeanour that can only be committed by a human being or is visited only by a penalty which cannot by its nature be inflicted upon a corporation. It is, however, possible that the cases of manslaughter and any other felony that may be punished on indictment by fine will be found to be exceptions to the above rule.

With regard to all other misdemeanours and all summary offences, a corporation is prima facie liable, but there are some cases where by the construction of the statute or regulation a company is not rendered liable and there are a few cases where the penalty is not such as can be imposed on a company.

The Legislature has not concerned itself with laying down any general rules, and the courts in dealing with the cases that have arisen have therefore found themselves obliged to lay down principles that appeared to them to be just and right, having regard to the circumstances that the legal responsibility of human beings had to be adapted so as to apply to entities having no real existence.

In the first instance the courts were most impressed by two criteria (1) impossibility of imputing *mens rea* to a mere legal institution and (2) impossibility of imposing the punishment prescribed by law. It would seem that they were also influenced by the principle that a man is not criminally responsible for the acts of his servants or agents unless he does something which makes him a party to the criminal act. Mere authority to act which is abused by committing an offence is not of itself sufficient to

impose criminal obligation in the principal. When statutory companies came into existence and obligations were placed on them, it became obvious that to hold them incapable of being convicted would defeat the intention of the Legislature, and, further, that the search for an offender would in most cases simply lead to the conviction of an unimportant subordinate. It was thought that this applied only to statutory offences requiring no *mens rea*, but by degrees this view was modified and the rule applied to cases where subordinates who had the necessary state of mind were carrying out the duties entrusted to them in a manner forbidden by law, where the breach was of an obligation imposed on the person, natural or juristic, who was carrying on the business or other activities for which the subordinates were employed, and the operations of which they were carrying out. This was justified by relying on the principle that their employer was responsible for what they did within the scope of their employment. Once it became accepted that the state of mind of the actual person could be imputed to his principal, then the *de facto* impossibility of that principal when a corporation having any intention or motive or knowledge became irrelevant, and the limitation of this vicarious criminal responsibility to statutory offences became unjustifiable. How far the decisions that a corporation can be guilty of common law indictable offences will be applied is a matter of conjecture. The only limitation that has emerged is that the criminal act or omission must be of such that it is the act or omission of the corporation and not that of the subordinate acting outside his authority or ostensible authority. If that be so, then the only offences that cannot be imputed to a corporation are those which are only punishable corporally and then only because the punishment cannot be inflicted, which is not the same thing as a corporation not being capable of committing them.

After all, corporations are creations of the law for the purpose of facilitating the organization of human society and the conduct of human enterprise. There is no reason why the law should not impose on such institutions criminal liability for any offences committed for and on their behalf so long as the penalties are not impossible or absurd. Fines, restriction of activities and even extinction by forfeiture are neither impossible nor absurd.

SOCIOLOGICAL RESEARCH IN CRIMINOLOGY IN THE UNITED STATES

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A.—General Nature of Criminological Research

1. *Its field and scope*

The term "criminology" has perhaps legitimately been used in both a general and a restricted sense. In its narrowest sense criminology is concerned only with the explanation of crime as defined in the law. In its wider sense criminology is concerned with any behaviour held by the group to be immoral or anti-social, whether it is defined as crime in the law or not. Many writers also do not restrict the field of criminology to the explanation of behaviour but extend it to include the study of crime prevention, and the detection, apprehension and punishment or treatment of offenders as well. Under any definition, criminological research is of course that part of criminology to which more or less objective methods have been applied. Criminological research implies a positive approach and a search for causal relations.

If criminology studies other than legally defined offences, its field is wide and its demarcation vague. This inclusion of more than legal crimes has both advantages and disadvantages. It has been urged[1] that scientific criminology cannot be confined to the study of crime as defined in the law, because legal definitions are arbitrarily determined by legislatures or other authorised sources. Hence they vary at different times and in different places. They do not, therefore, mark out behaviour which is consistently related to a social process such as conflict or exploitation. We may seek to discover a theory of social deviation, conflict, exploitation or disorganisation because these concepts are concerned with similar types of social relations. The law, however,

[1] Thorsten Sellin, "The Basis of a Crime Index," in *Journal of Criminal Law and Criminology*, September, 1931.

does not deal with any consistent process. Stealing, rape or murder may or may not express conflict attitudes and may or may not evidence social disorganisation. Failure to recognise this varying content of the criminal act may help explain the inadequacy of some so-called theories of crime which try to reduce crime and its cause to a single simple formula. I may hope to explain why men fight, compete or take advantage of one another. But I cannot so consistently explain why men break laws, because law-breaking as behaviour may be a conflict, a competitive, an exploitative or even a co-operative phenomenon.

The disadvantages of the broader conception of the field of criminology are perhaps more practical than theoretical. If criminology essays to explain all anti-social behaviour, for example, its field takes on unmanageable proportions. No university course could hope to deal with the problem without trespassing upon the fields of many other courses in the psychological and social sciences. In a sense this difficulty is unavoidable even if we confine criminology to the explanation of crime as legally defined, because crime in the legal sense does involve all these disciplines. From the practical viewpoint, however, criminology must deal with that behaviour which is dealt with by police courts or institutions and which is thought of by the public as the crime problem. Moreover most of our research has in fact been directed to the study of crime in this narrower sense. We may hope to explain behaviour even when so arbitrarily defined in so far as the behaviour or its causes are found to entail factors which repeat themselves in consistent combinations. Yet if we define the subject matter of criminology in terms of formal law only, rather than in terms of a process, it is less plausible that we shall find its nature and its causes sufficiently consistent to fit into any one criminological theory.

The question whether criminology shall be confined to the explanation of crime or extended to the study of its detection and prevention and to the treatment or punishment of criminals is less significant for causal explanation for it is simply a matter of terminology and expediency. Undoubtedly research is needed in all of these fields. Moreover they cannot be wholly separated. Preventive programmes and treatment programmes apply and test theories of causation and our knowledge of particular influ-

ences. The Glueck research,[1] though concerned primarily with testing penal policies, has contributed to our knowledge of crime causation. Moreover our penal policies are themselves the product of social processes and in turn affect the commission as well as the repetition or non-repetition of crime.

The present article will be primarily concerned with research[2] dealing with crime as defined in the law. Its emphasis will be upon studies of crime causation and efforts to develop theories of crime. There will be less reference to studies of preventive and treatment programmes. No mention will be made of studies of criminal identification or crime detection although knowledge of social relations is not, strictly speaking, wholly insignificant even in this area. No attempt will be made to catalogue all recent research. We shall confine ourselves to a few representative studies deemed most significant for criminological theory.

2. *What is a cause?*

It has been said that some differences in criminological theories are largely due to different conceptions of the nature of a cause. Disregarding philosophical problems, there seems to be two different views of the nature of social causation in the field of criminology. To such men as Lindesmith[3] and Sutherland,[4] a cause can only be a factor found universally present in the behaviour pattern under study. It is thus something which is independent of time and place. Just as the elements in a chemical formula are universals found everywhere and every time in the

[1] The original studies are: Sheldon and Eleanor Glueck, 500 *Criminal Careers*, New York, Knopf, 1930; *Five Hundred Delinquent Women*, New York, Knopf, 1934; and *One Thousand Juvenile Delinquents*, Cambridge, Harvard University Press, 1934. Follow-up studies of two of these groups have been made, and the whole series of research studies have been conveniently summarized in their recent book, *After-Conduct of Discharged Offenders* in Cambridge, England, University Faculty of Law, Department of criminal science; *English Studies in Criminal Science*, U.S., November, 1945.

[2] Professors Thorsten Sellin and J. P. Shalloo formerly published periodically classified lists of criminological research which were invaluable to the student. Unfortunately the war and other difficulties have interrupted this service; Cf *Criminological Research Bulletin*, No. VIII, 1939, J. P. Shalloo, Ed., Philadelphia, 1939

[3] Alfred R. Lindesmith, "A Sociological Theory of Drug Addiction," in *American Journal of Sociology*, January, 1938.

[4] E. H. Sutherland, *Principles of Criminology*, 3rd Ed., Chicago, Lippincott, 1939, Chapter I.

composition of a given compound, so the cause of a criminal act is an element universally present. Thus Lindesmith finds[1] many situations and influences involved in the life histories of drug addicts, but only one of these appears in every case he has thus far studied. Men may take drugs and acquire the drug habit sometimes in connection with medication; sometimes when they would escape reality; sometimes as a result of social pressure when companions urge them to indulge in order to be "good fellows"; sometimes when satisfying their curiosity concerning the effects of indulgence. None of these conditions, however, are found in all cases and so no one of them can be the cause of addiction. In every case, however, addiction was found to follow the discovery by the addict that pains he suffered when without the drug were due to its absence and could be relieved by taking another dose. On this discovery the addict was "hooked". Being universal this knowledge is to Lindesmith the cause of drug addiction. Sutherland apparently accepts this view of causation.

The contrary notion of causation is that a cause is simply a necessary antecedent or accompaniment of the act. The test of causation is thus not the universality of a factor but the effect of its absence. If without medication, desire to escape reality, social pressure or curiosity, any addict would not have taken the drug, then in that single case, that necessary element becomes one of the causes of drug addiction. This view has been ridiculed by insisting that to be human or to possess a head is in this case a cause of crime, but the fact that some causes are obvious does not seem to invalidate the concept. Clearly this view of crime causation involves a multiple factor concept. It does not discover a universal formula for any type of behaviour. Rather it discovers varied combinations of factors which result in similar behaviour. This does not mean necessarily a chaotic view of causation; for similar factors and similar combinations of factors are found to repeat themselves. Yet the relationships found are complex, so that conceivably a factor necessary to explain crime in one case might even be a factor necessary to explain the avoidance of crime in another. Of course no single theory of crime is found by

[1] Alfred R. Lindesmith, *The Nature of Opiate Addiction*, University of Chicago Libraries, Chicago, 1937.

proponents of this second view. It must stand or fall in terms of evidence discovered. Nevertheless it is pertinent to point out that if one confines himself to the first view of cause as universal, programmes of prevention are limited to attacks upon that universal. In the case of Lindesmith's theory of drug addiction, one would thus presumably strive to keep users of drugs ignorant of their effects. In the second view, however, one would hope to control medication, social relations or other factors found to be necessary antecedents in a significant number of cases. We should not, however, remove heads because heads are of value independent of their use in the commission of crime. However important this difference in definition of cause may be when a theory of crime is under discussion, it is of little significance when one analyses a specific piece of research.

3. *Methods used in criminological research*

Not all the methods of the exact sciences are available to the criminologist. An experimental or laboratory method obviously has but a limited place in criminological research. The full control of the laboratory is impossible. The nearest approach to such control is seen in the use of the therapeutic method. To a limited extent a preventive programme based upon a theory of causation may test the validity of that method, if there has been little change in the other factors involved. Perhaps the best example of this method as used by the sociologist is seen in Clifford Shaw's Area Project.[1] One of the avowed purposes of the Area Project is to keep careful records of results to determine how far Shaw's theory of delinquency as the product of the disorganised neighbourhood is sound. Shaw has shown that the delinquency rate declined appreciably in the area of his Russell Square project following a programme of democratic neighbourhood reorganisation, as compared with a similar area where no such programme had been tried. Shaw is free to admit, however, that less convincing success has characterised some of his other projects. This partial demonstration is, of course, just what one would expect if other factors than the neighbourhood operate, and when control is incomplete. At best Shaw can only partly re-

[1] Cf. Clifford R. Shaw, Joseph D. Lohman, Ernest W. Burgess, "Coping with Crime," pp. 8–28, *National Probation Association Year Book* 1937.

organise neighbourhoods, and influences other than the neighbourhood are involved.

Statistical comparison of criminals and non-criminals is, of course, a widely used method. Sociologists have used it to show similarities and differences with respect to various group relations, just as psychologists may use it to show differences in the prevalence of specified personality traits characterising criminal and non-criminal groups. Similarly much sociological statistical research has used the method of correlation. Thus one may study the increase or decrease in crime rates as related to changes in indices of culture change or of social disorganisation. Again crime and sociological indices may be related in space when the ecological approach is employed. Shaw and McKay[1] and other sociological ecologists have employed this method to supplement their descriptive characterisations of neighbourhoods where delinquency was found to be concentrated. Clearly correlation studies are the beginning and not the end of criminological research. They suggest causal relations and locate areas in need of further study by methods not restricted to the use of exact indices.

The use of case and life histories is among such less exact, but often more meaningful methods. Clifford Shaw is justly famous for his unusually full life histories[2] which have at once tested and illustrated his hypotheses as to crime causation. Seriously limited and full of pitfalls as such a life history method undoubtedly is, it has often revealed very convincingly those subtler meanings of experience which cannot be measured with a yardstick.

Similarities and differences as between sociological and non-sociological research are well illustrated when one compares, for example, outlines used by sociologists in studying a case as compared with those employed by the more orthodox psychiatrists[3] or psychoanalysts. The differences may be matters of

[1] Cf. Clifford R. Shaw, and Henry D. McKay, "Social Factors in Juvenile Delinquency," National Commission on Law Observance and Enforcement, *Report on the Causes of Crime*, Vol. II.

[2] Cf. Clifford Shaw, *The Jack Roller*, Chicago, University of Chicago Press, 1939; *The Natural History of a Delinquent Career*, Chicago, University of Chicago Press, 1931; and *Brothers in Crime*, Chicago, University of Chicago Press, 1938.

[3] See Judge Baker Foundation, *Case Studies Outline*, Series 1, Boston, 1923; Myrtle Strom Mink, *Suggested for the Psychiatric Study of Children with Behavior Difficulties*, published by the Institute for Juvenile Research, Chicago, undated. Donald R. Taft, *Criminology*, New York, Macmillan, 1942, pp. 44–51.

emphasis but they are none the less important. Thus a psychiatric social worker with a minimum of sociological training, will seek many kinds of social facts looking for their relation to emotional tensions which the psychiatrist finds significant as origins of delinquent motivations. He may report the home as dirty, ill-disciplined, immoral, overcrowded and whatnot. These characterisations are likely to be based upon more or less absolute and static standards or upon his own conception as to how clean, moral and roomy a home should be. The sociologist or sociologically trained social worker, on the other hand seeks *relative* social conditions, because it is these which determine social status, and loss of social status is found a most important criminogenic factor. Dirt, overcrowding and even immorality *per se* are found of little significance. But to live in the dirtiest house in the row, to have a reputation among neighbours for immorality according to their standards, for parents to quarrel more than the local mode—facts about such *relative* status-determining situations are called for more or less distinctively in the case history outlines of the sociological research student.

4. *Disciplines contributing to criminological research*

It is increasingly recognised that no single approach or discipline can independently explain criminal behaviour.[1] Crime is not the subject matter solely of either sociology, geography, psychology, physiology, medicine or psychiatry. Criminology is the systematic application of these and other sciences. Crime is now known to result from the interaction of many factors which are the subject matter of many disciplines. Co-operative research, clinical experience, interdepartmental relations in our universities, and practice in applying and testing preventive and treatment programmes have demonstrated this fact. The more representatives of these several disciplines work together, the more they learn from one another. The more meaningless, also, become hairsplitting distinctions between them. Differences in emphasis, however, remain. In attempting to define the several approaches we are almost compelled to exaggerate actual differences in order to give them distinctive meaning. In speaking of

[1] Cf. Taft, *op. cit.*, pp. 287ff.

sociological research in criminology below, I shall use a definition which appears to be meaningful and of great significance for the understanding of crime. In using it, however, there will be no implication that the approach so labelled is unknown to or unpractised by some students who have been trained and labelled as psychologists, psychiatrists or economists. Certainly the sociological approach as we shall define it, has been conspicuous by its absence in the research [1] and practice of some representatives of these other disciplines. As surely this situation is on the decline, and that decline is to be welcomed. Yet some of our otherwise most valuable research still largely ignores the sociological approach. The sociological approach deals with social relations. It asks how far delinquent behaviour is a product of group patterning. It studies the family but, unlike the old-line psychiatry, it does not confine its attention to the family, but is concerned with the influence of other primary and secondary groups such as clubs, gangs, neighbourhoods and communities. As indicated above, it is concerned with relatives rather than absolutes. It is the relative condition of the home, the neighbourhood, and the gang which sociologists consider. They are concerned with the particular social world of the delinquent. Hence they not only record said conditions but compare them with social conditions which characterise other groups which the delinquent may compare with his own. The delinquent behaviour is seen as a function of his own experienced social relations. It is these which significantly fix his status. Thus sociologists in their research are tremendously concerned with social status. They often find the delinquent an individual who has lost status in a significant group and who has sought status in a delinquent group. They consider the status of the individual in his family, of his family in its neighbourhood, of his neighbourhood in the larger community, etc. Sociologists are much concerned with the social roles which delinquents play. They see personality as a complex product, but as largely the product of group relations. Sociological criminology is concerned with the moral standards of the law as defining crime, but more concerned with varying group moral

[1] The studies of Sheldon Glueck, referred to above, among our best in many respects, though giving attention to certain "social" factors, almost wholly lack a sociological approach as we define it.

norms as influencing the delinquent to depart from legal behaviour as defined *in the law*. It finds culture conflict provocative of delinquency.[1] It finds emotional tensions increasingly aroused by absence of agreement as to what is moral today, as between groups of which the individual may have been a member. It speaks of our neurotic age[2] as well as of neurotic individuals. It finds that in a neurotic society the neurotic individual may be better adjusted than the better balanced emotionally. A man loses social status if he does not lose his head, when the prevailing mode is unbalanced behaviour.

In all this it is to be hoped that the sociologist does not lose sight of the individual. But as a sociologist he is concerned with the individual's social relations. Individual eccentricities interest him chiefly as they affect social status. To be thought of as "queer" is more socially devastating than just to be queer. Moreover the sociologist sees personality differences themselves as often the product of varying group experience. Some sociologists have distinguished here between psychogenetic and cultural personality traits.[3] The former are found common to types of individuals living in many cultures and so are not properly considered the products of culture except perhaps as cultures have universal elements. Emotional instability and egocentricity have been mentioned as examples of such psychogenetic traits. Research has shown, however, that however important such psychogenetic traits may be in some cases, a common group experience as in the gang may mould the behaviour of individuals with widely differing traits into a common pattern of delinquent behaviour. Some sociologists hold, moreover, that such a trait as egocentricity is developed to unusual degree by a materialistic culture and that situations which shall arouse emotionally unstable behaviour may be given in the culture.

[1] Cf. Thorsten Sellin, *Culture, Conflict and Crime*, Social Science Research Council, Bulletin, 41, The Council, 1938.

[2] Cf. George Devereux, "Maladjustment and Social Neurosis," *American Sociological Review*, Dec., 1939, p. 845.

[3] Cf. Edward Sapir, "Personality," *Encyclopaedia of the Social Sciences*, Vol. XII, pp. 85–7; and especially Ernest W. Burgess, "Personality Traits of the Brothers," in Clifford R. Shaw, *Brothers in Crime, op. cit.*, pp. 326–335.

B.—Types of Sociological Research in Criminology

Sociological research in the field of criminology has been varied. Fortunately not all of it has been exclusively sociological for sociology alone cannot explain crime. The following types of research may be distinguished:

1. *Studies of particular influence such as families, neighbourhoods, gangs and social institutions.*

These have contributed much, but in so far as they have excluded the influence of other social factors they have often suffered from particularism and so laid themselves open to attack from other sociologists as well as from psychologists or psychiatrists.

2. *Community or neighbourhood surveys*[1] *with emphasis on the causation of crime.*

Like individual case studies these have the advantage of indicating the interrelationship of many types of influence. Often they have suffered from inadequate study of a control community characterised by less crime. State surveys have often been mainly confined to description of penal machinery, but some, including the Illinois Crime Survey, have contributed to criminological research.

3. *Studies of a particular type of crime and of particular groups of criminals.*

Type of offence by no means suggests the social process by which individuals become criminal, since many roads lead to the same crime. Nevertheless maturity in crime is often indicated by the type of offence when studied within the limits of a given local culture. Thus Shaw has shown[2] a somewhat standardised process to characterise the slum boy as he progresses from local pilfering in his neighbourhood, to more serious local offences, to downtown thieving, to robbery and sometimes to rape.

[1] Cf. Clifford R. Shaw and H. D. McKay, and Leonard S. Cottrell, *Delinquency Areas*, Chicago, University of Chicago Press, 1929, and later publications by Shaw and McKay.

[2] "Social Factors in Juvenile Delinquency," *op. cit.*

More important, probably, have been Sutherland's [1] recent studies of the group life of particular types of professional criminals, including that of the professional thief and the embezzler. Such studies add to known facts concerning the influence of the group on the beginnings of delinquency, its continued and special influence at the professional level. Not only improved technique and mutual protection, but the development of group codes and much mutual aid is evident. Moreover the similarity of certain aspects of the group life of professionals to that of conventionally approved business and other groups is made evident.

4. *Studies of crime among a particular minority group.*

In the United States the Negro,[2] immigrant,[3] Indian[4] and Oriental[5] groups have been extensively studied from this point of view although some of these studies are by no means wholly sociological. In addition the culture of particular nationalities, conspicuous either for much or little crime, has been made evident. Wide contrasts between the crime records of these groups and sub-groups make this type of study especially significant. Almost invariably such study has revealed that either the nature of the culture, the degree of its contrast with American culture, the peculiar type of situation in which the minority finds itself, or discriminatory practices toward the minority in question, explain its deviation from prevailing patterns of behaviour. Many of the better studies of immigrant minorities have been in the nature of general social surveys in which crime has been but one of many considerations. To date the best work seems to have been done with the Mexican, Italian, Japanese, Polish and Hungarian groups.

[1] Cf. E. H. Sutherland, Ed. *The Professional Thief*, Chicago, University of Chicago Press, 1936.

[2] Cf. Chicago Commission on Race Relations, *The Negro in Chicago*, Chicago, University of Chicago Press, 1922; Dollard, *Caste and Class in a Southern Town*, New Haven, Yale University Press, 1937, etc. . . .

[3] National Commission on Law Observance and Enforcement, *Report*, No. 10, on Crime and the Foreign Born, Washington, 1931. Donald R. Taft, *Human Migration*, New York, Ronald, 1936, Chapter III; Donald R. Taft, *Criminology*, *op. cit.*, Chapter VII and many more.

[4] Hans von Hentig, "Delinquency of the American Indian," *The Journal of Criminal Law and Criminology*, July–August, 1934, pp. 75–84.

[5] Edward K. Strong, *The Second Generation Japanese Problem*, Stanford University Press, 1934, etc.

5. *Analyses of the general culture.*

The thin partitions which separate behaviour defined as crime, from various types of non-criminal behaviour, the wide prevalence of such near-crime, attitudes of indifference, tolerance, acceptance and even approval of some of these exploitative patterns—such facts have led to the study of what Sutherland calls "white collar criminality" and to the analysis of the general culture within which criminal behaviour arises. In the case of Sutherland attention has been confined to white collar crime which is technically unlawful. Sutherland thus attempts to bring white collar crime within the scope of his general theory of crime. The present writer, not concerned to develop an all-embracing theory of crime, has rather sought to find within the general culture causes both of violations of the criminal law, narrowly construed, and of exploitative and other injurious behaviour not defined as crime. Much further study is called for within this latter area. Thus far the method used has been chiefly that of logical analysis. The culture being what it is, and behaviour approximating crime being so wide-spread and so generally accepted, behaviour which is crime within the meaning of the law, would be expected largely as a consequence of the nature of the general culture. It has thus been argued that we get the criminals we deserve. The writer has never argued that all crime can be thus explained. Nevertheless this general cultural influence appears so important that the conclusion may be approximated that each culture produces its own types and quantity of crime. Such a cultural influence is, of course, often indirect rather than direct. For example the competitive struggle normal in American culture implies relative failure for some and some strain on ethical standards for most. It may thus indirectly cause crime which grows out of the sense of failure or—without failure—out of a straining to succeed in the search for social status which depends upon success.

In addition to the above types of sociological research in criminology we may mention methodological[1] and bibliographical[2]

[1] Thorsten Sellin, "The Basis of a Crime Index," *op. cit.*; "Research Memorandum on Crime in the Depression," *Social Science Research Council Bulletin No.* 27, New York, 1937.

[2] Thorsten Sellin, and J. P. Shalloo, *A Bibliographical Manual for the Student of Criminology*, Philadelphia, 1935.

studies and critiques of the findings of students who have approached criminology from a somewhat exclusively anthropological, psychological, psychiatril, psycho-analytical or economic viewpoint. The last-named discussions are naturally often found in textbooks. We attempt no systematic listing of these types. Undoubtedly students utilising the sociological approach need, and have received, similar criticisms when their research has been too unilateral.

C.—Examples of Sociological Research in Criminology in the United States

We shall devote the remainder of this article to brief comments on, or characterisations of, a few types of sociological research in criminology which seem to have been especially significant for the development of criminological theory. We shall deal in order with studies of juvenile and adult gangs by Thrasher, Shaw, Landesco and others; Clifford Shaw's analysis of city neighbourhoods and his and Saul Alinsky's preventive programmes utilising neighbourhood organisation; Sutherland's important research dealing with the white collar criminal; and Donald Clemmer's, Donald Rasmussen's and the present writer's analyses of the general culture in its relationship to crime and of the prison community. In each case other students have undoubtedly contributed important data which we shall not have space to mention, our interest being in illustrating influential type studies.

1. *Studies of companionship and the gang.*

Clifford Shaw has surely established[1] beyond question the fact that juvenile delinquency, at least in large American cities, is a group phenomenon. Of 5,480 offenders in Chicago he found that less than a fifth (18.2%) had committed their offences alone, and that in the case of the most prevalent offence among boys, stealing, almost nine-tenths were collectively engaged. Where, in other studies such as those of the Gluecks, smaller proportions of gang activities were found, it sometimes appears that more rural cases were included and also that possibly the student

[1] Shaw and McKay, "Social Factors in Juvenile Delinquency," *op. cit.*, pp. 195–6.

was less concerned with a thorough analysis of the delinquent group.[1] The influence of the juvenile gang is clearly somewhat more important than even these figures would seem to indicate, since a delinquent acting as a "lone wolf" in a particular offence, may nevertheless have learned the delinquent pattern in the gang. Gangs are found[2] to teach an attitude of conflict and a general hoodlum pattern as well as the technique of crime. They impart and enforce the gang's code which is often the reverse of that of the general community. They are a medium of contact with more experienced juvenile delinquents and with adult and professional criminals who become local heroes to the boy and coax him into more serious and "manly" delinquencies. When such gangs are located in neighbourhoods where delinquency is almost universal and where professional gangs are located, the spread of more and more serious patterns of behaviour has been observed. Through the gang the boy may develop a financial interest in crime through contacts with the "fence". Normally by definition a conflict group, the gang in some communities may have the support of the local population because it expresses hostile or prejudiced attitudes, for example toward the Negro, which are rather widely held by the local neighbourhood. Many studies have been made of racketeers and rackets and of professional criminals. John Landesco, hob-nobbing with criminal gangs in Chicago, has given[3] us a pretty convincing demonstration of the naturalness by which many boys, growing up in gangland, choose professional crime as their lifework. They have been prepared for such choices through their childhood conditioning. Their non-criminal fathers have been examples of "poor-working-saps" making their pittance and rated as failures. They have been exposed to a somewhat unrepresentative sample of successful men because in their neighbourhoods, so many have found their success only in crime. The few professional people the potential gangster has known have not been without willingness to accept illegal and unsocial profits. The policeman, politician and petty exploiter have taught them that success

[1] Cf. *One Thousand Juvenile Delinquents, op. cit.*, pp. 94 and 100–1; 500 *Criminal Careers, op. cit.*, p. 152.

[2] Taft, *Criminology, op. cit.*, pp. 172–174.

[3] "Organised Crime in Chicago," in Illinois Association for Criminal Justice, *Illinois Crime Survey*, part III, Chicago, 1929.

requires dishonesty and that dishonesty is widespread. It is easy for them to believe that everyone has a racket and that crime is a bit more open but not more reprehensible form of exploitation than that of the more or less respected citizen. To account for criminal behaviour in this area no abnormality of personality need be assumed. The boy rushing gladly into his gang activities because they are the mode and because they bring status, surely need not have been the victim of emotional tension in the home, as the psychiatrist is wont to insist. The gang has been shown to mould the emotionally stable and the emotionally unstable, the boy with high and the boy with low IQ, the boy from the broken and the boy from the whole home, into one common pattern of unsocial behaviour, because the gang awards status for delinquency.

2. *Studies of neighbourhood influences.*

Clifford Shaw is, however, most distinctively known for his neighbourhood surveys, his life histories illustrating social influences upon crime, and his Area Project programme applying his criminological theories. For decades Shaw has gathered material from Chicago neighbourhoods and scores of other students have found similar material in other cities. Shaw first locates delinquency areas on spot maps and rate maps. He then examines the characteristics of the neighbourhoods where delinquency rates are highest. Among characteristics he discovers, however, he tends to emphasize one. The delinquency area is a place where the neighbourhood, as an agency of social control, has broken down. Its mobility, its culture conflict produced by clashing immigrant mores, and its evidence of social failure, combine to destroy the neighbourhood pride which may have existed earlier when it was a true residential primary group. Product of the industrial growth of the modern city, the slum loses its sense of neighbourhood pride. Property is not improved for residential purposes because it will soon be sold for a factory or commercial site. Indifference as to personal appearances is paralleled by more significant indifference as to behaviour. The neighbourhood no longer awards status to those who avoid crime, denying it to the criminal. People do not know one another. They lack neighbourhood consciousness. Delinquency

to Shaw, thus, is in large measure the product of the breakdown of neighbourliness in the slums of our large cities.

Shaw's work is of great importance, and that importance has hardly been shaken by various criticisms made of some of it. Miss Robison in her *Can Delinquency Be Measured,*[1] called attention to the difficulty of defining delinquency areas accurately, and to the impossibility of exactly comparing the delinquency of certain particular neighbourhoods on the basis of Shaw's statistics. She has shown that such a factor as nationality, for example, may somewhat invalidate such comparisons if reliance is upon official police or courts statistics. For example the Jew may avoid arrest and trial partly because he is equipped with clinics and other agencies to which he may be referred instead of formal trial. The Negro, on the other hand, ill-equipped with agencies, suffers arrest and punishment disproportionately and his recorded delinquency rate thus exaggerates his criminality as compared with that of the Jewish child. Hence comparisons between neighbourhoods predominantly Jewish with those of the Negro are unfair to the Negro and inaccurate measures of relative neighbourhood delinquency. Such criticisms are often well taken but they do not seriously affect the general pattern of delinquency concentration which Shaw shows.

More important, it seems, is the criticism that neighbourhoods, though often factories manufacturing delinquency, are also receptacles collecting delinquents and potential delinquents[2] through selective migration. The poor, the failure, the bum, the drug addict and the criminal himself may gravitate disproportionately to the slum, rather than be wholly slum products. Yet many of these came from other slum neighbourhoods, and this fact of selective migration does not invalidate Shaw's analysis of the way in which the slum produces delinquency.

Still more important is the criticism[3] that the breakdown of neighbourliness which Shaw stresses is not confined to delinquency areas. It is a trend in American society, more evident in the city than in rural areas, but extended to some locations

[1] Sophia M. Robison, *Can Delinquency Be Measured?* New York, The Welfare Council of New York City, Columbia University Press, 1936.

[2] Donald R. Taft, "Testing the Selective Influence of Areas of Delinquency," *American Journal of Sociology*, March, 1933.

[3] Taft, *Criminology, op. cit.*, pp. 156ff.

where the well-to-do live, as well as found in the slum. Life is perhaps no more anonymous so far as neighbours are concerned on the boulevard than in the slum, although in the former location other primary groups such as the club, which are not necessarily neighbourhood groups, perform a control function not unlike that of the old-fashioned neighbourhood. There women gossiped and borrowed sugar over the back fence, and men were concerned that they maintain status by approximating the approved mode in their behaviour. This criticism, it seems, merely asks us to add to the influence of neighbourhood breakdown other characteristics of the slum which Shaw may have stressed less in his earlier studies.

Finally Shaw's spot maps are chiefly concerned with delinquency as defined in the law and as punished by the courts. Had he been able to locate white collar crime of the business and professional man, to say nothing of tax evasion and exploitation which may or may not be defined as crime, his maps might well have shown a different pattern of distribution. We must, however, include delinquency as Shaw considers it as at least part of the crime problem, and, so restricted, that problem is highly concentrated as Shaw has shown. From this viewpoint Shaw is quite right in drawing life history material from the slum and in developing his well-known neighbourhood reorganization programme. His published life histories are perhaps the best examples of their kind, and, though such materials can never perhaps achieve full scientific proof, they show a logical relationship between neighbourhood and other group relations which goes far to establish the validity of Shaw's emphasis on neighbourhoods disorganization. Shaw hardly goes back of the neighbourhood to show its own genesis in still deeper aspects of American culture, though he probably would never deny such deeper influences. To the present writer, Mr. Shaw's life histories demonstrate the related influence of other than neighbourhood factors. Shaw's efforts to[1] show the relative unimportance of the broken home seems to have been less well controlled. His Area Project preventive programme, though of great significance, hardly falls within the scope of the present paper, except so far as reduced delinquency, in at least one of the areas, proves the truth of the

[1] "Social Factors in Juvenile Delinquency," *op. cit.*, p. 276.

neighbourhood disorganisation hypothesis. As Director of the Division of Delinquency Prevention of the Illinois Department of Public Welfare, Clifford Shaw not only has an opportunity for wider influence, but eventually should be able to test further his criminological theories.

Saul Alinsky, formerly on Shaw's staff, directs not only the Back of the Yards neighbourhood reorganisation project, but also the larger efforts of the Industrial Area Foundation. It seems to be a matter of some disagreement but not too important, whether Alinsky's work[1] represents an effort sufficiently different from that of Shaw to justify distinction. The Industrial Areas Foundation perhaps seeks to deal with somewhat deeper roots of delinquency and hopes that community organization will not only be a local programme but will be federated nationally to become a significant political influence.

3. *Studies of "white collar" criminality.*

In the writer's judgment Professor E. H. Sutherland's studies in the area of "white collar crime"[2] are the most significant criminological research ever undertaken at any time. Their significance seems not to stand or fall with the validity of Sutherland's somewhat tentatively proposed theory of crime. Sutherland's importance as a criminologist and in the field of research extends, of course, beyond this most recent of his activities. His significant analyses of the group life of professional criminals have already been referred to. His review of studies[3] of the relationship between intelligence and crime are still quoted as convincing refutations of the claims of the earlier psychological students in this area. His critical analysis of weaknesses in the work of Goring[4] and Hooton[5] are classics. His theory of crime referred to below is at least one of the most challenging to date, and his

[1] Cf. Saul D. Alinsky, "Community Analysis and Organization," *American Journal of Sociology*, May, 1941, pp. 797–808, and his recent *Reveille for Radicals*, Chicago, University of Chicago Press, 1946 (1).

[2] Cf. E. H. Sutherland, "White-Collar Criminality," *National Probation Association Yearbook*, 1940, pp. 138–155. "Is White Collar Crime Crime?" *American Sociological Review*, April, 1945, pp. 132–9.

[3] "Mental Deficiency and Crime," in Kimball Young, *Social Attitudes*, New York, Henry Bolt, pp. 375–75.

[4] *Principles of Criminology*, 3rd Ed., Chicago, 1939, pp. 35–6.

[5] *Journal of Criminal Law and Criminology*, April, 1939, pp. 911–14.

textbook which has now passed through three genuine revisions is probably still the most scholarly and widely used in the field. In addition it contains many telling critiques of conflicting schools of criminology. Yet, in the writer's judgment, his white collar criminal studies are his major contribution to date. These present objective data of the most convincing sort and present an argument which tends to revolutionize the whole of our thinking as to the nature of crime and its causation. Anyone who writes from the psychological, psychiatric, psychoanalytical or economic viewpoint, as to the causes of crime must at least justify his writing, either by refuting Sutherland's conclusions or by bringing his own work into line with them. We suggest below that a still broader and, to us, more acceptable approach to the explanation of crime is in order, but that broader approach has not yet been supported with adequate objective research. Moreover it is quite consistent with Sutherland's research if not wholly with his theory. The reader should not be satisfied with the following brief summary of the Sutherland research, but should go to Sutherland's own writings and to the still more recent work of Professor Clinard which deals with white collar crime in the field of violations of war-time OPA restrictions.[1]

A white collar criminal is a genuine criminal in that he has violated a criminal law which could have subjected him to prosecution in the criminal courts. Actually he may have been prosecuted rather in the civil courts, dealt with by administrative processes, been subjected to a cease and desist order, or otherwise disposed of or overlooked. His white collar crime was committed in the course of his business or profession and he himself is a member of a class which has relatively high social status. This status is also little if at all affected by his criminal behaviour. This is indicated both by the frequent leniency with which he is dealt with by the courts, and by the tolerant, not to say approving, attitudes of his associates. Yet his acts, judged by the financial and other losses to which his victims are subjected, are far more serious than most crimes against property committed by those traditionally considered the criminal class—by the burglar,

[1] Marshall Clinard, "Criminological Theories of Violations of Wartime Regulations," *American Sociological Review*, June, 1946, pp. 258–270. Professor Clinard has a book on the OPA in process.

pickpocket, embezzler, common thief. Much white collar crime is racketeering though the two terms probably do not coincide. If white collar crime and racketeering are combined they constitute, in terms of severity, *the* crime problem, at least so far as property crimes are concerned. Perhaps Sutherland will sometime discuss the relationship between white collar crime and crimes against the person to test how far the latter are involved in white collar crime, or represent a different category of acts which cannot be put on the same scale. The point is, that while we might consider some crimes against the person as more important socially than white collar crime or racketeering, it seems that some crimes against the person result directly or indirectly from white collar crime. Of course not all do. Sutherland has supported his argument with many facts including a study of the seventy largest industrial and commercial corporations in the United States. All of these were shown to have been criminal without any quotation mark around the word. Such findings raise many questions of great significance. The type of criminal which crowds our American prisons is not the white collar type. What would be the result if either of two policies were followed: (1) if white collar criminals were punished by imprisonment and loss of social status as fully as the traditional criminal? (2) If the more lenient and socially constructive methods often used in the case of the white collar criminal were applied to the "no-collar" criminal? A third question is intriguing: How far is "no-collar" criminality a by-product of the complex results of white collar-crime? This question seems to lead to the larger question of crime in its relationship to the general culture, discussed below. So far as the writer is aware, Sutherland has thus far been more concerned to discuss the relationship between his white collar criminal studies and his well known theory of crime.

Sutherland's theory of crime is apparently still in process of development. As originally set forth[1] it sees crime as the product of social disorganisation which has resulted from the social processes of mobility, competition and conflict in modern society. This social disorganisation results in culture conflict. "Culture conflict in turn has produced differential association, the individual having possible contacts with many groups with differing

[1] *Principles of Criminology, op. cit.*, Chapter 1.

social values and patterns of behaviour. More immediately, then, crime results from the association of the individual with groups with criminalistic patterns—crime producing crime."[1] Negatively Sutherland holds "that a person does not participate in systematic criminal behaviour by inheritance".[2] Also that "individual differences among people in respect to personal characteristics or social situations cause crime only as they affect differential association or frequency and consistency of contacts with criminal patterns."[3] Finally he holds that emotional stresses in the home are significant only as they drive the individual away from the home where he may come into contact with delinquents.[4]

Accepting most of Sutherland's theory as part of the explanation of crime, the present writer has ventured minor criticisms in another place. Generally I feel that Sutherland's theory, broad as it is, is too particularistic to explain all crime, and that no exclusively sociological theory can explain such a varied entity as crime. Moreover it seems to me that Sutherland misses the significance of various aspects of the general culture which can hardly be comprehended under such characteristics as social disorganisation, mobility, differential association, etc.

4. *Crime as a product of the general culture.*

The notion that crime is the product of the culture of a nation implies either that crime, which we deal with as abnormal behaviour is in fact normal, or that its abnormal aspects are the product of its prevailing characteristics. Study seems to show that in fact many kinds of crime are less abnormal than has been supposed; that behaviour approximating crime is widespread; and that certain characteristics of American culture, at least, imply conflict deviation and crime. In the opening chapter of his book *The Prison Community* Donald Clemmer describes the backgrounds out of which the several types of inmates found in an

[1] Taft, *Criminology*, *op. cit.*, pp. 284–7.
[2] *Sutherland*, *op. cit.*, p. 5.
[3] *Ibid.*, p. 5.
[4] *Ibid.*, p. 6.
[5] Boston, Christopher, 1940. Though less significant in its purely criminological aspects, this book, a pioneer in the field, is of importance as a basis for the application of sociological principles for prison organization.

Illinois prison had come. Though by no means all people living in these backgrounds are technically criminal, nevertheless the criminal element appears as an expected by-product of life in Coalville, or Metropol or any other given area. The writer has attempted to consider various aspects of American culture in their relationship to crime.[1] Thus American culture is dynamic and change implies unadjustment for some. American culture is complex and complexity involves culture conflict out of which much crime grows. Materialism is a dominant value in America and social status is largely awarded in terms of success in competitive individualistic struggle for material gain. Failure in this struggle, or the strain to achieve still greater success, is obviously the source of much delinquency and crime. Life in intimate primary groups makes adjustment and social control easy, but in American culture life has become increasingly impersonal and the family, neighbourhood and church have lost very much of their socialising functions. This implies crime. In the United States we are great joiners and club and gang afford us status. To rate some such gang has become a dominant motive in our great cities and the gang has enslaved its members to its code which is often criminalistic. In earlier years the American frontier required a rough and ready existence and stressed extreme individualism. Such frontier life created its own type of crime. The frontier has largely passed, but sections of the country still show in their types of crime the imprint of earlier days and the survival of a frontier tradition. America was in a sense founded on law breaking, and the spirit of revolution in the United States remains in contrast with the tradition of orderliness which characterises some European countries. In the United States we have great faith in law and have extended its sway into areas which elsewhere are more often left to other agencies of social control. Such laws are difficult to enforce, and their existence largely accounts for many types of racketeering, the experiment with prohibition being but one obvious example. Effective crime prevention requires the acceptance of the scientific point of view in its study and treatment, but American culture is far from having incorporated this positive philosophy, and the principles of social science, though spreading, are certainly not generally

[1] *Criminology, op. cit.*, Chapter 15.

accepted in the United States. Our prized democracy has not proven wholly efficient, and political corruption has not only been wide-spread but has come to be tolerated and expected by the people. Such political corruption causes crime. In spite of our faith in law Americans do not expect obedience to all law, and law-breaking in this sense is in our culture. Race prejudice and ingroup preference is inconsistent with American democracy, and yet both patterns are exceedingly prevalent. It is shocking, if true, that more people in America accept, than deny, the validity of something like the Nazi theory of racial superiority. That attitude explains not only much of the excess of crime among Negroes, but not a little of the crime of whites against Negroes. Immigrants in the United States have, in general, lower crime rates than the native-born and yet immigration has increased crime on the part of the native American because it has increased culture conflict. This culture conflict in no small degree results from the in-group prejudices against the alien, which, though certainly not peculiar to America, are very prevalent here.

Finally patterns of behaviour approximating crime are widespread and many of them are accepted. Sutherland's white collar criminals are true technical criminals, but they are not looked upon as such because the crimes they commit are more or less expected in the United States, do not destroy social status. In some cases they even are essential to the achievement of social status. In that sense white collar crime is in American culture. But the pattern goes far beyond the limits of crime as defined in the law. Not all of this pattern is properly called exploitation of the disadvantaged but examples of such exploitation are widespread. They merge by imperceptible degrees into exploitation which has been defined as crime. The view that everyone has a racket is no doubt not literally sound, but it is so nearly true as to furnish an excuse and often partial explanation of the behaviour of the criminal. From the point of view of loss of property values, the order of seriousness seems to rise from petty individual predatory crime, to more serious individual felonious acts, to criminal racketeering and organized white collar crime, to a climax in exploitative behaviour not defined as crime at all. It is arguable that Americans lose more property through non-

criminal exploitation passing for rugged individualism, than from all the technically criminal acts combined. Moreover it is easy to show that this prevalence of noncriminal exploitation in large measure explains technical predatory crime itself. It is also easy to show how the more abnormal situations and much of abnormal personality itself results from the nature of the general culture. To cite a single example the slum, as Shaw has shown, manufactures delinquency; but the American slum is a product of American culture, for the slum is a receptacle which collects life's failures—economic but also moral failures. These failures result from the highly competitive nature of life in the United States.

All this does not imply that all crime can be explained in terms of the nature of the general culture of a country. The writer still makes a place for personal abnormalities which do not have such cultural roots. But surely that place has been greatly exaggerated by the psychiatrist or psychologist who used to talk in terms of crime as inherent in abnormal personality. Because of natural differences in personality American culture no doubt impinges differentially on different types of personality. Some elements in these personality differences may even have an hereditary or physiological basis, but much of abnormal personality also is a cultural product, as ecological studies of mental disease are suggesting.[1] But there is, we believe, no simple cultural explanation of all crime. Crime seems to result from the combined influence of the personality and the individual and group experience. In that experience, however, the nature of the culture seems to play by far the dominant role. Hence emphasis on heredity, emphasis on early emotional experiences in the home, and emphasis on personality abnormality seems to have relatively little place in the deeper explanation of crime. Contrast, if you will, Lombroso's or Hooton's search for a criminal type or for a few millimeters difference in the bone structure of the supposedly abnormal criminal as compared with us "good" people; with the now almost established near-truth that crime is the product of the prevailing culture, that the most dangerous criminal is one type of successful businessman, and that even he

[1] Cf. Robert E. L. Faris, and H. Warren Dunham, *Mental Disorders in Urban Areas*, Chicago, University of Chicago Press, 1939.

is less destructive of property values, at least, than are exploiters not even thought of as criminal. There may still be a place for the study of physical differences between apprehended criminals and the unapprehended population, but today and increasingly we look among ourselves for the reasons why men commit crimes.

In closing we should refer to the criminological research of Professor Sheldon Glueck. Its importance is universally recognised. It is perhaps our best American example of thoroughness in the persistent and repeated study of criminals. It has not been considered in this article because, thorough as it is in its way, it can hardly be said to have been sociological in its approach. It is to be hoped that in the future the incomplete criminological research to date, will be supplemented by large co-operative research, as thorough as Dr. Glueck's, but which shall include the sociological approach which seems to have added so much of value to the understanding of crime. The writer gladly admits that much of sociological criminological theory still lacks adequate objective data. Some of the most significant facts, however, do not lend themselves to statistical measurement. Nevertheless we are in grave need of objective and many-sided study of the many-sided problem of modern crime.

SEXUAL CRIME

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Formerly H.M. Commissioner of Prisons, etc.

Discussion

Among the flotsam of modern society, sexual offenders require special consideration. At the same time anyone who attempts to approach the subject of sexual crime from the scientific aspect is confronted with some difficulty. For criminology has hardly reached the dignity of a science, and psychiatry is still in its adolescence. Moreover, the subject impinges upon social morality and religious doctrine, and the ordinary man or woman is tempted to appraise the viciousness of sexual misconduct in accordance with the manner in which it personally affronts him rather than by the measure of its social importance, or its significance as a spiritual shortcoming.

And here I am concerned to state that although the ethics of the Christian religion are beyond reproach and the scientific quest for truth must be disciplined and sincere, the exponents of religion on the one hand and of science on the other sometimes fall short of the standards required to illuminate their particular points of view.

So it comes about that the ordinary man occasionally ignores the opinions proclaimed by religion and science and establishes his own standard of sexual behaviour. This is frequently based upon ignorance and unreliable premises, and in this matter the ordinary man or woman may be incompetent to accurately assess the activities of others.

This much is certain in regard to sexual as well as the acquisitive and aggressive instincts, we must either live on a higher level than the rest of the animal world or fall to a lower. We cannot live on the same level for, apart from other considerations, our activities have numerous repercussions and may adversely affect social security unless the potentialities of the higher levels of behaviour are exploited. It is also important to bear in mind the fact that, in matters concerning sex, emotion is

often uninfluenced by reason and may be affected by chance circumstances.

Although monogamy is today the most favoured solution of the sexual relationship between men and women it is clear that not inconsiderable forces constantly operate to disrupt it. The daily press frequently presents us with examples of what amounts to polygamy when men and women repeatedly remarry after successive divorces. Society has not so far introduced alternatives to the promiscuity associated with professional prostitution, or non-professional libertinism.

Ideas change with the times. The Mosaic Law[1] imposed the penalty of death on both parties when a married woman committed adultery. The old Roman Law punished adultery on the part of the wife, but not on the part of the husband, and although a father had the right to kill both his married daughter and her accomplice if she was taken in adultery either in his house or her husband's, a husband had no such right as to his wife in any case and no such right as to her accomplice unless he was an infamous person or a slave taken in his own home. By a law of Cnut's a woman was to forfeit both nose and ears for adultery, and in the seventeenth century the ecclesiastical law punished both adulterous accomplices with extreme severity. Sir James Stephen called attention to the fact that when the Divorce Act of 1858 was under discussion the suggestion that adultery should be treated as a criminal offence was decisively rejected.

On the other hand, although it is said that the law against adultery in America is a dead letter, and convictions in the courts of law are rarities, the Swiss Federal Code of 1937 includes adultery among Offences against The Family. Article 214 states: "A married person committing adultery and the partner guilty with him (or her) shall, on petition of the injured lawful spouse, be confined in the prison for not over one year or shall be fined if a divorce or legal separation ensued as a result of this offence."

It is a curious fact that although the steadying influence of marriage and family life is generally recognized, official statistics do not attempt to establish their relation to criminal behaviour in general. Indeed, I know of no figures which would

[1] Leviticus, xx, 10.

assist me in this connection to determine whether the obvious and beneficial effects of marriage outweigh its stresses and responsibilities. Even so careful an observer as the late W. C. Sullivan did not enter into this aspect of drunkenness in his valuable book on Alcoholism. I have unwittingly neglected the matter in my own studies, although I considered it briefly many years ago in an investigation on attempted suicide, and later in a paper on exhibitionism in which I noted that of 150 males charged with indecent exposure 90 were single, 57 were married and three were widowers.

Kenny of this University pointed out that the English Law of sexual offences does not inflict criminal penalties upon all those acts which ecclesiastical law prohibits and used to punish, and which the law of contract still visits fitly with the sanction of Nullity, but it selects for criminal prohibition only those in which there is also present some further element—whether of abnormality or violence or fraud or widespread combination—that provokes such a general popular disgust as will make it certain that prosecutors and witnesses and jurymen will be content to see the prohibition actually enforced.

Sexual offenders are generally regarded as individuals who engage in certain illegal sexual activities. The medical conception is wider and includes cases of theft, housebreaking, burglary, common assault and murder if the offence has for its purpose the immediate or postponed gratification of normal or abnormal sexuality. As when a man steals or breaks into a house to obtain possession of a woman's underclothing in order to satisfy a fetishistic activity, or knocks a woman down in the street to possess her shoe for the same reason, or murders her under the influence of jealousy or when she attempts to save herself from being raped. So, too, when a well-to-do woman steals from a shop in order that the tense feeling aroused by the danger of detection may act as a sexual excitant.

In the year 1938 the number of sexual offences committed by males was, in round figures, ten times the number committed by females. The proportion, in round figures, for all kinds of offences being eight to one. The reason for this must be to some extent a matter of speculation, but biological, social and psychological factors seem to influence the result.

The number of persons in England and Wales aged sixteen and over who were found guilty of sexual offences during the years 1910 to 1933 varied in round figures from 4 to 7 per 100,000 of the population—the peak year being 1920. Since the year 1934 the official figures are given in respect of persons aged seventeen and over and vary from 5 to 6 per 100,000 of the population.

Sexual crimes come second in frequency to acquisitive crimes, larceny, fraud, false pretences and the like, and are closely followed by aggressive crimes—violence against the person. In regard to age, among 2,321 persons found guilty of indictable sexual crimes in England and Wales during the year 1938, 5 per cent were under the age of fourteen, 15 per cent were aged fourteen and under seventeen, 15 per cent were aged seventeen and under twenty-one, 9 per cent were aged twenty-one and under twenty-five, 12 per cent were aged twenty-five and under thirty. In all 56 per cent were under the age of thirty and 44 per cent were over that age.

The order of frequency of sexual crimes committed by persons under sixty years of age during the years 1929 to 1938 was as follows: indecent assaults on females under sixteen years of age, bigamy, attempts to commit unnatural offences on males under sixteen, defilement of girls under thirteen to the age of sixteen, indecent assaults on females, indecency with males, incest, attempts to commit unnatural offences, rape, procuration and abduction. In persons over the age of sixty the only significant difference is the relative positions of bigamy which, as might be expected, is less frequent and indecency with males which is more frequent than in persons below that age.

The number of males of all ages found guilty of the non-indictable offence of indecent exposure exceeds that of all other sexual offences against females. The majority of sexual offences committed by males are deviations from the normal.

Persons aged seventeen years and over (sexes not differentiated) were found guilty of sexual offences by courts of summary jurisdiction during the year 1938 as follows: Attempts to commit unnatural offences (indecent assaults on male persons under sixteen), 225; indecent assaults on females under sixteen, 657; indecent exposure, 1,574; offences by prostitutes, 3,192.

The number and sexes of persons convicted during the same year of sexual crimes at Assizes and Quarter Sessions were as follows:

Offence	*Persons Convicted*	
	Males	*Females*
Unnatural offences	58	—
Attempt to commit unnatural offences	76	1
Indecency with males	141	—
Rape	40	—
Indecent assaults on females	115	—
Defilement of girls under thirteen	31	—
Defilement of girls, thirteen and under sixteen	179	—
Incest	40	4
Procuration	15	2
Abduction	4	—
Bigamy	195	81
	894	88

The Annual Report of the Prison Commissioners for the year 1938 shows that 246 males were received into prison for unnatural offences and attempts, 483 males and one female were received for rape and other offences against females, 110 males and 22 females for bigamy, 154 males and 32 females for brothel keeping and living on the earnings of prostitution, 5 men and 172 women for prostitution, and 449 men and 81 women for indecent exposure. In addition to the above there will be an unrecorded number of persons convicted of other crimes in which the motivation was sexual.

Bonger, quoting G. Aschaffenburg, recorded the fact that in Germany sexual offences occurred most frequently in the months of June and July. He also quoted Roesner who stated that in France in the years 1827 to 1870 indecent offences against children and against adults reached their peak in the same months as did also indecent offences in England in the years 1905 to 1909. Bonger pointed out that the increase had already started before there was any question of a noticeable rise in the temperature, and it is therefore probable that the length-

ening of the days and the better weather allows opportunist crimes to take place in quiet woods and parks. Further, sexual offences are naturally committed more in the open air and upon strangers. Bonger suggests that the remainder of the rise is connected with an enhanced sexual urge at this time.

Causative Factors

Biological. The importance of biological factors in connection with sexual crime does not always receive the attention it deserves. Nevertheless, striking illustrations are sometimes observed in the lower animals as well as among ourselves which indicate the significance of the mental as opposed to the physical aspects of sexual attraction, and interest in the psychological and sociological aspects of sexual crime should not obscure the significance of the biological associations.

Human society, like other animal societies, is sustained by the fundamental urge of the sex instinct. Although the desire for offspring may be often present, and the predominant factor in human mating, it is clearly not invariably so.

There seems to be little doubt that parental emotion is usually the result and not the cause of sexual union in the lower animals. But if we consider the elaborate courtship of the Great Crested Grebe and the aphrodisiac advances of the male Warbler in ecstatic mood, holding a leaf or piece of stick in his beak before his prospective mate, as if suggesting, as Pycraft observes, the work of nest building and its delightful sequence, we are led to believe that an association between courtship and the idea of future offspring may be an occasional and necessary antecedent to the mating of some of the lower animals.

The monogamous habits of the higher apes and some birds may be the result of physical and environmental as well as mental factors. But when I observed a thoroughbred stallion, who was serving two mares on alternate days, in the act of uniting with one of them immediately dismount before penetration had taken place on hearing the other, whom he could see in the distance, neigh to him, it seemed clear that his mental associations with her were more important than his physical contact with her rival.

When, too, I think of the bull sea-lion who asserts his ownership of a cow wandering from his harem towards a rival bull by seizing her so that she is torn to pieces in the tug-of-war between the two (Pycraft), and of the female baboon in the London Zoological Gardens who was torn to pieces when her mate died and the unmated males fought to possess her (H. G. Wells, J. Huxley and G. P. Wells), I am reminded of the men I have examined who murdered the woman of their choice determined that if they could not possess her no one else should have that privilege. Again, there is a strong likeness between the activities of the flagellant sadist and that of a male Painted Terrapin, who was observed by Pycraft to swim around and oppose the path of a female. Having done this he closed up, and with his long whiplike finger nails beat her about the head so rapidly that nothing more than their blurred image was visible.

For the most part union between the two sexes is more readily accomplished among civilized men and domestic animals who are able to obtain an abundance of food, and have better chances of maintaining a high standard of health than appears to be the case in the natural state. The love antics and exhibitionism of birds show us the mental stimuli which are intended by the males to attract the females and serve as preludes to physical union. The remarkable display by the Argus Pheasant of his wing and erected tail feathers to the female described by Darwin is well known. Pycraft suggested that an amorous dalliance was perhaps the invariable rule among animals, although it takes many and strange forms. He described, for example, the undignified caperings of the ardent male crocodile which are accompanied by roars and bellows only emitted during the mating season, and by an overpowering odour of musk discharged from glands in his lower jaw and tail which at length overcome the apathy of his chosen mate. Among animals attempts at homosexuality, which would be regarded as sexual deviations if indulged in by men and women, are often to be seen on our home farms as substitute reliefs for sexual tension.

Normal sexual activity in man is expressed through biological channels and the preliminaries connected therewith. Abnormally, action may go no further than the preliminary activity, or it may be expressed in directions which appear to have no

biological connection. For example, bestiality is a not uncommon offence in some districts and under certain circumstances, but as far as I am aware is unknown among the lower animals.

Some light is thrown upon the biological associations of sexual perversions in men by the recent observations of Róheim who studied the Central Australian native in his home. He finds it hardly possible to understand their psychosexual life without taking into account the importance of homoerotism. Discussing the cruel practice of infibulation on Somali women and their defibulation on the wedding night, Róheim states that sadism among Somali men, who also always have a whip at hand, cannot develop into a special perversion because it is simply the normal condition.

The forensic psychiatrist giving evidence in the criminal courts in a sexual case, and the lawyer who examines him are, I believe, likely to be more intelligible to a jury if they have the biological approach to sexual offences in mind than they will often be if they only concern themselves with abstruse psychological theories which may not stand the test of time.

Physical. The personal attributes and attractions of the woman who is the victim of a sexual offender do not usually seem to be considered in any detail by the attacker. In a recent case an edentulous virgin of unprepossessing appearance was raped in her seventieth year and murdered by a man of twenty-six who was not drunk, mentally defective or insane.

In some cases of homosexuality the attractive physique and appearance of the accomplice may be an important causal factor. The physique of the offender may be a factor when physical development is much in advance of mental growth and precocious desire is uncontrolled by the reason and judgment which will restrain it in later years.

An enlarged prostate gland is sometimes said to be a common cause of sexual crime in elderly men, but personal experience leads me to believe that the association has been greatly exaggerated. At the same time it may be noted that a sexual offence sometimes seems to be related to climacteric changes in men and women, although the majority of those who present sexual abnormalities do not show any demonstrable abnormality of their endocrine glandular system. It is to be remembered that

castration in adult men does not necessarily do away with sexual desire or phantasy. Forel stated that men castrated in adult age may cohabit with their wives, and Havelock Ellis and other observers have arrived at the same conclusion. These opinions are significant in connection with the proposal which is sometimes put forward, and has been practised in Germany, that castration should be adopted as a method of preventing sexual crime. Even if potency is destroyed, castration of the body does not include castration of the mind, desire may continue and lead to indecent assaults.

Psychological. The various psychological impacts which affect sexual behaviour are frequently insufficiently appreciated, but are at once apparent when it is remembered that autosuggestion may give rise to impotency. That is to say a man may become impotent if he believes that he is so. On the other hand, sexual pleasure may be entirely mental, as when sexual phantasies are unaccompanied by sexual activity. It seems likely that in affairs of sex, even more so than in the ordinary affairs of life, there are no normal men, for each one sets up his own standard and is all too ready to believe that it necessarily corresponds with the standards of others. And in matters concerning the emotions generally, it often happens that personal bias distorts clear judgment.

There is no doubt that a chance occurrence in which sexual pleasure is experienced for the first time with emotional intensity may, by its associations, permanently condition the sexual life of the individual. A sadistic murder was traceable to a sexual experience in childhood. A shoe fetishist's personal taste was due to an episode at puberty in which the shoe of an attractive girl played a prominent part. Similarly, the pollution of a girl's underclothing and her resulting annoyance served to condition the future activities of a sadistic dress defiler.

The view that sexual crime is usually an expression of mental abnormality is often incorrect. The strength of the sexual urge, whether the activity is normal or perverted, varies in different persons. And this is medico-legally important, for we do not acquit a rapist because he is oversexed and may have more difficulty in restraining himself than many others, and there seems to be no reason to excuse a pervert because he has not

controlled his perversion if he is not mentally defective, or insane, or affected by other exculpatory condition. For although the strength of the sexual urge is sometimes sufficient to cause the offender to deliberately defy the penalty he may incur, the same decision is made by many thieves and fraudulent persons and by many aggressive offenders who are rightly held to be responsible.

It is convenient to regard the earliest form of sexual interest as that in which the individual discovers that he can obtain sexual pleasure from self-stimulation. This may occur in infancy or early childhood, and is perhaps at first no more than a mechanical activity. Through accidental or more intentional environmental stimulus phantasies tend to develop round this form of pleasure and are associated with persons of the same or opposite sex, or other animate or inanimate objects. For many years the normal sexual goal may not be realized or understood and the phantasies may be associated with themselves, and with all possible relations and emotions that arise between human beings.

So it comes about that in phantasy, sexual feeling may become associated with the infliction and bearing of cruelty, or may interest itself in activities such as excretion, exhibitionism and the like, the exact form depending upon the experience of the individual, his treatment by adults, the stories he is told or the books that he reads. Moreover, free sexual development or sexual development along abnormal lines is opposed by ordinary social standards. There is the general disapproval and condemnation of overt sexual behaviour, and the general pressure applied to make the individual conform in development and behaviour with what is considered to be in a particular society ethically correct and socially acceptable. The first type of opposition will tend to drive out of the forefront of the mind all sexual preoccupations and interests particularly those which are tabooed. The second type of obstructive factor will tend to shape the individual into leading, or attempting to lead, a monogamous heterosexual life. But, as this is highly complicated in form and variable to some extent in different peoples, it may often become associated with other sexual patterns which are less socially acceptable among some peoples and illegal among

others. Our social system is only one of many alternatives and is far from perfect. Formerly homosexuality was encouraged in Grecian States to strengthen educative influences for cultural purposes, or to make a special military system more cohesive and effective. Incest was common among the Ptolemies.

A true sexual perversion is sexual activity in which complete satisfaction is obtained without the necessity of heterosexual intercourse. It must be persistently indulged in, preferably in reality, at any rate in phantasy, and not merely be a substitute for a preferred heterosexual activity which is unobtainable for some reason. Both sexes indulge in perverse activities but these seldom lead to criminal proceedings against women.

Perverse activity which is a preliminary to ordinary sexual relations is excluded from the above definition. Sexual perversion may mean an interest in an abnormal sexual object, or abnormal sexual activity, in a combination or in a synthesis of the two. Examples are met with in a case of bestiality, an exhibitionist, a sadistic homosexual, and a type of transvestite. Usually in addition to the main perversion there is interest in and frequently a performance of other perversions, and it may therefore, be difficult to classify the offender unless the predominance of a particular activity is clear. I have recorded a case in which exhibitionism, masochism, flagellation, frottage and bestiality were combined in the same man; and the combination of homosexuality with sadism or masochism is extremely common.

In some persons, therefore, we find a tendency towards a general sexual perversion, whilst other factors determine the particular interest involved on a special occasion. It would appear that in such cases one is dealing with a personality factor since environmental factors alone would be unlikely to determine such variations of behaviour. Further, many sexual perverts are quite normal in ordinary heterosexual relationships, but have a strong bias towards one, and sometimes more than one, form of perversion. Moreover, cases of sexual perversion occur in families of sexual perverts under circumstances in which common environmental factors can be excluded with some degree of certainty.

The environmental factor associated with a sexual perversion

may be an early experience of perverse activity arising before the ordinary sexual pattern of activity has been established, or from a more recent happening which actively repels the normal heterosexual expression. Occasionally a more general environmental factor may favour the development of the perversion in persons who are so disposed.

The unconscious psychological factors elucidated by deep mental analysis are too involved for presentation here. They are believed by some observers to be of considerable importance although rejected by others.

Psychiatric. Sexual crime may be due to mental defectiveness, some forms of psychopathic personality, psychoneurosis or insanity. In a court of summary jurisdiction the certifiability of a sexual offender under the Mental Deficiency Act, 1927, or the ordinary Lunacy Law, may be a matter of consideration, and in a court of assize or quarter-sessions, if the accused is fit to plead to the indictment and the McNaghten ruling is not strictly applied. It is unnecessary to consider here the different standards of mental alienation required to satisfy the higher and lower courts in the matter of irresponsibility. If the accused is not mentally defective or insane, but is suffering from some minor form of mental abnormality which is directly associated with the crime, judicial authorities sometimes feel justified in modifying the award in sexual as well as in other classes of crime.

Among mentally defective persons received into prison, sexual crimes come second in frequency to acquisitive offences. Usually the sexual crime is of a minor character, but murder and rape occur. Occasionally two mentally defective persons commit a sexual offence together. The importance of sexual offences committed by this type of patient lies in the fact that they almost inevitably recur unless he is under care and supervision.

Psychopathic personalities often commit sexual crimes. The sexual perverts are included in this group of mentally abnormal persons in many classifications, and in our present state of knowledge this is convenient. But some sexual offenders appear to belong to the constitutional psychic inferior groups of psychopathic personalities and are not necessarily sexual perverts.

Psychoneurotics sometimes express their sexual inferiority and

striving for superiority by committing murder or other sexual crime. The hysterical sexual crime is usually a nuisance to society rather than a menace, such as sending indecent letters through the post and mild exhibitionism. As Hubert and East pointed out, the sexual life of the hysteric has usually a complicated pattern: precocity, repression, extreme flirtatiousness and provocativeness, combined with frigidity and the gradual development with a married partner of an intricate and abnormal emotional relationship, is a rather common sequence. In general, sexual crime, like other crimes, committed by hysterical persons has a histrionic element often associated with it. It is frequently extremely difficult to assess the amount of psychoneurotic compulsiveness in sexual crime, as the normal urge has in many men and women a strong element of compulsion. In doubtful cases it is necessary to enquire closely into the circumstances of the crime and the mental attitude of the offender at the time, and compare both their similarities and dissimilarities with normal desires and abnormal compulsions. I agree with Aubrey Lewis that "Sexual offences or perversions are sometimes referred to as though they were obsessional; they are really no more so than gluttony. The patient enters into the act and willingly entertains the anticipation of it; he has none of the true obsessional experience, even though afterwards he recognizes the unwisdom of his act and may say that he had a preliminary repugnance which had been more of the intellect than of the will, if one may so express it. There are of course rare instances in which sexual offences have been of an obsessional nature."

Schizophrenia is rather frequently associated with different kinds of sexual crime, and with homicidal crimes which are essentially sexual in origin. Morbid impulsive sexual conduct is sometimes an early manifestation of a schizophrenic illness and the phantasies, delusions and hallucinations which may be present are often frankly heterosexual or homosexual in character. The offender may have some insight into his condition and be willing to discuss the events connected with the crime.

Manic-depressive disease may be associated with sexual crime in either the elated or depressed phase. In the elated, the sexual crime is often impulsive. In the depressed phase, homicidal crime occurs sometimes as the result of sexual delusions and the

intention may be altruistic. In some cases of depression a sexual crime may be committed in an endeavour to temporarily replace gloom by a pleasurable experience.

In general paresis sexual offences are less frequent than was declared by some former observers. When they occur they are usually, in my experience, of the minor sort and are frequently carried out in a particularly flagrant manner.

The alcohol insanities are rather frequently associated with sexual crime. The aphrodisiac action of alcohol together with the blunting of conscience and reason which accompany alcoholic excesses often cause major and minor forms of offence apart from insanity, and the mental deterioration which gradually overtakes many alcoholists is also occasionally associated with sexual misconduct. Epilepsy is only occasionally associated with sexual crime.

In elderly men sexual crime is often due to the fact that phantasy and desire have outlived potency, and may be an indication of senile degeneration. I have pointed out elsewhere that senile sexuality, deprived of an adult victim or accomplice, often expresses itself by indecent assaults upon young children who are sometimes very ready to take a passive part in a new adventure, and sometimes offer themselves to elderly men for a few pence. Homosexual crimes of a minor character sometimes occur in early senile dementia, and murder due to sexual delusions concerning the married partner is a well known occurrence. Senile sexuality occasionally expresses itself in sending indecent letters through the post to persons who are often strangers. In one case an old man wrote obscene matter on strips of paper which he dropped on to the floor of a well-known shop in London hoping they would be read by women customers.

Sexual Crimes and Sexual Criminals

It may perhaps be reasonably argued that the victim of a crime is also sometimes an accomplice, as when articles temptingly displayed to the view of customers passing through the various departments of a multiple store are stolen.

In sexual crime, for example homosexuality, the passive agent is often an accomplice and just as culpable as the active

partner. In heterosexual offences there may be reason to believe that the woman or girl was consenting and to that extent an accomplice. But usually she has no complicity in the crime and will suffer an injustice if the contrary is assumed.

There seems to be little doubt that young children may be harmfully affected if a sexual assault is made upon them, but an absence of fear or sense of guilt is sometimes notable. Von Hentig records the case of a child who actively debauched her father, and of another daughter who did so when her father was gravely ill. Many years ago I had under observation a boy aged sixteen, who repeatedly attempted to have incestuous relations with his mother after his father had gone to work in the early morning.

On the other hand sexual fixation may be encouraged by a parent. An insane young man, aged twenty-two, came under observation charged with assaulting the police. His father was many years older than his mother, and they soon separated. The mother took the accused, their only child with her, and they lived a rather lonely life. During the remand he wrote passionate love letters to her, and she described to me various sexual activities which took place between them, and which it was clear that she had encouraged.

One of the weaknesses of modern methods of punishment lies in the fact that no restitution is usually made to the victim of a crime for the injury he has suffered. When rape is followed by pregnancy, an additional hardship is inflicted upon the woman.

In this connection the case of *Rex* v. *Bourne*, which came before a jury at the Central Criminal Court in July, 1938, is of interest. The defendant, Mr. A. W. Bourne, obstetric surgeon to St. Mary's Hospital and consulting surgeon to Queen Charlotte's Hospital, was called upon to answer a charge of unlawfully using an instrument with the intent to procure the miscarriage of a girl under the age of fifteen years who had been raped by soldiers on April 27th. After the assault the police surgeon found evidence of rape and physical injury, and later a woman doctor formed the opinion that the girl was pregnant. Mr. Bourne consented to take her into St. Mary's Hospital for observation and curettage. After tests of pregnancy and venereal disease, the former having proved positive, the operation was performed.

Giving evidence, Mr. Bourne, whose integrity was never impeached, said that he had operated in a similar case in 1935, and in that instance his house surgeon refused to assist him. That fact had decided him on the next opportunity to obtain a ruling in court. In the present case after observation he formed the opinion that the shock to the girl had been very great, far greater than she was willing to admit. He had carried out the operation on these grounds, i.e., the danger to the health of the patient. He added that he could not draw a line between danger to life and danger to health; if one waited for danger to life, the woman would be past assistance. He attributed great importance to the element of fear in cases in which conception occurred as the result of rape and violent assault; he also considered this danger to be much greater for a child than an adult. He considered it dangerous in the present case for the girl to bear a full term child. This view was supported by other eminent medical witnesses. Summing up, Mr. Justice MacNaghten told the jury that the word "unlawfully" implied the exception which was expressed by Parliament in the proviso to the Infant Life Preservation Act, 1929, s.1. That Act prohibits the killing of an infant before it has attained an independent existence, but after it has become capable of being born alive:

"Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

His Lordship added that, in his opinion, to preserve life meant more than to save from immediate death, and that no hard-and-fast line could be drawn between preserving life and preserving health. If in the present case the Crown had satisfied them that Mr. Bourne had not operated in good faith for the preserving of her life, then he was guilty of the offence with which he was charged; but if the Crown had failed to satisfy them on this point, then the law entitled Mr. Bourne to a verdict of acquittal. After deliberation the jury found Mr. Bourne not guilty, and he was acquitted.[1]

Heterosexuality. This term is restricted to the normal sexual activity which is directed towards a member of the opposite sex,

[1] *The Medico-Legal and Criminological Review*, Oct., 1938.

and under the heading of heterosexual offences are included rape, carnal knowledge, incest, indecent assaults on unwilling women, and sexual interference with girls under the age of consent.

It is sometimes argued that it is impossible for a man of ordinary physique to overcome a woman of ordinary strength, and have carnal knowledge of her by force and against her will. It would almost seem that those who hold this view persuade themselves that the rapist treats his victim with the consideration that men usually adopt towards the women they meet socially. But what are the facts? During the ten year period, 1929–1938, 258 men were convicted of rape, and it is difficult to believe that in this matter the arm-chair critic is right and 3,096 jurymen and women were wrong, or that his opinion is of more value than that of the experienced judges who presided at the trials. Moreover, medical men dealing with these cases are sometimes revolted by the brutality inflicted upon the victim. In a recent case of murder, with which I was concerned, the homicide stated that he took a journey of some hours determined to have intercourse with the girl of his fancy by force if she resisted. She did so and was killed. In another case a woman was murdered whilst struggling with her attacker. She received three fractures of the jaw, thirteen ribs were broken, the liver was ruptured and there were numerous bruises about the chest, abdomen, arms and legs, as well as the local injuries due to penetration. It is unnecessary to refer to non-fatal cases since lawyers, pathologists, police surgeons, and prison psychiatrists are aware of the injuries which are sometimes inflicted on women who are forcibly raped.

Reference has been already made to the fact that incest was practised by the Ptolemies. It will be recalled that in Babylonian Law it was punished by death or exile according to its heinousness, and that formerly it was not generally treated as a crime in England, although with other offences against morals it was made punishable by death in 1650. Herbert quotes Blackstone that since the Restoration it had been left to "the feeble coercion of the spiritual courts". And writing in 1883, Stephen states "the only reason I can assign why incest in its very worst forms is not a crime by the laws of England is that it

is an ecclesiastical offence and is even now occasionally punished as such".

Attention is called to these matters because practical experience leaves one in no doubt that although incest has been a criminal offence in this country since 1908 (The Punishment of Incest Act), and in 1922 the proviso that the proceedings were to be heard in camera was repealed (Criminal Law Amendment Act), there is still much public ignorance of the fact that it is a misdemeanour and is more frequent than is sometimes supposed.

During the years 1929–1938 inclusive, 471 males and 49 females were convicted of incest. The majority of women were over twenty-one years of age. The fact that among men incest was much more prevalent in the age group forty to fifty years than at any other time suggests that many were widowers with daughters living at home.

In regard to other heterosexual offences it is hardly necessary to add that indecent assaults on unwilling women, and interference with girls under age may not be evidence of mental or sexual abnormality.

Fewer sexual offences are possible to women than is the case where men are concerned, and the law has been more occupied with protecting women and girls from men than men and boys from women. It is noteworthy, however, that the proportion of female bigamists is high; in round figures one woman to two and a half men.

Sexual offences among women are usually heterosexual. Offences connected with prostitution are the most frequent, and the prostitutes who are received into prison form a collection of very different individuals. Some are depraved and alcoholic, others are mentally defective or psychotic; some are psychic inferiors; many are temperamentally unstable, hysterical and suggestible, others are idle, deceitful and unscrupulous. In Copenhagen, Tage Kemp found among 530 women who had lived as prostitutes for a short or long period of time, hypersexuality and other sexual abnormalities occasionally occurred. It is, of course, well known that the rapidity and completeness with which the transformation from an honourable girl into a prostitute proceeds, and her incorrigibility, are the despair of the Social Worker and Aid Society.

Homosexuality. Acceptable standards of conduct in many directions change with the period. Sexual behaviour at the present time reaches limits which are condoned by some and decried by others. The position is fluid; so much so that some observers see little objection to restricting homosexual crimes to acts which cause bodily injury, or contaminate young people, or offend against public decency. There is reason to believe, however, that ethical and religious considerations enable some, perhaps many, homosexuals to lead chaste lives, and that to amend the law and permit homosexuality would make their self-denying efforts still more difficult.

The fact that the social attitude adopted towards homosexuality has varied very considerably with different peoples at different periods suggests that it has often been regarded as a normal method of sexual expression. If the usual definition of a sexual perversion is accepted many homosexual offenders are not sexual perverts. For example, those who occasionally indulge in homosexual acts as an adventure, as a substitute when long deprived by circumstances of ordinary sexual relationships, as a temporary convenience, and as the result of a surfeit of experience in heterosexual relationships. It is found in persons who show no other marked mental or physical abnormality; they may be of superior intelligence, prominent and successful in creative work and in occupations of varied social importance. It is also to be remembered that the proportion of homosexuals in the general population is probably large, and that antisocial conduct appears to be less certainly attributable to mental abnormality in proportion to the frequency with which the antisocial tendencies are found in the ordinary population.

Homosexuality may be constitutional in origin or acquired, and in many acquired cases a constitutional factor seems to be also present. Generally, a clearer view of the condition is obtained if it is regarded as the result of a combination of various causes.

The importance of the constitutional factor was emphasized by Havelock Ellis who found family or hereditary inversion in 35 per cent of the cases, and he referred to Romer whose findings were exactly the same. In a recent study, Lang came to the conclusion that many cases of homosexuality are hereditarily determined. In a series of 79 cases of homosexuality in males

coming before the courts, investigated by Hubert and East, it appeared fairly certain that a factor related to the physical type concerned might play an important part: attractive and good-looking boys and young men would be predisposed to the development of homosexuality because they would be more likely to attract homosexuals and be seduced by them. A constitutional element is occasionally suggested by the fact that some male homosexuals have undoubted feminine physical characteristics. The condition is often associated with more than one other perversion, and it would seem that probably a significant number, particularly among the well educated, adopt a career in the artistic pursuits in which women excel.

Hubert and East found seduction in early youth or childhood was the commonest single environmental factor found in the series investigated, and it seemed that this was probably far more likely an explanation of homosexuality than one which depends upon the assumption that there is commonly some specific glandular influence acting in a feminine direction in these cases. Apart from seduction, homosexuality appears to be sometimes acquired as the result of conditioning when an early sexual experience is associated with an older person of the same sex. It is sometimes connected with parental warnings regarding the dangers of venereal disease which repress heterosexual and stimulate homosexual interests. In certain families the general parental attitude has much the same effect. For example, those who desiring a daughter bring up the son in as girlish a manner as possible. Or the widowed mother who indirectly through her entirely feminine influence, and more directly in her desire to keep her son to herself and away from other women, produces a homosexual outlook in him by fostering tendencies, perhaps already present, thereby increasing the chances of homosexual seduction.

The factors which predispose towards homosexuality were summarized by Hubert and East as, first, a general tendency towards a varied and primitive kind of sexual outlet; secondly, in some cases at any rate, a specific inherited tendency towards homosexuality; thirdly, a physical type which predisposes towards early seduction by homosexuals which may be regarded as the fourth factor and most important of the environmental causes.

The tendency towards homosexual interest may be realized for the first time at any age. In the series investigated by Hubert and East the earliest homosexual activity remembered occurred at the age of four. In some cases the patient will not discover his tendency until he reaches middle age. If the activity is released by organic brain disease the offender may be more than sixty years of age. In cases where the individual may not have recognized their implication he will be able to remember dreams or phantasies in early life which have had a homosexual significance. Occasionally it appears to be true that an offender did not realize his homosexual tendency until it was expressed in a criminal action on a sudden impulse, and sometimes it may be first declared during a state of alcoholic intoxication.

Homosexuality and heterosexuality are not necessarily antagonistic and are frequently associated in the same person. A sadistic homosexual murdered his male paramour. He married some years before and consummated the marriage from time to time, although his real interests were homosexual.

In ordinary life many environmental factors are in favour of heterosexual interests and opposed to homosexual attractions; they may turn the homosexual away from his characteristic activities. The homosexual who acts in conformity with the culture in which he lives and remains chaste may be as blameless as the ordinary man who remains continent in spite of heterosexual attractions. Indeed his sexual life is often more complicated, specialized and sublimated.

According to the usual view, homosexuality is unrelated to other forms of sexual perversion, and is due to environmental influences combined with a constitutional factor predisposing towards femininity which may be glandular in origin. The view outlined above, has practical consequences, for it does not restrict psychotherapeutic treatment to cases who present the fewest feminine characteristics.

It is sometimes suggested that the association of other sexual perversions and of general asocial and antisocial activities with homosexuality is simply due to the fact that they are a persecuted class, and therefore tend to become associated with those who are condemned for other reasons. But this is only relatively true, and there can be little doubt that the majority of homo-

sexuals escape arrest. Further, an investigation carried out by Hubert on an unselected group of women homosexuals as well as various other studies upon female offenders, prostitutes and others showed that women homosexuals, as a group, have many characteristics which may be regarded as perverse and asocial in considerable excess of those shown in a heterosexual group. The writings of Havelock Ellis in some measure support this view. He referred to women homosexuals as showing a considerable proportion of individuals who were somewhat abnormal in some respects, and he believed that they were more inclined to commit crimes of violence than other women.

It has been said that alcoholists as a class are essentially homosexual. A latent homosexuality may be exposed by the aphrodisiac effect of alcohol together with the fact that the alcoholist for the most part drinks in the company of his own sex. But many are strongly heterosexual, and many heterosexual crimes are due to alcohol. Perhaps intuition is not always a sure guide in assessing the relation of alcoholism and homosexuality, either of which may depend upon a combination of various causes.

A homosexual experience causing a persistent feeling of guilt may be a precipitating factor of a schizophrenic illness, or of a reactive depression. I recorded many years ago the case of a restaurant cook, approaching middle age, who attempted to murder the man who shared his private lodgings. Investigation showed that sexual relations had existed between them, the prisoner being the passive agent. When he discovered that his companion was going to marry their landlady he became anxious, depressed, and irritable, and was under medical treatment when he committed the crime in a passion of jealousy and revenge. Suicide pacts in members of the same sex are sometimes due to homosexuality.

Freud, Brill and others have strongly advocated the view that there is a close relationship between paranoia and homosexuality. As far as criminal cases are concerned, I believe that the clinical connection has been exaggerated. Discussing non-criminal cases, Henderson and Gillespie hold the view that "the importance of homosexuality in the etiology of paranoia is not so widespread as the psychoanalytical school would have it".

Exhibitionism is the term used to denote indecent exposure of the genitalia, and more rarely the gluteal region, and stresses the motivation of the act.

Social prohibitions relating to exposure vary with the times, and a visit to many bathing beaches will show how much our ideas on this matter have been modified in recent years. Briefly, the motive behind exposing part of the body on social occasions differs from a perversion in that it is an adult method of attracting the opposite sex, with a view to bringing about a closer relationship at some future time. The pervert adopts a childish method of attracting attention to himself in order to experience sexual gratification at the time of the exhibition, without physical contact or any long-term objective.

Exhibitionists form a very varied group. The true exhibitionist pervert prefers this method of sexual gratification to any other, and many deliberately seek opportunities for exhibitionistic adventures. Others fight against the desire and wish to have it removed. Some who are not true perverts expose themselves as a means of obtaining sexual intercourse, and in cases of mental defectiveness it is easily understood as a primitive method of approach to a woman who has aroused sexual desire.

Offenders who show this form of sexual behaviour usually have a history of autoerotic behaviour from the age of puberty or before. The step from this towards indecent exposure to passing women in a relatively unfrequented place may not be a great one in some men. The increased excitement so obtained stimulates phantasy and becomes a desirable addition to autoerotic satisfaction. It soon becomes a habit which is indulged in conditions of increased sexual feeling.

Additional precipitating factors are the presence of a general tendency towards sexual perversion, a disposition which leads to irresponsible behaviour, lack of moral control and imperfect emotional development in social relationships. Occasionally some local physical abnormality may predispose towards exhibitionism, but usually such explanations should be regarded with suspicion. Physical satisfaction becomes so closely associated with this form of sexual indulgence that it often persists after marriage although normal sexual relations are established.

The sexual object of the typical heterosexual exhibitionist is

fairly well fixed. She must be a stranger, sometimes more than one person must be present, and her age must be fairly constant, girls of a particular age are sometimes essential. In the ordinary heterosexual relationships exhibitionists show no tendency to enjoy exhibitionism on the part of their partner, nor do they then tend to exhibit themselves.

Some exhibitionists carry out their perversion for several years, and in many cases the stereotyped character of the act is shown by the fact that it is often repeated in the same place, at the same time of day and to the same person. Occasionally it may appear as an isolated act in connection with a chance opportunity. It may be the result of the loss of control which follows alcoholic intoxication, and the desire to urinate may suggest the activity. It may be the result of mental defectiveness, psychoneurosis or psychosis. In many cases a history of heterosexual play in childhood is common and may remove at an early age the barrier between the sexes and predispose to exhibitionism. In some homosexuals indecent exposure to other men may be a commercial solicitation, but examples of true homosexual exhibitionism occur.

The impulsive quality of exhibitionism is usually clearer than in other types of perversion, or in any other, except very rare types of crime. The exhibitionist often becomes seized with an ever increasing urge to carry out his desire and this may overwhelm him. Usually there is no anxiety, but this may be present in men who are constitutionally predisposed to become anxious in situations of tension. The pleasurable aspect of the act may be obscured by a feeling of agitation which is only relieved at the time of actual exposure. In such cases the urge is complex and other objects in carrying out the performance can be demonstrated. The universal obsessional characteristic appearing in comparable situations where one thing is anxiously balanced against another, as in "doubting mania" is absent. As soon as the temptation is yielded to the whole personality is affected. There is no suggestion of a separation off of a morbid part of the mind such as is found in the obsessional patient against which the healthy part can be opposed. The obsessional subject usually shows evidence of a long standing obsessional personality before asocial or antisocial conduct is declared, and is exceptional

among exhibitionists. Nor were occasional obsessional symptoms at all common in the series of cases investigated by Hubert and East.

Sadism and Masochism. The term sadism is used here for activities which enable sexual satisfaction to be obtained by inflicting pain, and masochism for activities which enable sexual satisfaction to be derived from suffering pain. The victim of the sadist is not necessarily a masochist, and the masochist's aggressor is not necessarily a sadist.

The infliction of cruelty without sexual relationship may give pleasure by satisfying an inherent or acquired aggressiveness alone or in association with destructiveness, revenge, hatred or other debasing feature. The infliction of suffering on oneself, or seeking out situations which enable others to inflict suffering upon one may also have a pleasurable effect apart from sexual accompaniment. But to include under the heading of sadism and masochism conduct which is pleasurable in a non-sexual manner would inappropriately extend this thesis. For the same reason the more abnormal and complicated situations and conditions arising through mental disease, or any grossly abnormal emotional behaviour pattern from whatever cause other than sexual, are excluded.

The cruelty or bearing of pain in sadism and masochism is the most striking feature, as a rule, of the emotional life of the sadist or masochist, and in many cases a complicated ritual of a stereotyped pattern precedes the act and is an essential accompaniment.

It is convenient to group sadism and masochism under the same heading, because although clinically they often exist separately there is no clear line of demarcation between them, and an element of masochism may occasionally appear in the sadist, and an element of sadism in the masochist. That is to say active and passive elements may be closely associated in the same individuals.

Havelock Ellis considered sadism and masochism were based on normal human impulses and reinforced weak impulses, and that they were extremes of tendencies which in slight degree are within the biological sphere. The sadist is not necessarily impelled by the desire to be cruel, his objective is to arouse a specific

emotion. So too, the masochist does not necessarily wish to suffer cruelty, but to experience the specific sexual emotion which pain incites. Sadists and masochists are usually undersexed rather than oversexed. Strong sensations and emotions such as anxiety and grief appear, both from the literature and practical experience, to act sometimes as sexual stimulants and, as Ellis points out, may produce pleasure although painful in themselves.

Hirschfeld regarded sadism in man as a heightening of the normal sexual attitude and masochism in woman as a heightening of the normal female sexual attitude. Bloch, discussing sadism and masochism says: "It is certain that we have here to do with an anthropological phenomena, and that it is normal within wide limits." Stekel looks upon sadism and masochism as a definite form of psycho-sexual infantilism, the sexual energy of the sadist being actively that of the masochist passively directed. He says, however, "It will not do simply to compare with each other the ideas masculine-sadistic and feminine-masochistic, although this point of view apparently gains support through many manifestations of sexual life." He considers sadism and masochism to be a disorder of environment and to be referable to definite influences in childhood.

W. McDougall regarded sadism and masochism as the impulses of the two opposed but independent instincts of self-assertion and submission respectively. And it is a matter of common observation that in sexual contacts the aggressiveness of the man is opposed to the degree of submissiveness of the woman. At the same time both men and women may show evidence of sadism and masochism.

Freud stated: "The sexuality of most men shows a taint of aggression, it is a propensity to subdue, the biological significance of which lies in the necessity of overcoming the resistance of the sexual object by actions other than courting. Sadism would then correspond to an aggressive component of the sexual impulse which has become independent and exaggerated and has been brought to the foreground by displacement." He stated in another passage: "A sadist is simultaneously a masochist, though either the active or the passive side of the perversion may be more strongly developed and thus represent his preponderate activity."

Discussing sadism and masochism, Hubert and East state: "The reasons that led to the development of this abnormality are often difficult to determine, but probably they are in all cases specific and environmental. Many remember gaining sexual pleasure from phantasies of this nature in early years, and very often remember pleasure obtained from actual performances. Contact with others with similar, or opposite, tendencies and certain types of story also have a direct influence. . . . The child thinks of human relations so much in terms of like and dislike, friendship and enmity, kindness and unkindness, physical caress or cruelty that the developing sexual feeling readily associates itself with the dramatic form of these attitudes. It is a well known finding also that children who are ignorant of intersexual relations will, upon learning something of them associate them with sexual feeling in themselves and the conception of a violent attack by the man on the woman. In addition to this, various abnormal personality types who tend to associate sexual feeling with excretory or nutritive activities will, by easily appreciated associations, tend to develop sadistic and masochistic interests. Individuals who, through constitutional factors or unfortunate experience develop very strong aggressive drives, such as resentment or antagonism, will tend to link them with sexual feeling developing at the same time and with a similar result."

Sadism is not confined to heterosexual activities. As I have already pointed out, it is common in homosexual offences. A sadist, when his confidence is gained readily admits that he obtains sexual pleasure from the act and this seems essential for diagnosis. The only exception is when there is a very strong reason to assume that sexual excitement was present although the individual cannot afterwards verbalise the fact that it was present physically or mentally. For example, if he has frequently obtained sexual pleasure from phantasies similar in content to the activity. To extend the term to cover cases in which sexual feeling may have been present in this way raises questions as to the exact meaning of "unconscious" sexual pleasure, and of the right to identify interpretation with material actually presented by the subject.

In the criminal courts, cases of sadism can be conveniently

considered from the point of view of reality, phantasy and simulation. Sadistic crime includes murder, attempted murder, wounding and lesser bodily injuries, and damage to property by cutting, or the result of ink-splashing, dress-slashing and the like.

As a cause of murder, sadism may operate alone or in association with an attack of manic-depressive disease or other mental disorder. In one case, two women were murdered and two others were seriously assaulted before the homicide was arrested. A less aggressive type is the man who stabs a woman with a penknife or needle as he passes her in the street. The dress-slashers and dress-defilers belong to this group. A married man, aged twenty-three, had never been in the hands of the police until he was arrested and convicted of slashing with a safety razor the dresses of two women on the same evening. Many years ago a sadistic widower, aged fifty-one, was convicted of throwing on to ladies' dresses from a fountain pen a solution of horse excrement which he prepared at home for the purpose, so that he might if arrested attribute the soiling of the dresses to splashings from the road. Sadistic arson, so-called, is probably infrequent in this country, and an incorrect diagnosis may be made if artefacts are misjudged. There appeared to be some reason to consider that a youth, twenty-one years of age, set fire to some hayricks to produce an emotional state in which sexual erethism was an important feature. He had derived sexual gratification from sadistic conduct with boys, and masochistic phantasies accompanied by autoerotic activities were present in his dreams.

The sadist may indulge in his abnormality only in phantasy. In some an act is imagined to cause pain and humiliation, as in the epistolary sadist. The importance of phantasy in sexual affairs generally is well recognised, and sadistic acts and phantasies in association with inanimate objects may be of forensic importance. I have referred elsewhere to the case of a fetishist who committed burglary to obtain possession of women's shoes which he then savagely slashed with a knife. He was detected in prison cutting the throats of women in the photographs which other prisoners retained in their cells, and he admitted that by so doing he derived full sex gratification.

Sadism may be simulated when a rapist kills his victim in order to silence the only witness of his crime, or uses extreme violence to overcome her resistance or to effect his escape. In one case the murderer mutilated the bodies of three prostitutes in a manner which suggested that they were the victims of a sadist. A medical examination of the prisoner, a voluntary statement by his wife and by a prostitute with whom he had relations, together with a full consideration of all the circumstances of the murders made it clear that he was not a sadist. There was reason to believe that he had mutilated the women in an attempt to lead the police to attribute the crimes to a sadist rather than to a robber, and so divert suspicion from himself; or, alternatively, suggest that the crime was due to insanity.

Sadism may be attributable to an early sex experience; it may be expressed early or late in life; it may be practised upon inanimate objects with full effect; it may vary in intensity from mere phantasy to savage murder; it may be accompanied by a stereotyped ritual; it may be expressed at different times in the same manner by the same person; it may be used as a sexual stimulant although it fails of itself to give full sexual gratification; it is usually more pleasurable to the sadist than normal sexual intercourse which is generally of secondary importance, but it may be used as an occasional alternative; it may be controlled, uncontrolled or uncontrollable. The sadist may be sexually inferior; he may have masochistic tendencies; he may be homosexual or heterosexual or both; his victims are usually fortuitous and may be of widely different ages; the degree of violence used may depend upon the rapidity with which sexual satisfaction is completed; the greater the violence used the more likely is the act to be associated with gross mental abnormality. The sadist may refuse medical treatment, he may be insane according to the law and irresponsible; he may be fully responsible; he may suffer from some minor form of mental abnormality and present various degrees of culpability.

Crime is seldom due to masochism but is sometimes met with in criminals. A young women convicted of theft frequently cut herself about the arms, legs and breasts, and inserted pins and needles under the skin, usually one or two days before the onset

of menstruation. She derived sexual pleasure and felt relieved when she inflicted the pain, and saw blood flow from the incisions.

Sado-masochistic practices appear to be more attractive to some women than is sometimes supposed. A sadist who came under observation stated that only one out of several girls—not public women—refused his invitation to beat them, and there was some evidence to support his statement.

In *Rex* v. *Donovan* it appeared that the defendant was a sadist and made suggestions to a girl which if taken seriously meant that he intended or desired to beat her. According to the evidence of the defendant, and that of a young woman who said that she had overheard some of the telephone conversation, there was talk between the defendant and prosecutrix which left no doubt that she had expressed her willingness to submit herself to the kind of conduct to which he was addicted. The defendant was convicted at quarter sessions of assault in that he beat the girl with a cane. The conviction was quashed by the Court of Criminal Appeal on the ground that there was a misdirection to the jury in regard to the consent of the prosecutrix since in the absence of facts which proved the act to be unlawful in itself the defendant could be convicted only if the prosecution negatived consent. In regard to the assault the Court of Criminal Appeal declared that "If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can licence another to commit crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrong-doer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is in one case an innocent act of familiarity or affection may in another be an assault, for no other reason than that in the one case there is consent and in the other consent is absent. As a general rule, although it is a rule to which there are well-established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily

harm is a probable consequence, and when such an act is proved, consent is immaterial. We are aware that the existence of this rule has not always been clearly recognized." The Court then referred to well-established exceptions and continued: "In the present case it was not in dispute that Donovan's motive was to gratify his own perverted desires. If in the course of so doing he acted so as to cause bodily harm, he cannot plead his corrupt motive as an excuse. Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of the opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the exceptions to the general rule. In our view, on the evidence given at the trial, the jury should have been directed that if they were satisfied that the blows struck by the prisoner were likely to be intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied that it became necessary to consider the further question whether the prosecution had negatived the consent. For this purpose we think that 'bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must no doubt be more than merely transient or trifling. (*The Times Report*, July 28th, 1934.)

Fetishism. The term fetishism is applied in different senses, varying from a usage which corresponds to that of the term sexual perversion itself to one which confines it to cases in which sexual interest is mainly centred on a part of the individual or an inanimate object. It is used here arbitrarily in the latter sense, and this corresponds rather closely to the use of the word in the non-sexual sphere.

Slight degrees of fetishism are, of course, entirely normal. Every lover tends to become attracted to some individual feature of the person he admires, or to some of the various articles that come into contact with her. This tendency becomes abnormal when the living feature or inanimate object is divorced from the personality, which it replaces and itself becomes the exclusive sexual object.

The fetishist may commit burglary, theft and assault in order

to provide himself with the required article of female clothing, and some fetishists find the garment must be stolen if full satisfaction is to be obtained. The shoe-fetishist is occasionally seen in the criminal courts, and many years ago a man came under observation who had knocked several women down in the streets of a London suburb to possess one of their shoes. The hair fetishist was also a rather frequent offender at that time. A man, aged thirty-one, was arrested as a suspected person. He went up to a little girl in the street and cut off some of her hair. He was arrested with the scissors in his hand and the hair in his pocket. At his address were found five plaits of hair of different colours, loose hair of two different colours as well as 72 hair ribbons. He was not mentally defective and no psychosis was present. He had served in the East and had committed similar offences there. The perversion was traced to its origin and was influenced by the fact that he was living apart from his wife, and the fear of venereal disease prevented indulgence in promiscuous intercourse.

In the simpler type of case, sexual excitement becomes by chance associated with a particular object or activity, and by repeated phantasy, usually combined with autoerotic manifestations, becomes increasingly important and fulfils the primary sexual need. In the more complicated case a relatively harmless perversion developed in a similar manner by a process of condensation allows partial outlet to much more dangerous perverted drives, such as a strong sadistic interest. A youth investigated by Hubert and East obtained sexual pleasure from collecting, making and playing with knives and from sadistic phantasies in which he made imaginary attacks upon girls.

Unless the confidence of the offender is obtained, mistakes are likely to occur in criminal cases, and an act which has a simple explanation may be regarded as a fetishistic manifestation. In a case of murder associated with rape, the homicide took away with him an article of the victim's underclothing, and it was suggested that this was a fetishistic act indicating sexual abnormality. In fact the homicide thought that if the article was examined it would show signs of seminal stains and give a clue to the cause of murder. So he took it with him and threw it away at the first opportunity.

Transvestism. Sexual pleasure derived from wearing clothing of the opposite sex may be obtained in various ways. Cross-dressing by either sex was forbidden by Mosaic Law.[1] In some cases a general tendency to sexual perversion is apparent, and in many a homosexual, fetishistic and exhibitionistic element is present. In a case which did not come before a criminal court, transvestism was associated with autoeroticism and masochistic practices which ultimately miscarried and caused the death of the pervert.

Dressing up may be relatively unimportant, but may increase sexual pleasure and stimulate phantasy if the pervert looks at his reflection in a mirror. Although homosexuals may dress up as women to increase or vary their attraction to other men the true male transvestite obtains sexual gratification from pretending to be a woman, and his phantasy is facilitated by wearing her clothing. In appearance, manners and interests they seem and feel more feminine than masculine and naturally adopt the little characteristic mannerisms of women. Investigation often shows that, as children, their play and general behaviour was girlish, and as they grew older, they acquired feminine rather than masculine occupations, associating and identifying themselves with women in preference to men. It is important to distinguish this type from the homosexual, as they may pass their lives with no sign of sexual interest in their own sex. Perhaps both are derived from the same physical type, but in the true transvestite, early homosexual seduction appears to be unusual and sexual activity is confined to phantasy and autoerotic habits.

Havelock Ellis considered that whereas it is normal for a man to identify himself with the woman he loves, the transvestite carries the identification too far, stimulated by a sensitive and feminine element in himself which is associated with a rather defective sexual virility on what may be a neurotic basis. He also held the view that an abnormal childhood with too close attachment to the mother, who might herself be rather abnormal, predisposed to the condition.

The male transvestite is sometimes arrested for an apparently non-sexual offence, such as burglary or theft, committed by him in order to obtain articles of female attire and satisfy his perversion.

[1] Deuteronomy, xxii, 5.

Before leaving the subject of transvestism it seems desirable to refer to the fact that some people are under the impression that although cross-dressing in either sex is innocent when no one is deceived, as at a fancy dress party among friends, it becomes an offence as soon as any person is deceived, or if there is an attempt or intention to deceive, even with no ulterior purpose in view, such as fraud.

The matter was discussed in an article on Masquerading published in the *Justice of the Peace*, February 26th, 1938: "Cross-dressing may, prima facie, be evidence of an intention to commit some crime. The same is true of any disguise. Particularly may a man masquerading as a woman in a public place incur suspicion under section 1 of the Vagrancy Act, 1898, which deals, *inter alia*, with persistent soliciting or importuning by a male for immoral purposes. . . .

"At Dorking in 1933, a man found in woman's clothes was convicted of being a suspected person loitering with the intention of committing a felony; obviously cross-dressing, like any other disguise, may be material to such a charge, whether the defendant be a man dressed as a woman or a woman dressed as a man.

"In connection with cases of this type, where the motive is to obtain money or other material advantage and not to satisfy some impulse, it is well to remember that the offence of obtaining money by false pretences can be committed without words. A 100 years ago in *R.* v. *Barnard* (1837), 7 C. and P. 784, a man was convicted under the head of false pretences, who obtained goods from an Oxford tradesman when dressed as an undergraduate, and that offence, or the modern offence of obtaining credit by fraud, might well be committed where the pretence consisted merely in wearing the clothes of the other sex, if by that means the fraud had been successful.

"Apart from suspicion of an intent to commit offences which can be committed only by a male, such as rape or importuning in breach of section 1 of the Vagrancy Act, 1898, the law is the same for men and women.

"We have heard it suggested that dressing in the clothes of the opposite sex may be somewhere an offence under bye-laws or under Local Act. But we are reasonably sure no such bye-law has been made for good rule and government, or would (now that

confirmation of such bye-laws has been made necessary by the Local Government Act, 1933) be confirmed by the Home Secretary. There is no other heading under which bye-laws to this effect are possible, unless for the regulation of a pleasure ground, and here again we have come across no such bye-law and are sure that none exists.

"As regards old local acts, no one can be sure of anything, but we have found no such local acts and we should be exceedingly surprised to find one.

"In many cases which came before the public there is no element of scientific interest. There is a crime or an attempted crime, for which a disguise is adopted. It is, however, vital to remember that it is the crime itself, and not the disguise, the fraud in the sense of obtaining money, goods or credit, and not the mere deceit, which is the offence. We repeat that the mere wearing of clothes appropriate to the opposite sex, and even the deceiving of other people by so doing, cannot, where there is no attempt to obtain money or attempt to commit some other criminal offence, be made the ground of any criminal charge."

Paedophilia, Necrophilia, Voyeurism and Bestiality. The sexual perversions which do not in themselves lead to criminal behaviour need not be considered here. But a brief notice of paedophilia, necrophilia, voyeurism and bestiality is necessary.

In paedophilia there is sexual attraction to children or immature girls, and this may be due to influences which delay or prevent the formation of ordinary social and sexual relationships, such as mental defectiveness, retarded emotional development or senile impotency. Interference with girls under age is hardly to be considered as abnormal if the girl is sexually mature, consenting and conceals her true age.

Necrophilia, sexual intercourse with a woman who is known to be dead is a very uncommon offence in this country, and my own experience is limited to three cases in which each offender was mentally defective. It is difficult to believe that anyone could knowingly commit this act unless gross mental abnormality was present. Forel states that some sadists are only necrophiliacs for fear of becoming assassins. However this may be it sometimes happens, in cases of violent rape, that the victim is dead before intercourse is effected.

Voyeurism, calls for police action if a concealed observer of courting couples indulges too recklessly in his secret pleasures. But a more serious offence sometimes occurs. A middle aged man led a normal sexual life as far as could be ascertained until his wife's death. He continued to live with his grown-up daughter and induced her to bring men home for an immoral purpose so that he could watch the incidents which took place between them.

Bestiality, is not uncommon in rural areas and may be the result of sexual deprivation, mental defectiveness or other gross mental abnormality.

Treatment

The proportion per 100,000 of the population of persons aged seventeen years and over who were found guilty of sexual offences during the five years before the World War, and their reconviction rates do not compare unfavourably with other groups of offenders. Experience shows that the sentences of imprisonment or penal servitude now imposed are generally effective when the offence is the result of normal impulses. Mentally defective and psychotic sexual offenders usually repeat their conduct unless they are detained in institutions for defectives or mental hospitals. Sexual perverts may be prevented from committing a further sexual offence by a sentence of imprisonment. But there is often a grave risk that the offence will be repeated. In such case the position is unsatisfactory and may menace social security, when the pervert is discharged from prison.

The first prerequisite for an improved situation in this matter is a better understanding, in which the public must share, of normal and abnormal sexuality. Next in importance is the before-trial medical examination of the sexual offender by an experienced psychiatrist. This will determine whether mental defectiveness or mental disease is present, and whether the offender is a suitable case for certification under the Mental Deficiency or Lunacy Acts. It will also determine whether the offender is suffering from a lesser form of mental abnormality which may be amenable to psychotherapeutic or more general psychiatric treatment. It cannot predict whether treatment will be successful, for many of these offenders treasure their sexual

gluttony at all costs, and are unwilling to wholeheartedly submit to medical treatment which is intended to modify their taste, unless an alternative and equally satisfactory method of gratification is provided. The third prerequisite is close collaboration between the courts and the psychiatrists. Already some progress has been made and valuable work done by accredited clinics in the diagnosis and treatment of sexual offenders, and their adjustment to social life.

Some aggressive and acquisitive as well as many sexual criminals may be on the borderline between normality and abnormality, but in our present state of knowledge, enforced detention may be the only method available for dealing with them if social security is to be immediately obtained. And although frustration occasionally invites conflict and its *sequelae* and the sexual offender, like others, may not be responsible for his dispositions, he must be held responsible for his acts if he is not insane or mentally defective, and in varying degree culpable, for the manner in which he gives way to them.

The psychological treatment of the sexual offender has its limitations and an exaggerated idea of its value is sometimes discernible. Society may not be effectively safeguarded if a sexual offender receives a non-custodial penalty because he is abnormal, and in the hope that he will submit himself to medical treatment. On the other hand, until the public is better advised, a sentence of detention sufficiently long to give medical treatment a trial may appear unjustified for a minor sexual offence.

As short sentences of imprisonment are so often useless in this class of offence, and having regard to the social adjustment of the sexual offender as well as the security of society, six alternatives seem to offer themselves if the offender is not certified under the Lunacy or Mental Deficiency Acts and the case is not dismissed by the court:

1. Probation, with or without a residence condition.
2. Imprisonment for periods reaching the upper rather than the lower authorized limits.
3. Corrective training or preventive detention.

} With or without medical treatment.

It is hoped that future legislation will empower courts to make medical treatment in suitable cases a condition of a probation order, and that Corrective Training and Preventive Detention as envisaged in the Criminal Justice Bill may reach the Statute Book.

This seems as much as is likely to meet with public approval for the present. It must be recognized however, that short of imposing an indeterminate sentence of custodial detention there may still be some failures. But, as I have stated elsewhere, the medical treatment of these and other types of offenders in a special penal institution administered on colony lines should enable much needed research to be carried out, and better results obtained, in cases which appear to be incorrigible.

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THE ORGANISATION OF THE METROPOLITAN POLICE

By SIR HAROLD SCOTT, K.C.B., K.B.E.

Commissioner of Police of the Metropolis

PEEL'S police reforms have been described as being among the most revolutionary changes in English history. To appreciate the force of this opinion it is necessary to consider the social conditions of the eighteenth and early nineteenth centuries. It was an age when immense aristocratic wealth and abject poverty existed side by side. The Earl of Jersey could "jog along on £40,000 a year" while, on an average, 20 persons less fortunately placed died nightly of simple starvation. Drunkenness was almost universal and the public found in gin—a recent importation from the Continent which was cheap and obtainable almost everywhere—the quickest escape from the squalor and insecurity of their lives. It is not surprising that violent crime flourished on a scale beyond modern comprehension. The ordinary citizen of London was careful to arm himself and his servants before venturing in the streets, and slept with his pistols within easy reach.

There were a number of reasons for this state of affairs. The machinery for the enforcement of law was archaic and ineffective. The unpaid and corrupt Parish Constables and the decrepit old watchmen were incapable of dealing with the violent criminals that infested the streets of London and the roads which led out of it. The magistrates, with a few notable exceptions, were little better. In 1742 Horace Walpole could say with some truth: "The greatest criminals in the Town are the officers of justice. There is no tyranny which they do not exercise."

Apart from the dangers which the citizens faced at the hands of footpads and highwaymen, there was the constant fear of injury in the murderous and destructive riots which occurred at irregular intervals throughout the eighteenth century. These riots were on a scale which appears fantastic to the modern

eye. In 1778 the *Annual Register*, referring to the Gordon Riots, stated that for six days successively the cities of London and Westminster were delivered up into the hands of an armed and nameless mob to be plundered and burned at its discretion.

With a dullness of perception not peculiar to their age the authorites pinned their faith to the imposition of severer penalties for crime. In the course of little more than a century the number of crimes punishable with death rose from 67 to 223. The idea of making a real effort to prevent crime rather than to punish it when committed occurred to few. Among those to whom it did occur were the Fielding brothers who in turn occupied the Chief Magistrate's chair at Bow Street, and who established the small body of professional thief-catchers known as the Bow Street Runners.

From time to time successive governments considered the problem. Between 1770 and 1829 no less than seven Parliamentary Committees looked into these matters. In 1785 Pitt went so far as to introduce a Bill, but the opposition to it was so great that he abandoned the struggle. Looking back today it is difficult to see why the establishment of a police force should have aroused such fierce and bitter opposition from a population whose daily life was overshadowed by the fear of robbery, rioting and murder. However, in 1829 Peel forced through his Bill, buying off the opposition of the City of London by excluding the City from its operation.

The Metropolitan Police Act of 1829 provided for the creation of a new police office in Westminster which would be under the authority of the Home Office, and in charge of certain Justices to be called Commissioners of Police, with administrative powers which were defined in the Act. It laid down rules regarding the duties, powers and discipline of a new force of paid constables who were to be enrolled. The area for which the Office was to be responsible was defined as the Metropolitan Police District, and this consisted of the whole of Westminster and a large number of other parishes. The new Police Office was opened in Whitehall Place with an entrance in Scotland Yard, and the first thousand of Peel's new police began their patrol on the evening of September 29th, 1829. No useful purpose would

be served in tracing the history of the Force[1] through years of opposition and criticism to the time when police forces on the Metropolitan model had become universal throughout the country. Peel's wisdom was shewn in his choice of the first Commissioners of the Metropolitan Police—Sir Charles Rowan and Sir Richard Mayne, both of whom were remarkable men. The principles that they formulated, though they have never so far as I know been officially laid down, may be stated as follows:

1. The Police are essentially citizens paid to discharge duties which are incumbent on all citizens.
2. The success of the Police is contingent on the approval, respect and co-operation of the public.
3. The enforcement of law must be impartial and independent of policy.
4. The Police have no judicial function. The decision of guilt or innocence and the punishment of offenders are outside the scope of their responsibility.
5. The preventive function in respect both of crime and disorder is paramount. The true test of police efficiency is the absence of crime and disorder and not the number of prosecutions.
6. The preservation of life and the protection from injury are functions to be discharged by the Police regardless of personal danger.

These principles are as valid today as when they were first formulated and it is their embodiment in the living tradition of the Force and not the exercise of repressive powers that have enabled a comparatively small body of unarmed men to maintain among a vast population a state of law and order which in over a hundred years has only rarely and for brief intervals been disturbed.

The Receiver for the Metropolitan Police District

One of the problems that Peel dealt with in working out his system was to provide for the control of the Metropolitan Police expenditure and property. He solved the problem by entrusting

[1] An interesting account of the early years of the Metropolitan Police is given in Charles Reith's *British Police and the Democratic Ideal*.—Oxford University Press.

the responsibility for all Police property and the administration of the Metropolitan Police Fund to an independent colleague of the Commissioners to be known as the Receiver for the Metropolitan Police District. This officer, of whose powers and duties the public have little knowledge, holds office under the Crown and acts under the general direction of the Home Secretary. He is a "corporation sole in perpetual succession" and has power to acquire land and property and to suc or be sued in his official name. All Metropolitan Police land and property is vested in him and all contracts relating to such property or to supplies are his responsibility. The Receiver's staff includes architects, surveyers, tradesmen, clerks of works, engineers, electricians, store-keepers, warehousemen and accountants. The Receiver's principal function is the administration of the Metropolitan Police Fund, and in this connection he acts as adviser both to the Secretary of State and the Commissioner. The Police Fund is constituted out of:

(1) The proceeds of the Police Rate levied annually on property in the Metropolitan Police District;
(2) Contributions from the Exchequer;
(3) Miscellaneous receipts.

Roughly speaking the cost of the Metropolitan Police is defrayed half by the local authorities in the district and half by the Exchequer. This means that an annual estimate and an annual appropriation account have to be submitted to Parliament and that the Home Secretary is therefore answerable to the House of Commons for police expenditure in London in just the same way as for the expenditure of the Home Office itself.

The Commissioner's Office

The Headquarters of the Metropolitan Police are at New Scotland Yard where they were transferred from Whitehall Place in 1890.

The Commissioner's Office is divided into six departments, four of which are presided over by Assistant Commissioners who, like the Commissioner, are appointed by the Crown on the recommendation of the Secretary of State and are Justices of the

Peace for the Counties of London, Middlesex, Surrey, Hertford, Essex, Kent, Berks and Buckingham. They may not, however, act as such at any Court of General or Quarter Sessions.

A fifth Assistant Commissioner was appointed under the Metropolitan Police Act, 1933, to act as Deputy Commissioner.

The four departments presided over by the Assistant Commissioners are known as "A" (Administration and General Duties), "B"(Traffic), "C" (Criminal Investigation) and "D" (Organisation and Recruiting).

A fifth department, the Secretariat, is presided over by the Secretary, who though a civilian has equal status with the Assistant Commissioners. The sixth department, known as "L" is that of the Solicitor.

The Assistant Commissioner in charge of "A" Department is responsible for all matters relating to the general administration of the Force, including discipline, promotions and complaints against the police. The Mounted Branch, the Women Police and the Special Constabulary are among his responsibilities. His department also deals with such subjects as liquor licensing matters, control of clubs, betting and gaming. "A" Department also prepares and issues Police Orders.

This is the department responsible for disposing of the police strength to the best advantage from day to day and for making arrangements to meet the unusual demands created by special occasions such as a Coronation, a Victory Parade, a widespread strike, political demonstrations and so on. At such times the police of the divisions concerned may have to be reinforced by calling in men from the outer parts of the district and by the mobilization of the special constables. The Operation Orders for such occasions set out in detail the distribution and duties of the Force in much the same way as a military operation order.

One branch of "A" Department is devoted to the organisation and general supervision of the Women Police. In the years since the end of the first World War increasing recognition has been given to the value of women police officers in dealing with women and children, particularly in connection with sex offences and with girls in need of care and protection. Women officers have also been employed with considerable success in detective work and in keeping observation in clubs and licensed

premises. The first regular body of women patrols in the Metropolitan Police was formed in October, 1918, but they were appointed only on a temporary basis and were not sworn in as constables. In 1922 they were given their full status as police officers and last year the establishment of women was raised to 300, though so far it has not been possible to recruit up to this number. 13 women are permanently employed in the Criminal Investigation Department.

The Assistant Commissioner in charge of "B" Department deals with the many subjects connected with traffic in which the police are interested. These include the regulation and licensing of public vehicles; the traffic patrols; advisory and inspection duties in connection with street lighting, traffic signs, road works and parking places; regulation of street traders; summonses for traffic offences and the Lost Property Office.

Perhaps the most interesting of these duties is the organisation of the traffic patrols. These employ some 750 men who are constantly travelling about the district by car or motor cycle. Their object is not merely to detect offences against the traffic regulations but to set an example of care and courtesy on the road and by advice and, when necessary, warning to educate drivers in good conduct and good manners.

The department is also responsible for the Police Driving School at Hendon. Here police officers are given an intensive training in driving before they take their place as traffic patrols, drivers of wireless cars, or in the Flying Squad. At any time a police car may become involved in a chase at high speed through the streets of London and the small proportion of accidents incurred is eloquent testimony to the high standard of driving taught at the School.

Most people when they speak of "Scotland Yard" are thinking of "C" Department, the Criminal Investigation Department.

The C.I.D. consists of a detective staff at Headquarters, and local detective staffs who form part of the establishment in the districts and divisions.

The Headquarters Staff includes the Central Office which deals with crimes of special importance or cases of a national character. When County or Borough Police Forces apply for

assistance it is from Central Office that officers are sent to help. Most of the cases in which the Director of Public Prosecutions applies for the services of an officer are dealt with by Central Office. Other branches of "C" Department at Scotland Yard are the Criminal Record Office, the Special Branch and the Fingerprints Branch.

The Criminal Record Office under a superintendent is a national registry of crimes and the criminals who commit them. Here criminals are classified by appearance as well as by the methods and habits which most of them adopt and by reference to these records the search for the unknown author of a crime is often narrowed down to manageable limits.

The Special Branch, under a Deputy Commander, is the English substitute for what in other countries is a political police, though it lacks the sinister reputation that such bodies usually possess. It has no powers beyond the law and it is concerned for the most part to keep itself informed of any activities that may at some time result in a disturbance of the peace. Except in time of war it is but rarely that it is called upon to take action against societies or individuals. Its normal work relates to the security of the state, the protection of Royalty, Ministers of the Crown and distinguished foreign visitors; and it plays an important part in the control of arms, explosives and aliens.

The Fingerprints Branch, whose head is a superintendent, now has a collection of nearly 1,000,000 prints. Under the system in use a print can be identified within seconds. The work of the branch in conjunction with that of the Criminal Record Office plays an increasingly important part in the investigation of crime not only in the Metropolitan Police District, but throughout the country, and indeed outside it. Recently fingerprints were successfully transmitted to Australia by short beam radio.

Attached to "C" Department is the Forensic Science Laboratory to which exhibits of all kinds connected with current criminal cases are submitted for scientific examination with a view to the presentation of expert evidence in the courts. Blood stains, seeds, soil, hairs, fabrics, markings on wood and metal all play their part as evidence of crime and it is at the labora-

tary that they are subjected to the various tests—chemical, physical, microscopic and so on—which reveal their secrets. The laboratory is at Hendon but will shortly be moved to New Scotland Yard so as to be in close contact with the headquarters of the C.I.D., to which it has become an indispensable partner.

Also under "C" Department is the Detective Training School at which regular courses of instruction are given to the officers of the C.I.D. The laboratory is closely concerned with these courses and by the organisation of a carefully selected museum of exhibits seeks to keep officers informed of the many ways in which science can come to their aid in the conduct of their investigations.

The Assistant Commissioner in charge of "D" Department is responsible for recruiting, the training of probationers, the supervision of police buildings and furniture and matters relating to clothing and appointments.

In "D" Department are kept the records of service of the force. Assistant Commissioner "D" is also responsible for communications, which include telephones, teleprinters, wireless telegraphy and the Information Room, and for the Medical Services.

Recruiting is at all times, and especially now when the strength of the force is at a very low level, a matter of the first importance.

Physique, character, intelligence are all necessary if a policeman is to meet successfully the demands of modern police work, and it is the task of the recruiting board to select from thousands of applications those most likely to make efficient officers. The age limits are 20 to 30 and since a policeman must now serve 30 years to earn his full pension any raising of the upper age limit would clearly be inadvisable. When selected the candidate is at once sworn in as a constable and remains on probation for two years. For the first 13 weeks he attends a Training School, either at Peel House or Hendon, where he goes through a carefully drawn up course of instruction on police duties before he is allowed to go on the streets. Once posted to a division he goes out in company with an older officer before finally he undertakes individual duty.

Individual duty is what distinguishes police work from that of other services. Every constable exercises the full powers of the police. He must often act alone with no chance of referring to higher authority and for that reason the work of the Training School is regarded as a vital part of police organisation. Similarly it has been thought necessary to provide refresher courses for all the 3,000 odd men demobilized from the Forces before they resume police duty.

The Assistant Commissioner "D" is also responsible for communications which in view of the increased mobility of the modern criminal have become a vital part of police organisation.

The centre of the communications system is the Information Room at New Scotland Yard which is in direct touch by telephone and teleprinter with all divisional stations. Soon the teleprinter network will be extended to all sub-divisional stations. By two-way wireless telephony, which is rapidly replacing the former system of wireless telegraphy, the Information Room can communicate with the fleet of wireless cars which regularly patrol the Metropolis. Over this network flows a constant stream of information and instructions and it is to the Information Room that calls from the general public are directed when they dial 999. The growing value of the system is shown by the following figures.

During the first nine months of 1946, 43,582 calls were received and as a result 4,254 persons were arrested by crews of the area wireless cars. These calls are 20,000 more than in the same period in 1945, and almost 6,000 more than for the whole of last year, while arrests are nearly 1,000 up on those for the first nine months of 1945.

"S" Department, the Secretariat, deals with the establishment of some 500 Civil Servants who work not only in that Department but in "A", "B" and "D" Departments, and with such matters as accommodation at Headquarters, parliamentary questions, firearms certificates and the licensing of explosives.

The Press Bureau and the Public Information Officer carry out their functions under the Secretary's supervision. The appointment of a Public Information Officer in December, 1945, marked an important change in the relations of Scotland Yard and the press. Facilities to the press for reporting police

activities have been increased and the aid of the press in making police work and police needs more widely known has been enlisted with encouraging results. In this way and by the use of wireless and the films an endeavour is being made to secure the interest and co-operation of the man in the street and, so far as is consistent with the efficient carrying out of police duty, the old policy of secrecy has been abandoned with results which can already be said to be very satisfactory.

Other branches of "S" Department are the Aliens Registration Offices, Pay and Allowances, Statistics and the editing of General Orders, Service Manuals, Divisional Forms and so on.

The Solicitor's Department staffed by some 15 practising solicitors is responsible for the conduct of all police cases requiring legal aid in the Courts of Summary Jurisdiction, Quarter Sessions and Assizes. When necessary Counsel are briefed but in the majority of cases the prosecution is conducted by members of the Solicitor's Department. In 1945, 3,946 cases were dealt with by this department.

The Solicitor also acts as legal adviser to the Commissioner on the numerous matters which naturally arise from day to day in the administration of a large force such as the Metropolitan Police.

The Metropolitan Police District

Administration and policy are determined as described above at Headquarters, but it is to the policeman on the ground that falls the responsibility for the actual safeguarding of life and property, the control of traffic and the apprehension of offenders. The force is distributed over a district which covers an area of almost 700 square miles and includes the Counties of London (excluding the City) and Middlesex and parts of the Counties of Surrey, Hertford, Essex and Kent. It extends from Dagenham on the east to Staines on the west and from Cheshunt on the north to Kenley on the south. Roughly speaking it is included in a circle of 15 miles radius from Charing Cross. The area has remained unchanged since 1840, but in 1947 the boundary is to be adjusted to correspond with local authority boundaries at various points and this will add a further 47 square miles to the area for which the Metropolitan Police are responsible.

The whole area is divided into four districts, each under a District Commander assisted by a Deputy Commander, a District Superintendent (C.I.D.), a District Chief Inspector, a District Traffic and Transport Officer (ranking as Chief Inspector) and a District Inspector of the Mounted Branch.

Each district is made up of divisions under Superintendents. The Superintendent's divisional staff consists of a Chief Inspector (Administrative), a Chief Inspector (Crime) and a Divisional Detective Inspector. There are 23 divisions, including the Thames division which patrols the river from Teddington Lock to Dagenham on the north bank and Dartford Creek on the south.

The divisions are again divided into about 90 sub-divisions under a Sub-Divisional Inspector and, depending on the nature of the locality and the size of the sub-division, there may be one to four sectional stations controlled by a police sergeant. In all there are 173 stations in the Police District.

The area of each sub-division is laid out in beats which are to be covered throughout the twenty-four hours by uniformed constables. They are revised from time to time and are designed to secure that every part of the area is visited regularly by a police officer. Naturally some parts of an area call for closer supervision than others and the size of the beat therefore varies according to the nature of the property. A busy shopping or industrial centre will call for shorter beats than a scattered residential area and in the latter type manpower is saved by the use of motor-cycle or car patrols which enable officers to travel quickly over unfrequented parts of their areas and to alight and spend more time at selected spots where police observation is more likely to be needed. The police do an eight hour tour of duty and to meet the criticism, which at one time was perfectly valid, that at the time of the change-over the area was left unprotected, patrols have for some years been superimposed on the regular beats beginning and ending at different hours from the beats, so that there are at all times officers patrolling the ground.

With a similar object in view the telephone box system was introduced between the wars. The well-known blue police boxes are placed at selected points throughout the police district. At

these officers can report on and off duty or get in direct touch with their superior officers without the loss of time involved in travelling to their station. In this and other ways there is a constant endeavour to secure the utmost economy in manpower, which with the increasing calls on the police and the increasing cost of the service becomes yearly more and more important.

The end of hostilities has brought a heavy rise in the calls on the Metropolitan Police. Crime has increased, traffic has returned to the roads and with it accidents and traffic offences have gone up. Rationing and the black market have brought many into conflict with the law who formerly were numbered among the law-abiding members of society. To meet these demands with—let us hope only a temporarily—reduced manpower will tax the resources of every force in the country. They can be met only by a contented and fully-trained service, supported by all the aids which science and technology can provide and by a public opinion which recognises in the policeman a friend and servant who deserves and requires the utmost co-operation which the public can give.

METHODS OF CRIME DETECTION

By RONALD MARTIN HOWE, M.C.

Assistant Commissioner in charge of the Criminal Investigation Department, New Scotland Yard

SIR Harold Scott's contribution on the general organisation of the Metropolitan Police enables me to approach in greater detail, the particular sphere of the Criminal Investigation Department.

Crime is as old as human society and, unless our nature alters very much, it will last as long. The causes are many and their investigation opens up a very wide field, and one which I have no doubt receives considerable attention in the Department of Criminal Science.

Detective officers are neither super-men nor fools, but ordinary persons whose business it is to detect crime and bring criminals to justice. Four essentials are necessary to efficiency and, with common sense, hard work, training and experience, success follows. Every police officer knows that his first duty is prevention of crime and this aspect cannot be alienated from detection, the terms being frequently synonymous.

The forerunner of our modern Criminal Investigation Department was the Bow Street runners, a body of men formed by Henry Fielding who was the magistrate at Bow Street in 1749. These men were primarily detectives and were never more than a few in number. In 1782 a body of police called "The Patrols" was established by the Government and placed under the control of the Bow Street magistrates. These men were appointed more for the prevention of crime than its detection.

In 1829 when the Metropolitan Police Force was founded there was no Criminal Investigation Department. The Bow Street Patrols had been incorporated in the new police but not the Bow Street Runners, who continued as a distinct body and were regarded as experts in the detection of criminals.

This state of affairs proved unsatisfactory. At a parliamentary

committee in 1837 it was said they "were private speculators in the detection of crime, rather than efficient officers for the ends of justice". In 1839 the Bow Street Runners ceased to exist and London was without detectives until 1842 when a small Detective Branch comprising two inspectors and six sergeants at Scotland Yard came into being. In 1868 the total strength was 15 men. In the year following an effort was made to combat the many burglaries and house-breakings which occurred during the dark winter months. Detachments of uniformed men were employed in civilian clothing to patrol those areas where such crimes were prevalent. These men were called "Winter Patrols" and this name was retained by uniformed officers employed to assist the C.I.D. right up until 1941 since when they have been known as "Aids" to the Criminal Investigation Department.

From time to time efforts were made to increase the strength of the detective force, but these efforts invariably met with severe opposition and it was not until 1878, as a result of reports submitted to a committee appointed to enquire into the Detective Organisation, that the department was overhauled and the Criminal Investigation Department as we now know it came into existence.

In March, 1878, the Criminal Investigation Department was created and Mr. Howard Vincent, later to become Sir Howard Vincent, M.P., was made its head with the title of "Director of Criminal Investigations".

In 1884 this office was abolished and the duties of the Department came under an additional Assistant Commissioner. The Department survived stiff opposition and has more than justified its creation by the most stringent test of all—results.

Every officer joining the Metropolitan Police who is an aspirant for the Criminal Investigation Department, must first perform an allotted period of uniformed street duty. Provided he is of suitable type and appearance his ability is then tested by his employment as an "Aid to C.I.D." when he patrols primarily to prevent crime and to effect the arrest of those engaged in its commission.

If recommended as being likely to achieve efficiency as a C.I.D. officer, he appears before a Selection Committee and, if selected, he is appointed a Detective Constable, in which rank he

serves a probationary period of one year. During this time he attends a ten weeks full-time course of instruction in criminal law and methods of investigation.

A great deal of thought has been given by experts to the syllabus. The course, as a consequence, is comprehensive and includes lectures which go into detail on subjects in which the following are included:

Larceny; fraud; company law; conspiracy; corruption; burglary and house-breaking; homicide; criminal abortion; forgery; coining; blackmail; indecent offences; dangerous drugs; bigamy; and the law relating to children and young persons.

Lectures are also given by experts on scientific and medical aspects of criminal investigation. During instruction and at its conclusion, examinations are held at which it is necessary to secure 75% of the possible marks in order to pass the examination and succeed in the probationary period. Refresher courses are frequently held for those up to the rank of inspector and the same standard is always demanded. The evolution of the C.I.D. to its present state of high efficiency has been very gradual and the multifarious powers possessed by the police are contained under not one statute but—and often obscurely—in many sections of many statutes. It will thus be realised that a detective officer has his work cut out to remember all the various powers which have, from time to time, been conferred upon him.

A thorough knowledge of the job is essential because in preparing cases for counsel or for court and in giving evidence in cases, the detective frequently has to match his knowledge and skill against the finest legal brains in our country.

The organisation of the Criminal Investigation Department of the Metropolitan Police can best be appreciated if some detail of its personnel and their respective duties is set out. The Department is under the control of an Assistant Commissioner which post I fill at present. The Assistant Commissioner is responsible to the Commissioner for all matters relating to crime. It has been the custom to appoint to the position a barrister who has had considerable experience in knowledge and practice, of the criminal law. The second in command is known as Commander (Criminal Investigation).

The organisation is then divided into two parts, one section dealing with crime and its investigation and the other known as Special Branch, the functions of which include the protection of Royalty and Cabinet Ministers, offences against security of the State, control of ports and airports and the naturalisation of aliens. In many respects Special Branch is national and not only Metropolitan in its duties, members of the Branch being stationed at sea and air-ports all over the country. Each of these departments is under the control of a Deputy Commander.

The headquarters staff of "C" Department is located at New Scotland Yard and is sub-divided for special functions. For convenience, numerals are allotted to identify its sections. Probably the most important section is *C.1* which is under the supervision of a detective superintendent. It deals with the more serious cases of crime and those calling for enquiry on several of the various divisions into which the Metropolitan Police District is alphabetically divided; crimes relating to Government Departments, serious crimes outside the Metropolitan Police District in which the local Chief of Police invokes assistance, important prosecutions undertaken by the Director of Public Prosecutions, cases of extradition and of fugitive offenders, international crime, in which a special training or knowledge of languages is required and cases of forgery and other fraud on banks. This list is by no means complete.

Under the superintendent are eight chief inspectors, who are sent, by request to investigate murders and other serious crimes in the provinces. The remaining staff which totals more than 100, comprises inspectors, sergeants and constables. The department also includes the Flying Squad with its fleet of fast cars. Officers possessed of expert knowledge of all types of criminals are selected for Flying Squad duties and their activities cover the whole of London. Much fiction has been written about the Flying Squad but in reality their work is carried out very unostentatiously. They also visit racecourses both in London and the provinces as these spots are invariably frequented by thieves and undesirables.

C.2 Department, also under the control of a superintendent, handles all correspondence dealing with reported cases and the

general communications received from the public and other forces on criminal matters.

A chief inspector, two inspectors, three sergeants and nine constables are continuously engaged on these duties.

The Fingerprints and Photographic Departments, known as *C.3* are in charge of a superintendent. It is a specialist department, national in character, which deals with the classification and identification of finger-prints and the examination of articles found at scenes of crime. Its officers visit scenes of crime for expert examination. It deals with the production at court of expert evidence of finger-prints, the taking of photographs at scenes of crime and the examination of documents by means of ultra-violet and infra-red rays to detect forgeries, etc. Its records contain something in the region of one million sets of finger-prints. The strength of C.3 Department includes a chief inspector, 11 inspectors, 31 sergeants and 29 constables.

The work of this Branch is ever increasing and some idea of its scope may best be given by figures. Finger-print classification covers the whole of the British Isles, and in 1945 a total of 109,680 sets of finger-prints were received for search and from these 32,026 identifications were made. In 1945 the number of juveniles identified, the volume of work which passed through several sections of the Main Finger Print Section, the number of articles from scenes of crime examined and quasi-scientific cases dealt with, all constituted records.

The proportion of positive results from the examination of erased cyphers in metals—102 restorations in the 114 cases submitted—was also very high. In the same year a photograph of a finger-print was successfully transmitted to Melbourne by wireless. The Branch also gives instruction to other forces in both finger-print and photographic work and it may be of interest to know that its advice was invoked on methods by which finger-prints might be taken from corpses disinterred in occupied territories.

C.4 Department or Criminal Record Office was established by section 6 of the Prevention of Crimes Act, 1871, and the Commissioner of Police of the Metropolis has been appointed by the Secretary of State as Keeper of Criminal Records for the whole of the country and consequently information regarding

every person convicted in England, Wales and Scotland reaches the office. A detective superintendent is in charge of the office and assisted by a chief inspector, his staff includes 10 inspectors, 34 sergeants and 53 constables.

An elaborate index of criminals and their crimes is maintained and it is at the disposal of the whole of the world. Without it we could not get very far in the investigation or in the methods for the prevention and detection of crime. Not only does the office keep a nominal index of persons convicted but each such person is registered in the name of any alias he may have used, his nickname is recorded as also are his personal peculiarities, particulars of deformities when such exist and a very detailed record of his method of effecting crime. Among its many indexes the office has established one detailing and classifying descriptions of stolen property and this affords a most valuable link in methods of detection as shown by the fact that in 1945, 1081 identifications were established concerning the property coming into police possession, much of which was found upon prisoners arrested for or detained on suspicion of crime.

The Criminal Record Office is also responsible for the publication of a newspaper known as *Police Gazette*, an official publication which is circularised to police forces by this Department throughout the whole of Great Britain, Northern Ireland, Isle of Man and the Channel Isles. Prior to the war it was also sent to certain continental forces. It contains particulars of persons wanted, suspected of and in custody for crime, particulars of property stolen and persons missing, of bodies found and of aliens who have contravened the various aliens restrictions. Allied to *Police Gazette* are supplements dealing with expert criminals, persons under that category about to be released from prisons and re-convictions of persons who in the past have been so classified. 7,000 copies of *Police Gazette* are printed daily at New Scotland Yard at a time which ensures that every police force in the country receives a copy by first post on the following morning. In 1945, individual cases published in the *Gazette* numbered 11,587 in many of which photographs of the subject were included.

The office also prints and distributes a similar publication of more local interest, known as *Metropolitan Police Confidential*

Information, which also contains under a miscellaneous heading particulars of methods employed and the persons suspected but not identified as committing the crimes concerned.

A further publication known as *Pawn Lists* is also printed and contains a description of identifiable valuable stolen property and it is distributed to pawnbrokers and jewellers.

C.5 Department. This is an administrative section which deals with promotion, etc. and complaints against C.I.D. officers.

C.6 Department is a new section known as Metropolitan and City Police Company Fraud Department. It is under the charge of a superintendent and its function, as its name implies is to deal with involved company frauds. An interesting feature of this department is that it has as members of its staff, three City of London police officers. Chief Constables throughout the length and breadth of the country can make use of the experts attached to the department.

A further part of the organisation of the Criminal Investigation Department is the Metropolitan Police Forensic Science Laboratory which is under the direction of a Doctor of Science. His staff comprises qualified chemists and scientists. There are several similar forensic science laboratories throughout the country to which police have recourse and the one which bears the name of this force is at the disposal of the police forces of counties surrounding London.

In the great majority of crimes triviality being no exception, the perpetrator has left the most important trace of his passage, namely the manner in which he has committed his crime. *Modus operandi*, when carefully studied and recorded is a most important link in the method of detection and consequently the Method Index at the Criminal Record Office is of invaluable assistance to investigating officers.

Their training includes instruction on the observance of minute detail and the reporting of such information so as to enable those responsible for the Index to extend the maximum aid to those seeking it.

By way of example, the simple term "larceny" is divided into over 150 classified headings; and breaking offences, a subdivision of larceny, are further classified in 100 ways. Codification of a general heading such as fraud, involves many hundred

independent classifications. The office in general is a national register of crimes and a *Who's Who* of their perpetrators, a means of enabling new crimes to be traced to old criminals, several crimes to the same person and old criminals to be recognised with certainty when re-arrested.

I have covered only that part of "C" Department organisation which is centred at New Scotland Yard and have yet to deal with that part carrying out the duties known to us as divisional work.

The Metropolitan Police is divided into 23 divisions, each under the control of a uniformed superintendent. The divisions are grouped into districts of which there are four, each run by a Commander and a Deputy Commander and work of the Criminal Investigation Department in each district is under the surveillance of a detective superintendent. He advises Divisional Officers in their work and acts as liaison officer between the divisions, districts and Assistant Commissioner.

Each division has its own staff of C.I.D. officers under a Divisional Detective Inspector. He has detective inspectors to assist him who are invariably in charge of more than one police station, the personnel at which includes detective sergeants and constables. The work of divisional officers is to investigate the crime committed within their area. The total present strength of our complete Criminal Investigation Department is 11 superintendents, 14 chief inspectors, 188 inspectors, 575 sergeants and 587 constables. At the moment we are much below normal strength because all forms of recruiting were suspended during the war.

The methods of crime detection are very varied. Of 128,954 indictable crimes committed in the Metropolitan Police District during 1945 only 71,664 were regarded as "detectable offences".

Many of these cases were not in fact detectable by the police, the crime popularly called shop-lifting being an example.

Can there be doubt that successful detection depends on the speedy receipt and handling of information? It is vital, and to this end the public has been induced to use the familiar "999" system of summoning police assistance and of passing on immediately any suspicions they may have.

Figures given for 1945 may give some idea of the public

participation in this scheme and the results of immediate action on receipt of information or complaints.

In 1945 the Information Room at New Scotland Yard dealt with 410,694 messages of which about 13% were via the emergency system and officers receiving the information disseminated, usually by wireless, from this source, effected 4462 arrests. This side of detection is linked inseparably with prevention.

The modern investigator is trained in the knowledge of how best to invoke the aid of those able to assist in a special sphere. He is cognisant of the way in which his medical, scientific or forensic counterpart is likely to further or strengthen his chain of evidence, he has a knowledge of the scope of the laboratory and can therefore decide what matters and articles are best left to the expert and in what condition and quantity the expert wishes to receive them.

The old detective viewed scientific aid to detection with considerable scepticism, but with the modern detective this prejudice does not exist. As the science of criminal investigation proceeds, oral testimony may fall behind. The importance of realistic proof cannot be over-estimated because "circumstances cannot lie"—witnesses can and do. These advances in criminal investigation have greatly increased the standard of detection.

These remarks are only general and I now wish to present a picture of common methods of detection adopted in the investigation of crimes which occur daily and which demand intelligent enquiry by the local detective officer. For this purpose an actual case has been selected and we will follow the officer in his enquiry.

Answering a summons for immediate assistance the detective arrived in the early afternoon at a private house in a semi-suburban district of London. The lady of the house had returned home from shopping and on entering she saw that the ground floor rooms were in disorder. She heard a scuffle in a room upstairs and telephoned the police.

The detective made a speedy search of the upper part of the house and found that the intruder had escaped by jumping through a bedroom window on to the lawn below leaving behind a jacket and a cap. From a cursory inspection of the garden it was clear that the thief had made good his escape by

climbing over a wall into adjacent premises. It was found on enquiry at these premises, a small foundry, that a tall man, middle-aged, without a jacket had just climbed over the wall and had run through their premises into the street.

Here was the necessary information whereby the first method of detection can be brought into play. The officer telephoned to the Information Room at New Scotland Yard a description of the man who had been seen escaping. This information, immediately disseminated to men patrolling in cars equipped with wireless, warned them to be on the lookout for the wanted man. In this particular case the efforts of the officers in the cars were unavailing.

The officer returned to the house and number of interesting things were discovered. Entrance had been effected by forcing open a casement window at the rear of the house. Some instrument, like a jemmy, had been used and careful measurements were taken first of the size of the chisel end of the instrument, impressions of which were clear in the woodwork of the window frame, and second of the paint work which had also been damaged by the insertion of the tool.

The rooms on the ground floor were thoroughly ransacked but no further clues were discovered. The finger-print expert who examined the rooms, found numerous impressions capable of classification but, on comparison, they were all found to have been made by persons having legitimate access to the house. Hopes of establishing the identity of the wanted man by this means were not realised. In the bedroom upstairs it was seen that an attempt had been made to remove the metal back from a small safe. The interior fireproof packing of the safe was lying about the floor and on a rug on which the thief had apparently been kneeling when attacking it. The officer took control samples of this packing and also the rug. The jacket left behind by the thief was examined and, apart from a cleaner's mark in the form of a tape affixed to the collar, it bore nothing to establish the identity of its owner. A cap, not owned by any occupant of the house, was found on the bed and the only peculiarity attaching to it was that it possessed a strong scent of a certain hair perfume.

The window from which the thief had jumped was badly

scratched and samples of the damaged paint were taken. Paraffin wax and resin casts were obtained of the foot-prints found on the lawn and made by the wanted man when he escaped from the window. Before leaving the house, the officer was supplied with a complete and detailed description of a gold watch and diamond ring which had been stolen.

Staff employed in the small foundry were again interviewed and it was found that none could identify the suspect. It will thus be appreciated that no use could be made of the photographic albums of known thieves in Criminal Record Office. It was seen, however, that the thief ran across a floor covered with metal filings and a sample of these sweepings was obtained.

Many were the routine matters enquired into but to refer to all would be a digression from my object of illustrating the more important methods of detection pursued. The officer visited Criminal Record Office and had detailed descriptions of the stolen articles inserted in the printed Pawn Lists supplied to jewellers and pawnbrokers. He then related and discussed the full circumstances of the crime to a colleague in the Method Index Section.

It has been said that "catching thieves on paper" is extremely interesting work and this case proved no exception. Cards relating to quite a number of house-breakers who operate in the daytime were selected. The approximate age of our suspect allowed of some slight elimination and the number was further reduced by reference to the section of the index dealing with afternoon house-breakers known to pick casement windows at the rear of houses by means of a jemmy. The description supplied of the house-breaker, i.e. that he was tall and middle-aged, enabled the search to be even further narrowed down. The peculiarity section yielded reward in that one of the remaining subjects of the selected card records was shown to relate to a man who habitually used a strong smelling hair perfume. The investigating officer left the Criminal Record Office confident that he had discovered the identity of the person responsible for the crime but it will be readily appreciated that, although he had gone a long way in his method of detection, he did not possess any evidence against the suspect.

Particulars were inserted in Police Informations calling attention to the suspect and asking for

(*a*) special enquiries at jewellers and such places to trace the stolen articles described in the Pawn Lists and

(*b*) to obtain information about the cleaner's tab on the jacket.

The latter request produced fruit and the jacket was identified as having been stolen from a dwelling house some miles outside London which had been forcibly entered during the afternoon of a day a month earlier. In the provincial crime a jemmy of identical size had been used.

It will be obvious from this that we can often trace a criminal's movements through the country. However, in the case we are considering the circulation resulted in the man being caught within a week. An officer acting on the instructions in the Informations, detained the individual and found in his possession a pawn ticket relating to a watch and a ring. The man said he had found the ticket in the street. Needless to say the property to which the ticket referred was found to be identical with the articles stolen from the house. Now came the task of breaking down his story of innocence and proving beyond doubt that he was the person responsible for the house-breaking.

The officer in the case visited the suspect's lodgings and concealed beneath the mattress of his bed found a small folding type jemmy on the end of which were several paint marks. In addition he took possession of articles of clothing and a bottle of hair oil and later took from the suspect the trousers and shoes he was wearing. These articles, together with samples of paint taken from the scene of the crime, the specimen of safe packing and the foundry sweepings were submitted to the Police Laboratory for examination. Spectroscopic examination and comparison of the paint on the jemmy with the sample from the scene of the crime, produced conclusive similarity in paint composition. On the knees of the trousers taken from the prisoner were found fibres identical with those of the bedroom rug and dust in the trouser turn-ups was found to agree in all characteristics with the fire-proof packing from the safe. Concerning the shoes, on the arch of one was found paint similar in composition to that

found on the window frame at the scene of the crime and adhering to the soles of both were copper and brass fragments found to be identical with the control sample of sweepings from the factory floor, later the shoes were compared with the impressions left by the criminal in the lawn when he jumped from the bedroom window and they were found to agree.

Confronted with the facts as detailed the thief admitted his offences and pleaded guilty at his trial.

The case affords a good illustration of (*a*) the need for detectives to be thoroughly trained, not only in a knowledge of law, but in its practical application, and (*b*) a thorough knowledge of what to do and look for at the scene of a crime, and (*c*) the tremendously important part played by science in modern criminal investigation.

Every type of crime, by its own peculiarity, requires different methods of detection. One which causes trouble is that of the anonymous letter writer who, it frequently transpires, has never appeared in any criminal record and is indeed a highly respected individual. These cases usually entail long periods of observation (*a*) to establish the suspect and (*b*) to establish that the suspect is the individual responsible. In the past we have met with success in various ways, as, for instance, by arranging with the Post Office Authorities, to sell the suspect specially marked postage stamps and also to have a letter box immediately cleared when the suspect has posted something. Not infrequently in such cases as this the aid of an expert in handwriting is necessary to close a link in the chain of evidence. Blotting paper found in the suspect's home has often supplied useful data.

Rules and methods cannot be rigid and much depends on the resourcefulness, intelligence and education of the individual investigating officer. He has to be in many ways a practical psychologist because an ability to size up individuals, and situations and to act with discretion according to circumstances is extremely important. He must have a thorough knowledge of his own particular district and the people resident therein. He must know his subordinates and auxiliaries and be on terms with the experts on whose especial skill he must call when action demands.

There is nothing more interesting or more varied than criminal investigation and in conclusion I will just quote an old French friend who was once the head of the Sûreté in France. I have made a literal translation as I think the latter part reads better that way: "The art of the detective is of all professions that which exacts the greatest intellectual and physical activity and I feel sure that if I had to start life again recalling what I know today, I should choose the same profession as that I now pursue. And yet I have now 42 years of service and 64 years of age."

THE TREATMENT OF POLITICAL DELINQUENTS IN SOME EUROPEAN COUNTRIES[1]

By DR J. M. VAN BEMMELEN

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HAS there ever been a period in the history of Europe when as many people were in prisons as there are to-day? In a small country such as Holland, about 100,000 people had been put in prisons and prison camps after the liberation. A year and a half later—in October 1946—their number was still 50,000; in January 1947 it was 33,000. Denmark had in April 1946 10,871 political prisoners, apart from 216,000 German refugees who are not treated as prisoners but are nevertheless living in camps which they are not free to leave. In France in January 1946 there were about 38,000 political prisoners in addition to 24,430 prisoners for common crimes. In Belgium 44,000 people had been deprived of their freedom after the liberation. In May 1945 their number had gone down to 39,640. But after the repatriation of many Belgians from German camps a new wave of indignation against all those suspected of collaboration with the enemy swept the country and a further 20,000 were put in prisons for *incivisme*, as Belgians very aptly call the unpatriotic behaviour. In Norway 25,000 out of 60,000 members of the Quisling-Movement (*Nasjional Samlung*) had been arrested; in January 1946, 16,000 were still interned. If account is also taken of political prisoners in Poland, Austria, Czechoslovakia, Germany, Italy, Spain, Greece and other countries, it becomes evident that more than a million people are now in prisons and prison camps for political offences.

The bearing of this fact on the rebuilding of Europe is

[1] We are glad of the opportunity to publish this acute study of a difficult and controversial question which is of great topical importance. Obviously widely differing views can be held on this matter, and the Editors must not be taken necessarily to agree with all that Professor van Bemmelen has to say [Eds.].

obvious. Thousands of people are employed merely to guard these prisoners. Everywhere the governments are most anxious to reduce the number of political prisoners; on the other hand, they are afraid to set them free again, for there being little hope of their political opinions having changed, they still constitute a potential danger to democracy. None the less the democratic governments will have to show that they can overcome this difficulty in other ways and by other methods than those of the Nazi and Fascist governments. Very soon the enormous number of political prisoners will have to be very considerably reduced, for the impoverished Europe cannot afford to keep so many men in camps where they produce little or nothing and which become nucleus of discontent and resistance.

Moreover, the various countries concerned have to grapple not only with the problem of detaining all these people but also with that of their trial. Here again some figures may well be quoted as an illustration. In Norway the authorities have been confronted with a total of about 63,000 trials. In France 108,483 proceedings had been initiated by November 1945; of these 30,525 were put aside (*classées*) and a further 72,157 were concluded. 27,448 cases are still pending. In Belgium, out of the 338,750 cases that had been brought before military courts, 209,000 had not been tried by June 1945. By August 1, 1946, 67,969 persons received judgment before a military court and a further 389,258 cases were concluded with an *ordonnance de non lieu* or *décision de sans suite*.[1]

This wave of political delinquency was caused by German occupation which disturbed the minds of many people. It should be remembered that already before the war, countries such as Holland, Belgium and France had suffered from unemployment more widespread than had ever been known. The crisis of 1929 had left in its wake much economic uneasiness. The prices of many products had fallen, and when during the occupation Germans began to buy everything at higher prices, many peasants and industrialists were misled into thinking that a dictatorship was not so bad after all. In the first months of the occupation, the Nazis did not show the wolf

[1] For these dates see a *discours* by Mr. Ganshof van der Meersch, *auditeur général*, entitled: *Réflexions sur la répression des crimes contre la sûreté extérieure de l'Etat belge.*

hidden under the sheepskins;[1] moreover, apart from incentives to commit treason, many people were given a unique opportunity of enriching themselves by profiteering and of attaining positions they would never have attained in normal times.

The legislative systems of many countries were not well equipped for the battle against treason and profiteering. The countries that had known war in 1914-1918, had adapted their penal codes to the needs of war and occupation better than neutral ones. Thus Belgium and France were in a better position than Norway, Denmark and Holland.[2]

Belgium has an *arrêté-loi* of October 12, 1918 which enables the Minister of Justice to intern—in time of war—not only all foreigners, but also every Belgian who has no domicile in Belgium or is suspected of unlawful contacts with the enemy. After the liberation of Belgium most political delinquents were put in prison camps under this decree. Moreover an *arrêté-loi* of October 11, 1916 introduced into the Belgian penal code an article concerning collaboration with the enemy under which every Belgian could be punished with death for taking up arms against his country. This article (No. 115) runs as follows:

[1] See "The Netherlands during German occupation", edited by Prof. Dr. N. W. Posthumus; *The Annals of the American Academy of Political and Social Science* (May 1946).

[2] Literature:

Belgium: Joseph Dautricourt, *La trahison par collaboration avec l'ennemi* (Bruxelles, éd. Larcier 1945); *Idem, L'article 115 du code pénal et la répression de la collaboration économique* (éd. Larcier 1945); Jacques E. Duval, *Des notions de contrainte morale et d'état de nécessité, appliquées aux crimes et délits contre la sûreté de l'état* (Bruxelles, éd. Bruylant 1945); R. Billiard, *La collaboration industrielle et ouvrière avec l'occupant* (Bruxelles, éd. Bruyant 1945).

France: P. H. Doublet, *La collaboration* (Paris, éd. Librairie Générale de droit et de jurisprudence 1945); Pierre Huguéney, *IIième Supplément du Traité théorique et pratique de Droit pénal et de procédure pénale militaires* (Paris, éd. Sirey 1945).

Norway: Professor Dr. Johs. Andenaes, "Rettsoppgjøret med landssvikere og krigsforbrytere i Norge"; *Nordisk Tidsskrift for Strafferet* (1945).

Denmark: *Betaenkning afgivet af det af justitsministeriet nedsatte udvalg til overvejelse af spørgsmaalet om aendring af lovene af 1. Juni 1945 om tillaeg til borgerlig straffelov og til log om rettenspleje angaaende forraederi og anden landsskadelig virksomhed* (ed. Schultz, København 1946), especially the article of Professor Dr. Stephan Hurwitz: "Om Strafforfølgning i Danmark efter Okkupationen."

Holland: Dr D. van Eck, *Het misdrijf van hulp aan den vijand*, ed. Dekker & van de Vegt (Utrecht-Nijmegen 1945); Professor J. M. van Bemmelen, "Het buitengewone straf en tuchtrecht", *Tijdschrift voor Strafrecht* (1946), *Idem*, "De Byzondere Rechtspleging", *Nederlandsch Juristenblad* (1947), No. 2.

"Will be punished with death:

any person who shall facilitate the entry of the enemies of the State into the territory of the Kingdom;

any person who shall surrender to them towns, forts, posts, ports, stores, arsenals, vessels or buildings belonging to Belgium;

any person who shall give them assistance in the form of soldiers, men, money, food, arms or ammunition;

any person who shall help the progress of their arms on the soil of the Kingdom, or against Belgian forces on land or sea, by undermining the loyalty to the King and the State, of officers, soldiers, sailors or other citizens.

In all above-mentioned cases, an attempt to commit any such offence shall be punished in the same manner as the offence itself."

The difficulty with this article was that it had too wide a scope. It was feared that too many people might fall under its wording. Therefore, by *arrêté-loi* of May 25, 1945 the following paragraphs were added:

"The fourth alinea of the first paragraph shall not apply to any person who shall stay in the occupied territory, unless:

1. He shall directly, or by employing another, or by allowing himself to be employed as an intermediary, give assistance to the enemies of the State in the form of soldiers, men, money, provisions destined for feeding the enemy, war materials for their attack or defence, war ammunition in the strict sense of the word, parts needed for manufacturing these materials and ammunition, pieces of clothing and equipment, knowing that the same shall be used for military purposes, or if he shall organise or cause to be organised the work of building or camouflaging fortifications, aerodromes or any other construction or installation for military purposes;

2. He shall directly, or by employing another, or by allowing himself to be employed as an intermediary, furnish them with raw materials, materials or products, knowing the same to be needed for the manufacture of this material, ammunition or parts, or for the execution of these works, *except if before undertaking these deliveries he shall use all means at his disposal to resist the execution of the orders of the enemy*;

3. He shall directly or by employing another or by allowing himself to be employed as an intermediary, furnish them raw

materials, manufactured products, commodities or cattle, provided that he shall seek contract for any such delivery either by application or otherwise himself or through other people, or if any such delivery shall create, transform or enlarge his contract of work or modify its nature or its method of working, or if the production shall be kept on or brought up to an abnormal level to satisfy their demands, or if the contractor shall have recourse to their help to settle social conflicts or if he shall organise counter-sabotage;

4. He shall put himself at their service with a view to collecting for them raw materials or manufactured goods, products, commodities or cattle above-mentioned under 1, 2 and 3."

I have quoted *verbatim* text of these rather cumbrous and complicated Belgian articles in order to show how difficult it is to arrive at a fair and comprehensive definition of economic collaboration. This new law has been received with but a moderate enthusiasm by the Belgian jurists.[1] Like in other countries the question has arisen whether it is in accordance with the rule *Nulla poena sine praevia lege poenali*—a rule recognised by Common Law[2] in England, and by penal codes of nearly all European countries. However, the new text has been accepted because it limits and mitigates the old text of 1916, especially owing to exemptions laid down in the second paragraph (*in italics*).

In Holland, Denmark and Norway and Legislature did not hesitate directly to infringe upon the above mentioned rule *Nulla poena sine praevia lege poenali*, and to give retroactive effect to new provisions of criminal law. Prof. Stephan Hurwitz of Copenhagen thus writes about this discarding of an universally recognised principle: "One must bear in mind that during the occupation the Danish legislator did not have it in his power so to change penal code of 1930 as to allow it to deal with, or sufficiently to hinder, the commission of treasonable acts and of other crimes that the occupation brings with it. General sense

[1] The Belgian *Journal des Tribunaux* (June 10, 1945), No. 3644, states: "Le texte nouveau sans être fort bon, n'en est pas moins défendable."

[2] W. T. S. Stallybras, "A Comparison of the general principles of Criminal Law in England with the 'Progretto definitivo di un nuovo Codice Penale' of Alfredo Rocco", in *Modern Approach to Criminal Law* (ed. by L. Radzinowicz and J. W. C. Turner, 1945), p. 393.

of justice demands that such universally detested actions be adequately punished, and it does not offend this general sense of justice to give retroactive effect to the present laws."

In Holland, in deference to the same argument, the *nulla poena* principle—laid down in the first article of Dutch penal code—has been disregarded by the emergency law of December 22, 1943 (*Besluit Buitengewoon Strafrecht*).

This new law increases the severity of punishment for a number of crimes against the security of State and re-introduces the death penalty—abolished since 1870. It further creates two new crimes (articles 26 and 27).

Art. 26 lays it down that any person who during the present war shall expose another person to investigation, persecution, imprisonment or limitation of freedom, or to any other punishment or measure at the hands of the enemy or of its helpers, shall be liable to five years' imprisonment; if his action shall cause the death of the exposed person, he shall be liable to be punished with death. Any person who shall commit any such act with intent to conform to any order issued by the Dutch government, or in the general interest, shall not be liable under this article.

Art. 27 says: "Any person who during the present war shall knowingly use or threaten to use the power, opportunity or means offered to him by the enemy, or by the fact of occupation, illegally to damage, or to benefit by the property of another, shall be punished with not more than fifteen years' imprisonment."

Both in Belgium and in France the availing oneself of the opportunities offered by the occupation for criminal purposes has been made an offence by Art. 121 (bis) and Art. 83 of their respective penal codes.

In France there was no need to abandon the principle of *nulla poena*, because as early as 1939 the articles 75, 76, and 77 of penal code had been changed[1] in such a way as to render punishable principal forms of collaboration. The only exception is provided by an ordinance of December 26, 1944 which created the crime of national indignity, consisting of (1) having been a member of one of the governments or pseudo-governments

[1] *Décret-loi*, of September 29, 1939; *Vide* P. H. Doublet, l.c. p. 11.

France had had since June 16, 1940; (2) having been an official in one of these governments or of any of their side-branches; (3) having been a leading official in one of the services dealing with the Jewish question; (4) having been a member of one of the many fascist and nazi groups and corporations; (5) having participated in the organisation of artistic, economic, political or other manifestations in support of the collaboration with the enemy; and (6) having published articles, pamphlets or books, or having held conferences supporting the enemy, collaboration with the enemy, the "racism" or the totalitarian doctrines. These actions had to be committed with the intention of helping Germany or its allies, or of doing damage to the unity of the nation, the liberty of French people or their equal rights.[1]

The penalties for this new crime are the loss of certain rights, the confiscation of property or of a part of it, and the possibility of being forbidden to reside in certain places in France and its overseas territories. In defence of this retrospective ordinance it has been submitted that the above quoted sanctions do not amount to a punishment in the proper sense of the word but are only losses of rights (*déchéances de droits*). This seems to me a mere playing with words; a confiscation of one's entire property, or even a loss of certain rights, is as much a punishment as say a fine or the deprivation of liberty.

The Dutch legislator felt a similar need for making "national indignity" an offence. On September 17, 1944 the Dutch government in London issued the so-called *Tribunaal-besluit* by which many of the actions dealt with by the three articles of French code relating to national indignity were declared offences. But the Dutch decree went even further, for among the sanctions it provides are not only the loss of rights, or confiscation of property, but also an internment for a period of ten years. That these sanctions should be called not penalties but disciplinary measures, has been often condemned as a hypocrisy.[2] But the Dutch legislator went further than his

[1] The French text reads: "Sera coupable d'indignité nationale tout Français qui aura soit sciemment apporté en France ou à l'étranger une aide directe ou indirecte à l'Allemagne ou à ses alliés, soit porté atteinte à l'unité de la Nation ou à la liberté des Français ou à l'égalité entre ces derniers." Doublet in his book says: "que l'élément intentionnel apparaisse nettement."

[2] *Vide* Mr Robert van Oppen, in the *Nederlandsch Juristenblad* (1945), p. 229.

French colleague not only with regard to sanctions, but also with regard to the degree of intention required to make the offence. The French law declares that these acts shall be punishable if committed with intent to help Germany or its allies. The Dutch definition of the intent is much less clear. The *Tribunaalbesluit* states that a Dutch subject shall be liable under this law for having committed one of the acts enumerated in Art. 1, provided that "he must be supposed to have known that by so doing, he has acted against the interests of the Dutch people, or that he has done damage to the resistance against the enemy and his allies". This very complicated definition has been chosen in order to make the conviction of the accused possible without the proof of his intention; the tribunal, consisting of one trained jurist and two laymen, must only be convinced of the knowledge required by the decree.

In Belgium a similar deprivation of rights has been made possible by virtue of a provision incorporated in penal code by an *arrêté-loi* of May 6, 1944. Under Art. 123, those convicted of an offence against the security of the State may also be deprived of the right to vote in, or stand for, Parliamentary elections or elections to other representative bodies; to be an official, lawyer, teacher, clergyman, director, administrator, editor, publisher, or leader of an entertainment, art, charity, sport or commerce institution or organisation. By an *arrêté-loi* of September 19, 1945 this provision has been extended to a large group of collaborators and others found guilty of political offences,[1] when convicted of one of the offences against the security of the State.

However, in view of the very large number of such collaborators and political offenders, it was thought advisable somewhat to simplify the procedure. A decree proclaimed on November 10, 1945 provides that if the accused shall plead guilty, the public prosecutor may refrain from demanding a criminal punishment (*une peine criminelle*), and may propose instead that the accused should submit to one or several of the following sanctions specified in the decree: a police supervision for a period of two to five years; imprisonment, fine, confiscation or renunciation of property named in Art. 123 of penal code

[1] *Vide* "Statut de l'incivique", *Journal des Tribunaux* (1945), Nr. 3663.

(*i.e.* of any gain arising out of the accused's collaboration with the enemy or its allies). If the accused agrees to the proposal of the prosecutor, he is then called before a court martial, which, if satisfied of his guilt, may sentence him to sanctions proposed by the prosecutor. The sentence, which must be pronounced in open court, entails the loss of rights named in Art. 123 of penal code (see above). This simplified procedure is very frequently followed.[1] As Mr. Bekaert puts it: Originally conceived to deal with accused of a military status, the cognizance of these court martials has been extended so as to cover all acts endangering institutions, persons and goods which the army of the State has in its protection.[2]

The same need for simplifying and thus speeding up the proceedings against political offenders was felt in Holland, which could hardly afford to maintain 97,000 prisoners in camps and prisons. Already in September 1945 the Minister of Justice declared that it is essential to set free some 40,000 prisoners. This pronouncement was strongly resented by the Dutch people, a reaction not very difficult to understand in view of the immeasurable suffering that Nazi and their collaborators had brought upon the country. The Dutch Government in London had declared on several occasions during the war that there will be no room in Holland for these people. Yet after the war it has been gradually realised that it will not be possible to get rid of them. The overseas territories could not be expected to agree to take over this burden; it has become evident that the Dutch people will have to make an effort to re-adapt these offenders to social life. In September 1945, on the initiative of a group of people led by Professor Duynstee (Nijmegen) a new organisation was created the purpose of which is to "resocialise" political offenders (*Stichting Toezicht Politieke Delinquenten*). The organisation has been very active; it now has branches and departments in all principal towns of the Netherlands. In the course of one year and a half only, over 50,000 political prisoners have been set free, a great number of whom are under the organisation's supervision. The legal basis

[1] *Vide*, M. Ganshof van den Meersch, *Réflections sur la répression des crimes contre la sûreté extérieure de l'état belge*, p. 66.

[2] *Vide* H. Bekaert, *Le Code du Conseil de Guerre*, Preface, p. vi.

for setting these persons free within so short a period of time has been provided by the Royal Decree of October 26, 1945 (S.F. 244); it enables the prosecutor of special courts before which these political offenders are to appear, to set them free on certain conditions and even to stop conditionally all further proceedings. It seems to me that this Dutch system of probation is proving more effective than the Belgian system.

In the meantime yet another draft law was issued in December 16, 1946 and has now passed the Dutch Parliament. The purpose of this law is still further to simplify the procedure and to ensure an even more speedy decrease in the number of political prisoners. It purports to create the office of a police-magistrate, to be selected from among the members of special courts, who shall be empowered to pronounce sentences up to five years of imprisonment, and who shall also have the power to discharge the accused. If the accused accepts the verdict of this magistrate, the proceedings against him are thus concluded. If, on the other hand, he brakes the conditions under which he has been set free, he can still be brought before the court, but he is under no obligation to accept the punishment proposed to him by the prosecutor. The Dutch Government hopes that this system will make it possible to deal with all political offenders before the end of 1947. The danger inherent in the Belgian system is that in order to avoid imprisonment and other unpleasant consequences of a lawsuit, the accused may accept a punishment even when he is convinced of his innocence. Belgian lawyers have told me that they knew of cases where the accused had accepted a fine, or a short term of imprisonment, to be free again and not to be molested afterwards.

In Norway political offences are judged by ordinary courts: the county-council (*herred*), the town-council (*byrett*) and five courts of appeal (*lagmansrett*). Like in Belgium, public prosecutor may suggest to the accused that he should pay a fine or consent to be imprisoned for not more than one year. If the accused accepts this punishment, the case is thus concluded. Up to January 1, 1946, 1,809 cases were settled in this way as compared with 1,981 that were taken to courts. This number represents nearly half of all settled cases and it is therefore

expected that ultimately 39,133 out of a total of 63,232 cases still pending will be settled in this way.

Notwithstanding differences of procedure—special courts and tribunals in Holland and France, military courts in Belgium, ordinary courts in Denmark and Norway—all these countries have to contend with very similar difficulties. First, there is the question of the death penalty. Secondly, there is the difficulty of drawing the line between a punishable, and a non-punishable collaboration with the enemy. The third problem is the size of the prison population in camps and prisons. And fourthly there is the difficult task of "resocialising" these men and women, once they have been released.

As regards the death penalty, this punishment has always been maintained in France and Belgium. In Norway, Denmark and Holland it has recently been re-introduced: in Norway, by the Norwegian Government in London on October 3, 1941; in Holland by the Dutch Government in London on December 22, 1943; Denmark, on June 1, 1945. There can be no doubt that the death penalty is imposed more often in the countries that have never abrogated it, than in three others, where it was already abolished. Everywhere, however, one may detect a certain reluctance to have a too frequent recourse to it. This is a welcome sign, for the many evil consequences of capital punishment are well known. The State should give an example in recognising absolute inviolability of human life.[1] Naturally, this does not apply to periods of war, when the State has no option but to ask all its subjects willingly to sacrifice their life. But it is most dangerous if—as soon as peace has been restored—the State does not recognise that under all circumstances life is the most sacred of all goods and interests.[2] When, like the author of this article, one has been in the occupied territory during the whole period of German occupation, one can very well understand the craving for revenge, the idea that justice can only be done by retaliation. Nevertheless I am fully convinced that for the "psychic hygiene" of formerly occupied nations it is

[1] *Vide* Hans von Hentig, *Die Strafe* (1932), p. 209.

[2] *Vide* B. A. Wortley, "The English Law of punishment"; in the *Modern Approach to Criminal Law*, p. 64: "Capital punishment should be abolished, at any rate during settled conditions, when long terms of imprisonment can be safely substituted for it."

absolutely necessary to restrict to the utmost the execution of the death penalty. For if we do not resist this hunger for vengeance, there is a great danger of our losing all respect for life, a symptom which in Germany has led to the excesses of Auschwitz.[1] One of the main fallacies of the Nazi mentality certainly was to think that one could educate a people to a certain moral attitude by severe punishments. Fortunately in hardly any country in Europe outside Germany had this system of extended *Schlagkraft* of penal law taken root. Now we must take care clearly to show that we are not infected by Nazi ideas, but have remained true to ourselves. We must return as soon as possible to humane and rational forms of punishment; should we fail to do so, we should have won the war but lost the peace.

An even more thorny problem is that of drawing *a dividing line between a political offence that deserves punishment, and a political attitude that—though blameworthy—does not lie within the scope of criminal law.* As Mannheim has clearly shown in his recent book *Criminal Justice and Social Reconstruction*, it is not always easy to know which form of anti-social behaviour should, and which should not, be called a crime.[2] "Since, in a democracy, the efficient administration of criminal justice has to depend on the widest possible backing of the community at large," he writes, "any (such) divergence of opinion will make the lawgiver reluctant to resort to penal methods. Even where universal agreement does exist as to the antisocial character of certain forms of behaviour, they may be regarded as unsuitable objects of the criminal law, either because penalising them would mean interfering too much with the private lives of individuals, or because it would be technically too difficult."

Nearly all European democracies agree that various forms of collaboration with the enemy ought to be declared punishable offences. But, as we have already shown, it is extremely difficult to say how far the Legislatures should go, for it would be entirely inconsistent with basic principles of democracy to punish political views only because they are anti-democratic.

[1] *Vide* my article (written in Dutch) "Auschwitz en de Doodstraf" ("Auschwitz and capital punishment") in the *Nederlandsch Juristenblad* (1946), Nr. 11.

[2] H. Mannheim, l.c., p. 5.

Thus everywhere one has kept to the *adagium: nuda cogitatio crimen non est, nec quisquam poenam eius patitur.*[1] Yet this rule has almost been abandoned by the Dutch *Tribunaalbesluit*, which makes it a punishable offence: "having been a member of National Socialist Movement, or having supported this movement by word or deed, or in general having shown a national socialist or fascist state of mind, if one must be supposed to have known that by so doing one acted against the interest of the Dutch people." It is true that the decree still demands the existence of a fact (*e.g.* the membership of the National Socialist Movement), but it is the politically wrong state of mind that is *the principal motive for penalising it.* Kenny's cautious remarks seem to have been forgotten. "Treason", he writes, "is legally the gravest of all crimes, yet often, as Sir Walter Scott says, remembering Flora Macdonald and George Washington, 'it arises from mistaken virtue, and therefore, however highly criminal cannot be considered disgraceful';—a view which has received even legislative approval in the exclusion of treason and other political offences from international arrangements for extradition."

Similarly forgotten seems to be the agreement to exclude these offences from the international arrangements for extradition. Such an attitude may be understandable between allies, but it is a different matter when Belgium asks Spain for the extradition or rather expulsion of Degrelle, to whom Spain has never given permission to stay on her territory. Even the Belgian-Spanish treaty of extradition of June 17, 1870 and the additional declaration of January 28, 1876, do not provide a sure basis for treating Degrelle as a political delinquent. "Can it be admitted" —asks Mr. Rolin[2]—"that the challenge to wholesale murder, the organising of bands of rexist killers which played havoc in the country, especially at the dawn of the liberation, have any real connection with the political crimes the contracting parties of 1870-1876 had in view? Furthermore, a 'political crime' in the meaning of the convention is a crime that affects the constitution or foreign relations of a State and aims at changing

[1] Antonius Mattheus, *De criminibus*, Cap. I 5 and l, cogitationis 18 D. de poenis.

[2] "L'affaire Degrelle devant l'ONU (Organisation des Nations Unies)"; *Journal des Tribunaux* (September 29, 1946).

its national institutions or its international status. But in Degrelle's speeches and writings the question is not so much of the fate of Belgium as of her participation in the monstrous plot of the axis powers, aiming at erecting a new Europe on the ruins and blood of the old. The international crime for which the accused at Nuremberg had to answer before an international tribunal is not one of those which Spain is by written undertaking obliged to repress. But the question arises whether the observance of this new law cannot be imposed on Spain in the same way and on the same grounds as it has been on Germany. In my opinion this law is in any case sufficient to prevent a too extensive interpretation of the exception stipulated in the convention of extradition with regard to the extradition of individuals prosecuted for common crimes, connected with political crimes."

I have translated this long quotation from Rolin's article to show the difficulty arising from the creation of a new international jurisdiction to deal with international crimes. In as much as these international crimes—in the first place the preparation for an aggressive war—are always perpetrated by statesmen, they are political crimes. As Mr. Justice Jackson said in his opening speech at the Nuremberg trial: "The Charter recognises that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of State."[1] I quite agree, but we must realise that this compels us to revise our conception of a political crime. My friend, Dr. J. C. Baak, whose premature death from exhaustion occurred just after the war when he was about to become the professor of public international law at the University of Amsterdam, had written in 1932 a very interesting article on political crimes,[2] in which he states: "Since 1894 (the year of the French law of July 28, directed against the anarchists and anarchistic acts), the world has witnessed an important evolution. The exceptional favourable position assigned to political crimes has become a problem and one may well ask whether it should not

[1] The trial of German major war criminals, Part 1, Opening Speeches, p. 42 (English edition).

[2] *Dutch Journal of Penal Law* (*Tijdschrift voor Strafrecht*) part XLII (Ed. by Brill, Leiden 1932).

be reversed." The reason for this is—according to Baak—"that modern democracy makes it possible for everyone to promote his principles and ideas without having recourse to unlawful actions. Consequently, a political crime should no longer be regarded as a necessary evil; it is more and more approaching the level of common crimes. . . . The moral foundation of political crimes has also changed. According to the doctrine of the sovereignty of the people, a political crime may be considered a lawful weapon against oppressors, worthy of praise rather than of blame;[1] consequently various states have accorded to it the above mentioned favourably exceptional position. . . . However, more and more often political criminals use methods which are at variance with the principles they proclaim. This has made it necessary to differentiate between political and common crimes and mixed crimes (connex and complex political crimes)." Baak concludes that it is necessary to withdraw exceptional privileges granted to political offenders, especially when the means used are out of all proportion to their avowed political aims, and even to make it possible for such offenders to be exiled or relegated for long periods of time.

I fully agree with Baak that democracy provides every opportunity for any person to pursue his aims by lawful means, and I will go even further than Bekaert, who makes a difference between a political crime, and a crime against the security of the State. He says: "In wartime, in a country occupied by the enemy, there is no room for political crimes."[2] I will go a step further: when at any time a citizen of a really democratic country like for instance Belgium, Holland, or Denmark, has recourse to methods which are wholly undemocratic (terrorising, murder, oppression, aggressive war), these acts should not be accorded the privileged position due to political crimes, but should be treated as the most heinous common crimes. On the other hand, it is necessary to bear in mind that all acts against oppressors and undemocratic governments—even in democratic countries governments may from time to time use

[1] Dr. Baak notes the work of Marciana, *De rege et regis institutione* (1598), and of Junius Brutus, *Vindiciae contra tyrannos* (1574).

[2] Hermann Bekaert, *Le code du conseil de guerre*, avant-propos, p. VIII. The same question is discussed by Ganshof van der Meersch in *Réflexions sur la répression des des crimes contre la sûreté extérieure de l'état belge* (1946), p. 14, 3.

undemocratic methods—should be considered political crimes and should be excluded from the arrangements for extradition, as it has been the custom to do in the past.

The problem of deciding where to draw a dividing line between a punishable and a non-punishable act is particularly acute in cases of collaboration with the enemy. I have mentioned already that to solve this difficulty Article 115 c.p. of the Belgian code relieves from legal responsibility persons who used all means that had been at their disposal to resist the execution of enemy orders. None the less, Belgian critics of this law advance that it would have been better to state that any person who acted strictly within the limits necessary for the maintainance of the industry in question, shall not be liable to any punishment. The emphasis would thus have been laid not on the resistance—always subject to differences of opinion—but on arguments which *bona fide* collaborators invariably offer, *e.g.* the interest of national economy, the possibility of retaining industrial machinery of the occupied country instead of having to hand it over to the enemy and the opportunity or preventing the deportation to Germany of workers and other employees.

In point of fact, these three arguments are invariably adduced by all collaborators in all countries. In Holland the Legislature issued a Royal Decree (*Koninklijk Besluit*) F. 160, dated September 3, 1945 on the *epuration*[1] of industrial life. This decree enables us to relieve leaders of industry from their posts for a period of 10 years, unless they can show that they acted under pressure and with the purpose and under a reasonable delusion that their acts would ultimately promote national interest. These offences might be compared with the "white collar" crimes.[2] In many cases leaders of industry acted more in their own interest and in that of their corporation, than in the real interests of their country. On many points however, these two groups of interests coincide. It is therefore extremely difficult to give a just verdict on how far these collaborators were

[1] The word "epuration", used in French and in Dutch (zuivering) means that measures or punishments are possible against individuals who were not pure (zuiver) in their behaviour from a national point of view.

[2] Like taxation frauds and profiteering they are "for all practical purposes among the most important white-collar crimes" (H. Mannheim, *Criminal Justice and Social Reconstruction*, p. 136 and 145).

justified to go. Nearly all docks and factories producing machinery, electric equipment, etc., worked in one way or another for the occupying authorities. They manufactured ships—even battleships—parts of machinery, planes, engines, motor-cars, floodlights, ammunition, etc. On the other hand it is certain that had the industrialists refused to produce the required goods, these factories and establishments would have been taken over or occupied by the enemy; also, in many cases a collaboration offered unique opportunities for sabotage. It is thus practically impossible to prove that the ultimate aim of collaborators had not been to further national and allied interests. Often even industries which enormously enriched themselves by working directly or indirectly for the enemy can prove that they had made efforts at sabotage, at delaying enemy orders and at slowing down production.

Finally there is the baffling problem of the overcrowded prisons and camps throughout Europe, and the question of the best method to be adopted in order to "resocialise" all those who during or before the war came under the Nazi or Fascist influence. This difficulty can only be solved by punishing those found guilty of really serious war crimes and crimes against humanity, and by setting free all those who collaborated in minor ways only. Europe must be rebuilt and no person capable of doing some work should be kept idle. We certainly must not be afraid of setting free all those who—though tainted with fascist ideology—did not themselves commit criminal acts. At a certain point we shall have to break the vicious circle, shall have to prove that democracy can give freedom of thought, religion and trade, as well as peace and social security, without having recourse to methods of political coercion used by dictatorial states. If we choose freedom, we must make it absolutely clear that though freedom must be supported by force, that force need not be brutal and must not cause injustice. Resocialisation means in the first place rebuilding of industry and social welfare. Not punishments but serious planning and great sacrifices on the part of the victorious States will bring about the revival of European culture and civilisation.

THE PROTECTION OF THE ACCUSED

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FOREWORD

As I am neither a scholar nor a member of the legal profession, it is obvious that I could not claim to write with any authority. However, with the permission of the Chief Magistrate, I essayed the task of suggesting certain ways in which the rules of evidence and procedure may possibly be too favourable to the accused, and stand in the way of the conviction of the guilty.

No one who has spent long years in the criminal courts in this country could fail to admire the spirit in which English law is administered and the preoccupation of the courts to guard against the conviction of the innocent. That this attitude results in the escape of some who are guilty is almost inevitable, but the question is whether that number is greater than it need be.

In reviewing a book on, *The Modern Approach to Criminal Science*, produced by the Cambridge Department of Criminal Science, Professor C. K. Allen wrote in the *Oxford Magazine* (Nov., 1945):

> "We shall hope, too, that some day this pioneer English School of Criminal Science will address its attention to what threatens to become a serious embarrassment to justice—namely, the constant complication of technicalities which make it difficult to obtain convictions even in the clearest cases. There are some common crimes, such as receiving, false pretences, and certain offences against the person, in which the safeguards for the accused have become so elaborate that juries, bewildered at the directions given to them, feel compelled to 'play safe' by acquitting even when they have no real doubt of guilt. The situation is not relieved by some of the very technical interpretations of the Court of Criminal Appeal. There is little danger nowadays of conviction of the innocent, but there is no small danger of the artificial innocence of the guilty."

Experience in the courts with its opportunities of hearing the

views of magistrates upon cases where they have felt themselves bound to acquit the accused, of hearing from advocates and police officers some of the facts which by reason of the strict rules of evidence could not be proved, and of occasional conversations with distinguished lawyers, and, of course, many laymen having business in the courts, strengthens the conviction that many of those who are acquitted are very fortunate.

The question is whether under present conditions it is necessary for the rules to be observed with the same rigidity as in former days, when undoubtedly they served the cause of justice and humanity. If these notes, inadequate as they are, should induce others, more competent to pronounce upon them, to discuss these matters, they will have achieved their object.

Introductory

Englishmen are justly proud of their system of criminal law and administration. They believe that, whatever its defects, it makes for a fair trial and humane treatment, and that by reason of the independence of the jury, and of the high esteem in which the judges are held, public confidence that courts of justice deserve their name is well-founded. Moreover, foreign observers of the English system at work almost invariably commend it. If they add, as sometimes they do, that they like the orderliness of their own Criminal Code, and that they find the English criminal law a rather complicated patchwork which would not suit the lawyer of their own country, they generally admit that it seems to suit the English way of life, and testify whole-heartedly to the fairness with which the English criminal law appears to work. They may criticize the strictness of the rules of evidence, and question whether the prosecution is not hampered and the search for the truth obstructed, yet they are struck by the calm atmosphere of the court, the scrupulous fairness of prosecuting counsel, and the apparent satisfaction of even the convicted that they have had an impartial, careful trial.

There is indeed a concensus of opinion that under English law an accused person can be sure that neither prejudice nor bias will harm him. The court itself will see to that, even if he is

not represented by counsel. In fact, few who are charged with the most serious offences are not so represented today. It was not always thus. Those accused of felony were heavily handicapped. The barbarous *peine forte et dure* was not formally abolished till 1772. Prisoners appeared in court loaded with chains. Of Sir John Holt, who was Lord Chief Justice of the King's Bench from 1689 till 1710, it has been written:

> "To the criminal his influence was a blessing. Though North had shown that he conceived of a prisoner as a fellow creature, it was Holt who set almost the first shining example of impartiality and humanity in criminal trials. In most cases at that date the prosecution was conducted by counsel, and the judge had been apt to 'lead' for the prosecution, while the wretched prisoner was denied assistance. Holt realised that the judge should hold the scales of justice even. Where a prisoner set up a defence, he saw to it that it was properly developed. He discontinued the practice of bringing prisoners into Court in irons, disallowed evidence of previous convictions, and allowed prisoners to interrupt him if they sought to correct him in his statement of the evidence. He did, it is true, still continue to question prisoners, but that practice was not, in his hands, to the prejudice of the innocent. His merit was that he tried the issues fairly and impartially, remembering that a prisoner, unless helped, might, through ignorance or fear, fail to make good a defence which ought to be placed before the jury, and seeing that in such cases the prisoner's points were not lost merely because he had no advocate."[1]

But judges were not all as enlightened and humane as Holt, and prisoners were sometimes browbeaten, while juries were punished for what were considered perverse verdicts. If judges were against the accused, English juries might come to his rescue. Thus when James II caused the seven bishops to be committed to the Tower and tried for libel in respect of their moderate and respectful protest against the order to read from the pulpit his second Declaration of Indulgence, and everything was done by the judges to secure a conviction, a verdict of "not guilty" was returned. At the trial of Penn and Meade in 1670, Bushell and his fellow jurymen returned a verdict of "not guilty" in spite of the bias of the Recorder, who fined the jurymen 40 marks, with

[1] *Fourteen English Judges* by the Earl of Birkenhead.

imprisonment until they should pay; but the jurymen were released by the judges upon *habeas corpus*, and never again has there been any attempt to question the absolute right of the jury to find such a verdict as they think right. In that case, the Recorder and the Lord Mayor had shown the greatest possible animosity towards the prisoners, but first the jury, and then the superior judges, saw that justice was done.[1]

Often the position was that judges and sometimes juries, were more humane than the criminal law of their day, and they contrived to save many a man from execution or transportation, the judges by subtle, meticulous technicality, the juries by a bold disregard of facts. The strictness of the judges in the observance of legal rules was the prisoner's shield against injustice, and it became a generally accepted principle that it was better for many guilty to escape conviction than for one innocent man to be condemned.

This was evidently the prevailing view when Archdeacon Paley published his *Principles of Moral and Political Philosophy* in 1785. After complaining, in his chapter on "Crimes and Punishments" of "injudicious acquittals," he refers to two popular maxims as having a good deal to do with them. The first related to circumstantial evidence. After this, Dr. Paley goes on:

> "The other maxim which deserves a similar examination is this: 'That it is better that ten guilty persons escape, than that one innocent man should suffer.' If by saying it is better, be meant that it is more for the public advantage, the proposition, I think, cannot be maintained. The security of civil life, which is essential to the value and the enjoyment of every blessing it contains, and the interruption of which is followed by universal misery and confusion, is protected chiefly by the dread of punishment. The misfortune of an individual (for such may the sufferings, or even the death, of an innocent person be called when they are occasioned by no evil intention), cannot be placed in competition with this object. I do not contend that the life or safety of the meanest subject ought, in any case, to be knowingly sacrificed: no principle of judicature, no end of punishment, can ever require that.
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> "But when certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted, in order to reach

[1] See Stephen's *History of the Criminal Law*, Vol. 1, p. 373 *et seq.*

the crimes with which the public are infested; courts of justice should not be deterred from the application of these rules by every suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by a mistaken sentence, may be considered as falling for his country; whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upholden."

Sexual Offences: Corroboration

To such a philosphy no one would now subscribe, though experience in the criminal courts shows that there is a certain danger of falling unconsciously into a state of mind not far removed from it. When a man is charged with an exceptionally obnoxious crime, such as the defilement of a child, the righteous indignation the crime inspires is apt to focus upon the prisoner, who, still unconvicted and presumed innocent appears abhorrent to those who believe the child's story at once, resent proper cross-examination designed to test it, and gird at the statutory requirement that the evidence of a child of tender years, taken without the sanction of an oath, must be corroborated[1] and equally at the rule of practice that even when such evidence is sworn there must be a warning of the danger of convicting without corroboration.[2] The trained mind is in no danger of falling into this error, but members of a jury, and some lay justices, might be so swayed by emotion as to fail in discharging their duty if they received no guidance and no reminder of the requirements of the law. It is beyond doubt a safe-guard against miscarriages of justice that there should be such rules of evidence.

Even so, it is possible that the law might be modified in such a way that a greater number of men who are guilty of sexual offences against children would be convicted, without risk to the innocent. It has been held that the requirement in section 38 of the Children and Young Persons Act, 1933, that the unsworn evidence of a child must be corroborated by other evidence, is not satisfied by the unsworn evidence of another

[1] Children and Young Persons Act, 1933, sec. 38.
[2] *R.* v. *Freebody* (1934) 25 Cr. App. R. 69.

child[1] That may be a wise provision in the case of two or more children testifying to a single incident. If, however, a number of children who have had no means of concocting a story together, identify the same man as having behaved indecently with them on separate occasions, should not such independent evidence be left to the jury so that they can convict if they are in no doubt? In *R.* v. *Sims*[2], Lord Goddard, C. J., in delivering the judgment of the Court of Criminal Appeal, dealing with charges of indecent behaviour with a number of men said: "The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together." After pointing out that the visits of the men might be for guilty or innocent purpose, and that their evidence all showed them to be the former, the Lord Chief Justice said that the same considerations would apply to a case where a man is charged with a series of indecent offences against children; if they all complained of the same kind of conduct it would show that the man's interest in them was not paternal or friendly, but was for the purpose of satisfying lust.

In the light of these observations, there seems some justification for suggesting that the law should be amended so as to make possible a conviction where there is a strong body of unsworn evidence in this particular type of case, though there should certainly be no possibility of conviction without corroboration. What is corroboration is for the judge to decide.

Acquittal of the Guilty

So satisfied are most people today that innocent people are never convicted in this country (which is probably near the truth), and that it is indeed better that ten guilty men should escape than that one innocent man should suffer (which is, *pace* Archdeacon Paley, a sound principle), that there is almost a general impression that the acquittal of a certain number of the guilty is good in itself, and shows British justice at its best. Sir Chartres Biron in a Foreword, wrote: "A witty attorney-general

[1] *R.* v. *Manser* (1934) 25 Cr. App. R. 18. [2] (1946) 1 All E.R. 697.

once said that every obviously guilty man who was acquitted placed the administration of law on a surer foundation. The paradox after the tiresome way of such efforts, embodies a great truth. The occasional escape of a rogue is a small price to pay for public confidence in the law".[1] It is at least open to question whether every acquittal of a guilty man inspires public confidence. The public, to say nothing of the prosecutor and the police, are sometimes a little shocked when a man who seems to ordinary people obviously guilty, escapes conviction. The acquittal may be correct enough, though there have been a few modern instances in which judges have congratulated the accused on his good fortune with the jury. The important point is that "the occasional escape of a rogue" should be as rare as possible, and should not be a matter for complacency. Whether, indeed, the law today is in some respects too favourable to the accused is a question which may be worth consideration and discussion.

The Judges' Rules

The protection of an accused person begins from the moment of his arrest. There is definite code of rules for the guidance of police officers which is generally observed as closely as if it had the force of law. This code usually known as the Judges' Rules, was drawn up in 1912, and some additions were made to it later. Naturally, the Rules are treated with the greatest respect, and police officers are enjoined to observe them. Evidence obtained by methods which offend in any way against the spirit of these Rules is likely to be the subject of objection at the trial, and may be excluded by the presiding judge. The Rules are, however, of modern origin, and, as Lord Sumner pointed out in *Ibrahim* v. *R.*[2] accompanied the rise of up-to-date police methods.

There are those who are bold enough to criticize some of these Rules, while admitting, as they must, that their whole object is to secure fair treatment for persons in custody and to prevent the exercise of any pressure or other device for the purpose of obtaining admissions of guilt.

Rule 4 begins, "If the prisoner wishes to volunteer any

[1] *Justice and Police in England.* By Albert Lieck.
[2] *Ibrahim* v. *R.* (1914) A.C. 599.

statement the usual caution should be administered." While it is easy to appreciate the necessity for prohibiting the putting of questions to accused persons except after caution (Rule 3), it is, so some people think, quite unnecessary to insist on a caution when the prisoner, without question or invitation from anyone, begins to make a statement. If he is guilty, and is about to say so, why should he be checked? If he is interrupted by a solemn caution that he is under no obligation to say anything, and that anything he says may be used in evidence, he is not unlikely to take this as advice to remain silent, and he may, on second thoughts, decide to plead not guilty, and to concoct a defence, a defence which may or may not succeed. If he had gone on with his statement unchecked, he might have told the whole truth, and perhaps have added information about accomplices which would have proved valuable to the police. If the caution sometimes does, as is suggested, stop the flow of the truth at its source, this cannot be in the interests of justice. If a man is guilty, there is no need to discourage him from saying so. To give him the impression that he may as well try to escape conviction, to encourage him to put the prosecution to the proof when his impulse is to confess his guilt, seems like carrying fair treatment just a little too far. A remark sometimes attributed to Mr. Justice Hawkins is, "A policeman should keep his ears open and his mouth shut", an observation to which many people humbly subscribe and regard as preferable to the Rule.

By contrast, police officers in the City of Bombay are instructed, "No police officer shall prevent by any caution or otherwise any person from making in the course of any investigation any statement which he may be disposed to make of his own free will."[1]

Rule 6 is on somewhat similar lines in requiring that where a prisoner makes a statement before he can be cautioned, he should be cautioned as soon as possible.

Rule 8 is as follows:

> "When two or more persons are charged with the same offence, and statements are taken separately from the persons charged, the police should not read these statements to the other persons

[1] Article on Powers and Duties of the Police (Under the City of Bombay Police Act, 1902), Bombay, *Law Journal*, April, 1946.

charged, but each of such persons should be furnished by the police with a copy of such statements, and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply the usual caution should be administered."

This Rule is also criticised in some quarters as tending to stifle the truth, and confer unnecessary advantage upon guilty persons. If several prisoners are in custody and if each, while separated from the others makes a voluntary statement, it may be found that there are serious inconsistencies between the stories told, or it may be that allegations made by one against another, though not evidence against that other, provide useful material for further police investigation. To furnish each prisoner with a copy of any statement made by another prisoner may forewarn him and enable him to prepare a false defence, or to cover up traces of his crime. There is no general obligation on the prosecution to give notice beforehand of the evidence it is intended to produce before the magistrates, and sometimes the element of surprise is an important part in its presentation. Again, if it be a sound principle to furnish such copies of statements, the question of the wisdom of administering a caution to the prisoner who wishes to make a reply again arises.

Those who venture thus to doubt the wisdom of some of the Judges Rules are far from suggesting that persons in custody should be induced by pressure or trickery of any kind to make confession. Public opinion, let alone the disapproval of judges, would prevent the growth of any such practice.

An interesting contrast in methods is to be found in *Lie Detection and Criminal Investigation*, by an American writer, Mr. Fred E. Inbau.

Technicalities of Procedure

Once before the court, the accused is protected by rules of procedure which, though far less technical than formerly, sometimes have the effect of bringing the case to an end in his favour without regard to the merits. The Indictments Act, 1915, made this much rarer, and today not many trials on indictment end in this unsatisfactory way, for it is unsatisfactory that any criminal prosecution should fail through some fault in proced-

ure, without proper investigation. The prisoner may be well pleased, but the true interests of justice are not served by an abortive investigation ending in acquittal. The object of the trial, it cannot be too often insisted, is to discover the truth, not to score points in a kind of game of technicalities. The interests of the accused are the care of his advisers and of the court, but they are secondary to the supreme object, which is a just verdict. In *R.* v. *Grondkowski and Malinowski*[1], Lord Goddard, C. J., dealing with a question of procedure as to joint or separate trial said:

> "The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners."

Lord Goddard made similar observations in *R.* v. *Sims.*[2]

Summary procedure remains over-complex and more cases fail on some small point of procedure before magistrates than in the higher courts. The Summary Jurisdiction Acts are highly technical, and though defects in form are generally capable of remedy by those skilled in procedure, it is still possible for a case to fail on the sole ground of a formal defect. Thus in *Jones* v. *Sherwood*,[3] an appeal by case stated against a conviction for "assault or battery" succeeded, although Lord Caldecote, C. J. observed that there were no merits in the appeal. So long as an accused person really knows what he has to meet, and is not misled by the words of a summons or other document, the law should be such that no mere mistake in wording could have the effect of non-suiting, so to speak, the prosecutor, who may feel aggrieved at what seems to him the bias of the law in favour of defendants. A still more recent case illustrating the strictness of summary procedure was *Kirkham* v. *Lloyd*,[4] where a conviction was quashed for a purely technical reason.

Such decisions, though recognized by lawyers as inevitable under existing statute law, perplex interested parties and such members of the public as read the reports. They are equally puzzled by such a case as *R.* v. *Turvey*,[5] though that decision followed a line of previous decisions and is easily appreciated

[1] (1946) 1 All E.R. 561. [2] (1946), 1 Cr. App. R. 697. [3] (1941) 106 J.P. 65.
[4] (1946) 201 L.T.N. 276. [5] (1946) 110 J.P.N. 261.

by lawyers. Here, a conviction was quashed by the Court of Criminal Appeal. The appellant, while in charge of a Government Depot was alleged to have tried, in conjunction with another man, to induce a third man to assist in an intended theft from another depot. The third man, who was honest, acted on instructions and handed property to the appellant, the police being on watch. Quarter-sessions convicted the appellant of stealing. On appeal, it was held that had the innocent agent merely allowed the appellant to take the goods, the appellant in taking them would have been guilty of larceny, but as they were handed to the appellant by the will of the owner, there was no asportation by the appellant, and therefore no larceny. Niceties in the law of larceny and of false pretences abound, sometimes to the bewilderment even of lawyers, and often their effect is to make it difficult for the prosecution to succeed, even where the fraudulent intention of the accused is manifest. Particularly in the case of obtaining property by false pretences, it is sometimes difficult to adduce clear evidence of the precise state of the prosecutor's mind, or of what actually induced him to part with his property. His own mind may not be clear, and his answers may be indefinite or equivocal, but counsel for the prosecution must not lead him. Illustrative cases are *R.* v. *Dale*,[1] and *R.* v. *Grail*.[2]

Rules of Evidence

It is, however, in the realm of the rules of evidence that the most striking examples of the way in which the escape of the guilty is made easier are to be found. In general, the English rules of evidence, founded as they are mainly upon the wisdom, learning and experience of generations of judges, command the utmost respect. In *Att. Gen.* v. *Horner* (No. 2)[3] Lord Sumner (then Hamilton, L. J.) said: "I yield to authority on the law of evidence without reluctance, because I am satisfied that in the main English rules of evidence are just, and I am satisfied also that there is no portion of the English law which ought to be more rigidly upheld. My experience is that the public have in the result derived great benefit from their application." The

[1] (1836) 7 C. and P. 352. [2] (1944) 30 Cr. App. R. 81. [3] (1913), 2 Ch. 156.

present tendency seems to be to relax the strictness of the rules in civil cases. This fact is noted by Mr. Lewis Sturge in his preface to the seventh edition of Cockle's, *Cases and Statutes on Evidence*. Dr. Heber Hart in his book, *The Way to Justice* goes so far as to suggest that as the majority of civil cases are now tried without a jury, most of the rules of evidence could be abolished from the procedure in civil courts. He admits the need for prohibiting leading questions and for allowing cross-examination as to credit, but he adds, "It may well be a matter for consideration whether almost all of the remaining rules might not be abrogated without any disadvantage to the course of justice and with considerable benefit in economy of time and practical convenience. Judges can safely be trusted to give no more than their proper weight, if any, to the material placed before them."

No one has suggested a similar relaxation of rules in criminal cases, and the utmost strictness in their observance is still insisted upon. Indeed, the rules are regarded as almost sacred and, in general, they are beyond criticism. In a memorable passage in his *Outlines of Criminal Law* Professor C. S. Kenny wrote:

> "The restrictions imposed by the English rules of evidence are in startling contrast to the laxity of proof allowed in Continental tribunals. But the constitutional value of our stringency is great, for it has done much towards producing that general confidence in our criminal courts which has kept popular feeling in full sympathy with the administration of the criminal law, and has thereby facilitated the task of government to an extent surprising to Continental observers. In the emphatic words of the late Prof. W. L. Birbeck, Q.C., 'the Jury and the law of evidence are Englishmen's two great safeguards against the worst of all oppressions—that oppression which hides itself under the mask of justice.'"

Yet a rule that was once necessary may not be so for ever. Times change, and human relationships alter; the administration of the law becomes more humane. It may be asked whether some of the rules that have been valuable safeguards may not have become unnecessary obstacles in the way of justice.

The Accused as Witness

The position of the prisoner has completely changed. Formerly he was precluded from giving evidence on oath. In fact,

there was a time when the parties to a civil action were incompetent to testify. By degrees the disabilities were removed. The preamble to the Evidence Amendment Act, 1869, recited that "the discovery of truth in courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses".

Until 1898 there were few cases in which the defendant to a criminal charge was allowed to give evidence on oath. The Criminal Evidence Act of that year, which made him competent in all cases, but never compellable, was viewed with some misgivings by many lawyers as being in all probability unfavourable to the prisoner. Counsel, it is said, were able to make much, when addressing a jury, of the fact that the prisoner could not go into the box and tell his story. That, obviously, had little to do with the desirability of getting at the truth, but more to do with the possible advantage of the prisoner. Today, there are few who would contend that the right to give evidence is not of advantage to an innocent defendant, or that a court is not put in a better position to judge when the witnesses have included the prisoner himself. He cannot be forced into the witness box, but the story for the defence is generally incomplete without his evidence. Opinion today would generally agree with that of Professors Maitland and Montague, who in a sketch of English Legal History referred to "The perverse rules which forbade an accused person or the husband or wife of an accused person to give evidence".

It is interesting to note that when the question of allowing prisoners to testify on oath was under discussion there were even hints that they might be made compellable.

Writing in *The Nineteenth Century* in February, 1892, Mr. Frederick Mead, then a Metropolitan magistrate and formerly Treasury counsel, pointed out that there were then certain statutes under which a defendant could be compelled to give evidence, and he went on to deal with the proposal that every defendant should be competent, with special reference to the question of cross-examination.

Mr. Mead wrote:

> "The great stumbling-block is the question of cross-examination as to credit. In the Bill introduced in the House of Commons to

give effect to the Criminal Code of 1883, which had been prepared with great care by a Royal Commission, it was provided that, so far as the cross-examination relates to the credit of the accused, the court may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissable in the case of another witness.

"In 1884 the impracticability of vesting so great discretion in the court was probably recognised, and in the Bill then introduced by the Home Secretary and law officers, but which, like its predecessor of 1883, failed to pass, such provision gave place to the following:

"A person called as a witness shall not be asked, and if asked shall not be required to answer, any questions tending to show that any defendant has committed any offence other than that wherewith he is then charged, or that the defendant is of bad character, unless such defendant has given evidence of good character.

"No such protection, however, was given by the Criminal Law Amendment Act, 1885, the words being: 'every person charged . . . and the husband and wife of the person so charged shall be competent, but not compellable, witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury.'

"The defendant in these cases can therefore be fully examined as to credit in precisely the same way as an ordinary witness.

"In the Lord Chancellor's Bill of last session it was evidently thought that the provision in the Bill of 1884 went too far in favour of the accused, whereas the Act of 1885 did not go far enough, and the following was substituted:

" 'A person charged with an offence and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that such person has committed or been convicted of any offence other than that wherewith he is then charged, unless the proof that such person has committed such other offence is admissible as evidence to show that such person is guilty of the offence wherewith he is then charged, or unless such person has given evidence of good character.'

"The diversity of these provisions doubtless sufficiently proves the fluctuation of opinion upon this point, and the difficulty experienced in properly protecting the accused. There may be added, utterly at variance as it is with the provision last quoted, the opinion of Mr. Justice Hawkins, who recently at Hertford Assizes,

in charging the grand jury, expressed his opinion that 'every prisoner should be able to give evidence in his own behalf, and be able to call his wife also if her evidence would assist his case; but of course they must be subject to cross-examination just the same as any other witness, so that the jury might be able to ascertain from their antecedents whether or not they were worthy of belief upon oath. It was a monstrous thing that a man should stand in the dock and be unable to say a word in his own behalf, when perhaps he and the prosecutor were alone present when the offence was alleged to have been committed.' "

That great authority Lord Bramwell, writing in the same issue of the *Nineteenth Century* said:

"My late friend Sir W. James, Lord Justice, seems to have said that parties when called should not be cross-examined like mere witnesses. He was a most able man and a great lawyer. I respectfully differ. If a man is called as a witness in his own cause, his means of knowing, his intelligence, his honesty are matters to be ascertained as much as in the case of any other witness. . . .

"The opinion of Sir W. James, however, is countenanced by some clauses in the Prisoners' Evidence Bill. Some distinguished lawyers have said his principle should be applied to that Bill. I own I think not. It is said that great injustice would be done, that the prisoner would be convicted not for the offence charged, but because he had committed offences for which he had been tried and punished. Take, it is said, the case of a man charged before county squires with poaching, and a dozen prior convictions owned by him or proved. What chance, it is asked, would he have? The first remark I have to make would be that the tribunal would be pretty well informed without the evidence, and could not but be influenced by their knowledge. But assume the convictions proved, and assume that it induced a probability of the man's guilt in the judges, would it only do so because that was a natural and probable result of the evidence? If so, why should the evidence not be given? I do not believe that the minds of the judges would be diverted from the question they had to try. I believe if the man had a good defence it would prevail. Suppose he proved that he had no gun, no nets, no stones, no bludgeon, no dog. Moreover, as I have said, the grossest injustice is done when a man of undoubted good character is opposed to one of undoubted bad character, and yet they are treated as on an equality. It would be an injustice that would be resented and the law would be evaded.

> The suggestion is that the question as to prior offences should not be asked—not merely that there should be no obligation to answer, but that it should not be asked. And that is necessary, for if it might be asked, and the defendant refused to answer, everybody would feel it was an admission. But if it might not be asked directly, there are plenty of ways in which the effect might be got—'Do you call witnesses to character,' or, 'He has not called witnesses to character,' or, 'Gentlemen, no question has been put to the prosecutor as to his character, you may trust him.' I say it would be unjust to treat alike two men wholly different. Sometimes the law would be evaded."

If Lord Bramwell and Lord Brampton were alive today, would they still be of opinion that the prisoner should be liable to cross-examination as to character, subject always to the discretion of the presiding judge to limit such cross-examination, or would they be of opinion that the stricter rules laid down in the Criminal Evidence Act, 1898, were in the interests of justice? At all events, it can hardly be denied that a considerable number of defendants are acquitted of criminal charges, although the jury or maybe the magistrates believe them to be guilty, but feel themselves bound to give the prisoner the benefit of the very small doubt which the evidence admits.

If they were entitled to know that the prisoner was of such a character that his evidence was open to considerable suspicion, that slight doubt would be completely removed. Would it really be unfair to allow cross-examination to elicit the fact that the prisoner is far less credible as a witness than the witnesses for the prosecution? If he is of good character, he is allowed the benefit of the fact, and if the prosecutor or his witnesses are of bad character, the prisoner may, if he is so advised, discredit them. In general, he is protected from cross-examination as to credit unless he brings it on himself. So far the conflict between the two principles, firstly, that a witness may always be cross-examined as to credit, and secondly, that an accused person must not be prejudiced by any reference to his bad character, has been resolved in favour of the accused, but it might be well to consider the possibility of relaxing the strictness of the rule against such cross-examination in the interests of justice.

Evidence of Similar Acts

It is not generally permissible, in order to prove that the prisoner is guilty of a particular offence, to show that he has been convicted of or has committed offences of a similar nature, though such evidence may be admitted to negative a defence of accident or want of intent, or where it is necessary to prove a system of conduct. It would certainly be unfair to invite a jury to convict on a charge of burglary because the prisoner could be proved to have been a burglar, and the general principle that the prosecution may not call evidence to show that the prisoner is likely to commit a particular kind of offence is necessary as a safeguard against conviction upon insufficient evidence. If, however, there are peculiar features in the manner in which the offence was committed, a sort of individual technique, evidence that the prisoner has committed similar offences in the same way might, it is suggested, properly be admitted, not as showing the prisoner to be a man of bad character, but as identifying him by his handiwork.

The law does not yet go quite so far, but in the recent case of *R.* v. *Sims*, *supra*, an important declaration, showing how the law is developing was made by the Court of Criminal Appeal. There the appellant was accused of a number of unnatural offences and acts of indecency, and the various counts in the indictment were tried together. The convictions were upheld. In the course of the judgment, Lord Goddard, C. J. said: "We start with the general principle that evidence is admissible if it is logically probative, that is, if it is logically relevant to the issue whether the prisoner has committed the act charged." Later, he said: "Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more." He then pointed out that evidence of similar acts between two persons might be admissible to show the nature of those acts, because human nature has a propensity to repetition. Reference was made to *R.* v. *Thompson*,[1] where the House of Lords held evidence admissible which related to the finding of certain articles not connected with the crime itself, but showing a propensity to that type of crime and therefore relevant

[1] (1918), A.C. 221.

as to the identity of the prisoner. In that case, Lord Sumner said that persons given to unnatural crimes were not only taken out of the class of ordinary men gone wrong, but were stamped with the hallmark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity.

R. v. *Sims* also laid it down that evidence which is logically of probative value needs no justification, but is admissible unless expressly excluded; further, that where there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent. The accused should not be able by the nature of his defence to exclude evidence that would be admissible and fatal if he raised other issues.

It thus appears that the grounds upon which evidence of similar acts may be permitted are broader than they had hitherto been thought to be, and that what many people had considered undue protection of the interests of the accused will have to give way to the true interests of justice. How far the principle will be extended to cases which are not of a sexual nature remains to be decided.

Questioning the Accused

The accused is never a compellable witness, and unless he gives evidence, he cannot be subjected by the court or by examining justices to any questioning. Formerly the accused was examined by the justices in the true sense of that word. In his *History of the Criminal Law*,[1] Mr. Justice Stephen wrote (this was in 1882):

> "The statutes of Philip and Mary already referred to, repealed and re-enacted in 1826 by 7 Geo. 4 c. 64, authorized committing magistrates to 'take the examination' of the person suspected. This examination (unless it was taken upon oath, which was regarded as moral compulsion) might be given in evidence against the prisoner.
>
> "This state of the law continued till the year 1848, when by the 11 & 12 Vic. c. 42, the present system was established, under

[1] Vol. I. 440–1.

which the prisoner is asked whether he wishes to say anything, and is warned that if he chooses to do so what he says will be taken down and may be given in evidence on his trial. The result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial, and that, on the other hand, he and his wife are prevented from giving evidence in their own behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial, when it is difficult for any one to test the correctness of what is said.

"This is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that which is common to, I believe, all continental countries. It is, I think, highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice, and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study.

"On the other hand, I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it."

Apparently, Mr. Justice Stephen thought that questioning an accused person could be unobjectionable. Indeed, it is beyond dispute that an innocent but unsophisticated person might be considerably helped in making his unsworn statement if he could be questioned, and it is equally true that a guilty man might be put to confusion by perfectly fair questioning at the hands of the judge or magistrate. It is said of Sir John Holt, as already noted, that in his hands the questioning of the accused was never to the prejudice of the innocent (p. 28 *ante*). Today, the innocent defendant would naturally be put into the witness box by his counsel, while the guilty man may sometimes prefer to make an unsworn statement and thus avoid the perils of cross-examination.

In many courts, it is the practice to inform the accused that while he is free to give sworn evidence or to make an unsworn

statement, at his own choice, the court must point out to him that only if he gives sworn evidence can he be asked questions, and, it is added sometimes, greater weight naturally attaches to the sworn statement which has been tested by cross-examination. Nevertheless, an unsworn statement unchallenged may be convincing, and may have its effect in securing the acquittal of a guilty man who has contrived to arouse some slight doubts in the minds of the jury or the magistrates. Again the law leans towards the accused, and there might be more convictions of guilty men if the court had the right to put questions to a prisoner who made an unsworn statement contradicting the evidence of the prosecution and making assertions which could easily be put to the test by reasonable questioning. However, it is doubtful whether public opinion would at once approve of what might be regarded as a reactionary measure, tending towards the reintroduction of the evils that certainly attended some judicial examinations of earlier days.

The answer may well be that in these days, with impeccable judges, competent magistrates, wide publicity and a prevailing spirit of humanity, there would be no danger of a return to those evils, and that if any kind of impropriety occurred it would quickly be corrected in a higher court.

Possibly, too much attention is being paid to the maxim *Nemo tenatur seipsum accusare.* The maxim undoubtedly served Meade in a spirited duel with the Recorder before whom he was tried. Meade prayed it in aid when questioned, describing it as true English, if not true Latin.[1] It is still a sound maxim, provided its application is kept within bounds. Dr. Heber Hart has a decided opinion on the matter.

> "The gravest of the obstacles to the conviction of the guilty have been raised on the basis of the singular delusion that no one ought to be regarded as under any obligation to incriminate himself.
>
> "The natural method pursued by parents, teachers, and others in responsible positions, in dealing with individuals supposed to be culpable, is the interrogation of the accused. To deny the importance and propriety of such questioning would appear to them to be the very negation of common sense. The idea, indeed, that there is anything morally wrong in inviting an accused person to in-

[1] Stephen's *History of the Criminal Law*, Vol. I., p. 374.

criminate himself can be reasonably entertained only when there is an apprehension that torture, or other improper means, may be used to obtain confessions or elicit admissions, or when the punishments following upon conviction are so cruel that humanity prompts the wish to facilitate the escape of the accused."[1]

Dr. Heber Hart quotes Jeremy Bentham on the rule forbidding judicial interrogation:

"If all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence."[2]

Judicial questioning, if permitted, would be totally different from police interrogation conducted in private, which would still be regarded as generally objectionable and inadmissible in the case of prisoners charged with crime.

Husbands and Wives

Just as it used to be thought that the parties to a suit were too deeply interested to be likely to tell the truth, so it was thought that neither husband nor wife could be expected to give impartial truthful evidence, and until comparatively recent times, they were incompetent witnesses for most purposes.

It is unnecessary here to trace the gradual development of the law, but sufficient to point out that the Criminal Evidence Act, 1898, which made the accused a competent witness for the defence, also provided that the husband or wife of the accused could give evidence for the defence, and further enacted that in certain specified instances husband or wife could give evidence for the prosecution against the other. There have been some additions to the list since 1898, but with one unimportant exception, the husband or wife of the accused when competent under any statute is not a compellable witness for the prosecution.

No doubt it is natural and proper that husband and wife

[1] *The Way to Justice.* By Heber. L. Hart, K.C., LL.D., p. 100.
[2] *Ibid,* p. 103.

should not be compelled to give evidence against each other upon a criminal charge, since the interests of husband and wife are or should be so closely identified as to make it often painful and almost impossible for an unwilling spouse to give in evidence the truth, the whole truth, and nothing but the truth. It may well be that some guilty men and women escape on this account, but probably public opinion would not favour husbands and wives being made compellable in all cases.

What is less easy to understand is why in these modern days husband and wife should not be competent as witnesses for the prosecution, so long as they are willing. Wives are nowadays rarely dominated by their husbands. The presumption as to coercion of wives by husbands to commit crime was abolished in 1925.[1] It is difficult to see why a wife who is willing to give evidence against her husband in the interests of truth and justice should not be allowed to do so whatever the nature of the charge. The present list of offences in which she is allowed to give evidence for the prosecution is not impressive, and there must be many cases in which the evidence of husband or wife against the other would complete the case for the prosecution, which must fail without it.

Whatever change might be made in the law in this matter, there would, without doubt, be a general acceptance of the principle that neither husband nor wife should be compelled to divulge communications passing between them during their marriage, for this, indeed, does go to the root of the right relationships between husband and wife in the privacy of their married life.

Evidence of Accomplices

Warnings to juries by the presiding judge, and warnings which magistrates apply to their own minds in that they have to act in the capacity of both judge and jury, weigh heavily in favour of the accused. Very rarely does a jury convict after being told that it is dangerous to convict on the uncorroborated evidence of an accomplice, and very rarely do magistrates convict where such evidence is uncorroborated. That an accomplice's testimony should be regarded with caution is a sound principle,

[1] Criminal Justice Act, s. 47.

which no one would wish to dispute. But it is sometimes questioned whether the law should not be such that unless the accused denies the charge, and gives or calls evidence in support of his denial, there need be no warning, on the general principle that if a man does not trouble to deny positive evidence given on oath against him that evidence stands, by whomsoever it may have been given. In the ordinary affairs of life, a person's silence under an accusation, in circumstances where it is reasonable to expect an innocent man to make immediate denial, is taken as some evidence, even if not strong evidence, of his guilt, and this principle has been applied in some cases reported in the text books. These, however, refer to statements made not in a court but elsewhere. The suggestion is that the same principle might be applied where the only evidence against the accused is that of a tainted witness. It would, indeed, be dangerous to act upon it if the accused denies the charge on oath, and is unshaken by cross-examination, but if the accused leaves the accomplice's evidence unchallenged, is it necessary to regard conviction as dangerous? The judge would no doubt comment on the prisoner's silence, but the jury might still think they ought to acquit, because of the warning.

Confessions

The law as to the reception of confessions as evidence in criminal cases has also tended to the exclusion of much that has probative value. It is the duty of the prosecution to prove that the confession was voluntary, within the meaning of that word as interpreted by judicial decisions, and there is often considerable argument as to the admissibility of a confession, owing to the circumstances in which it is alleged to have been made. In cases of doubt, it will inevitably be excluded. Here again, modern opinion sometimes questions the present need for the old strictness. No one is tortured today in this country for the purpose of extracting a confession. The police are strictly instructed, the courts sit openly, and there is every opportunity for bringing to the notice of magistrates and judges any allegations of impropriety in the matter of questioning prisoners or applying pressure.

It is arguable that there need be no dispute about the admissibility of a confession, no need to prove affirmatively that it was voluntary, unless either the accused denies that he made any such confession, or he asserts that in any case if he did make confession, it was not true. In other words, if the confession, however obtained, cannot be denied by the accused, it should be given in evidence, and any question of the conduct of the police as to their method of interrogation, or of obtaining a confession, is a separate matter to be dealt with disciplinarily.

Dr. Heber Hart in *The Way to Justice* wrote:[1]

> "We must of course maintain adequate safeguards against erroneous convictions—safeguards which ensure with all reasonable sufficiency that no innocent person shall suffer unjustly. But, subject to the provision and maintenance of these, our system of police and criminal procedure should be reformed with a single eye to the arrest, conviction, and reformatory incarceration, or other appropriate treatment, of those who are guilty of crimes. At present this is very far from being the case. As will appear from the ensuing pages the scales of justice are now heavily weighted in favour of the accused.
>
> "Referring to the rules of evidence observed in criminal courts in this country, Macauley, who was well qualified to form a sound judgment in the matter, wrote in 1841: 'Those rules, it is well known, exclude much information which would be quite sufficient to determine the conduct of any reasonable man, in the most important transactions of private life. These rules, at every assizes, save scores of culprits whom judges, jury and spectators firmly believe to be guilty.' Notwithstanding the changes which have occurred since these words were written, they are substantially applicable to the system which still prevails."

Stephen in his *History of the Criminal Law*, after discussing the development of the rules relating to the reception of confessions as evidence, concludes:

> "The general maxim, that confessions ought to be voluntary, is historically the old rule that torture for the purpose of obtaining a confession is, and long has been illegal in England. In fact it cannot be said that it ever was legal, though it seemed at one time as if it were likely to become legal."[2]

[1] p. 99. [2] Vol. I., p. 447.

In these days, there is no torture, and it is highly improbable that any adult person of ordinary intelligence, charged with a serious crime, will make false confession, and it might be thought reasonable to enquire into the validity of the way in which a confession was obtained only when there is a dispute as to its genuineness. For even if it should prove that the truth was elicited by improper means, that is surely no reason for not listening to it. A trial is not a mere game in which one side or the other scores points, or in which one may be disqualified for a false move. It is an attempt to get at the facts, and the conduct of those who supply the facts, though it may sometimes have to be the subject of criticism, may be quite irrelevant to the enquiry in hand.

Onus of Proof

A leading case which is constantly referred to by the defence, and which dealt with onus of proof, and directions to juries, was *R.* v. *Abramovitch*.[1] It has led to the acquittal of many prisoners. It did not lay down new law; that fact was stated by Lord Reading, C. J. in the Judgment of the Court of Criminal Appeal. It re-stated the law on the question of onus of proof, by pointing out that upon a charge of receiving stolen property, where the prosecution had made out a *prima facie* case, it was not incumbent upon the defendant to prove his innocence beyond all reasonable doubt. The onus was still upon the prosecution to prove its case beyond such doubt, and therefore, if the jury, though not convinced by the defendant's explanation as to his possession of the goods, yet considered that it might reasonably be true, they should acquit. Accordingly, where necessary, the presiding judge should direct the jury upon this question.

What seems to have happened is that juries or magistrates have imagined themselves bound to acquit, because the defendant offered some sort of explanation which was not impossible, but which they disbelieved. In other words, they acted as if they had reasonable doubt when, in fact, they had none, and so many receivers of stolen property have been acquitted when there was evidence upon which they might properly have been convicted. The Lord Chief Justice recently found it necessary to

[1] (1914) 11 Cr. App. R. p. 45.

refer to the case of *Abramovitch* in the hearing of an application in the Court of Criminal Appeal. His observations are thus reported in the *Weekly Notes* for 1st June, 1946: "Lord Goddard said it was contended for the applicant that the Recorder had not given to the jury a direction in accordance with the rule in *Abramovitch's* case. That was a very hard-worked case, and was very often misunderstood. It had laid down no rule of law. All it said was that the onus was always on the prosecution in a criminal case; that in the case of receiving stolen goods the prosecution might discharge the onus by showing that the prisoner was in possession of property recently stolen, and in the absence of any explanation given by the prisoner, the jury were entitled on the evidence of possession alone to convict. If, however, the prisoner gave evidence and told a story which left the jury in doubt as to whether he had received the goods feloniously, then the jury should acquit. The direction which he had often given to a jury with regard to evidence for the defence in a criminal case was that if the prisoner or his witnesses were called for the defence, their evidence might have one of three effects: it might convince the jury that the prisoner was completely innocent; it might cause such doubt in the jury's mind as to the prisoner's guilt or innocence that it was their duty to acquit; or it might strengthen the case for the prosecution. *Abramovitch's* case (*supra*) merely meant that if the story told by the accused person caused doubt in the jury's mind, then they should acquit."

Appeal

Once a defendant has been acquitted, or convicted and sentenced, the prosecutor has (with few exceptions), no right to appeal against the acquittal, and he has no right to appeal against the sentence as being inadequate, though a defendant who appeals may render himself liable to an increase of sentence. It occasionally happens that a prisoner escapes with a punishment so light that not only the prosecutor, but also the general public, is affronted by its inadequacy. However, unless the prisoner is unwise enough to appeal, he runs no risk of any increase of sentence. Without doubt, it is in general desirable that there should be finality in the matter of sentence, and that

there should be no general right of a prosecutor to complain, when the court, in the exercise of the discretion conferred upon it by Act of Parliament, passes a sentence which the prosecutor considers too light. It is open to argument, however, whether it is satisfactory that there should be no possibility of the review of a sentence on the ground of inadequacy. There would have to be safeguards, possibly leave of the court, or the certificate of the Director of Public Prosecutions, so that no prisoner should be vexed by a vindictive or a misguided prosecutor.

In India, the Code of Criminal Procedure contains the following provisions. Section 417 is as follows:

> "The (Provincial Government[1]) may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court."

and Section 439 is as follows:

> "(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by section 1, 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.
>
> "(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.
>
> "(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court the accused has committed than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.
>
> "(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.
>
> "(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

[1] These words were substituted for the words "Local Government" by the Government of India (Adaption of Indian Laws) Order, 1937.

"(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

Inadequate Sentences

An instance of a sentence described by the Lord Chief Justice as clearly inadequate which could not be increased was *R.* v. *Gibbon.*[1] The defendant had appealed against sentence, and the question was whether he had given notice of abandonment of appeal. Holding that it would not be fair to the defendant to treat him as not having abandoned his appeal, the Court of Criminal Appeal found itself unable to proceed with the appeal and increase the sentence, but Lord Goddard observed that but for the abandonment, it was certain that the sentence would have been increased. Such observations prompt the reflection that in such a case there ought to be power in the Court of Criminal Appeal to review a sentence, and where necessary to increase it upon the application of such an authority as the Director of Public Prosecutions, and that the power to increase sentences should not depend upon the attitude of the convicted person. If there were such a power, it is certain that it would be invoked sparingly, and it may be that its effect would be salutary.

New Trial

There is the further point that the Court of Criminal Appeal has no power to order a new trial. Doubtless this question was fully considered before the passing of the Criminal Appeal Act, 1907, and it was thought that the wide powers then conferred on the new court were sufficient to cover all cases. Possibly, however, it may be that in the light of experience there should be power to order a new trial.

There may be cases, even if they are few in number, where the court quashes a conviction on the ground of the improper admission of evidence, or through some other mistake on the part of the court of trial. The prisoner is then free. A layman

[1] (1946) W.N. 98.

might reasonably ask why a man who may be guilty should escape punishment because of some mistake made by, say, a chairman of quarter-sessions as to the relevancy of evidence, and he would probably ask why it should not be possible to try the case again before a different bench and jury.

In Southern Ireland, the Court of Criminal Appeal has power to order a new trial. In the recent case of *The People* v. *Stephen Murphy*,[1] the prisoner had been convicted of murder and appealed, the Irish Court of Criminal Appeal having held that the trial judge had not properly exercised his judicial discretion in determining whether to admit an alleged confession in evidence, and had improperly admitted such evidence, quashed the conviction and sentence and ordered a new trial. At the second trial of the prisoner, the jury returned a verdict of guilty but insane, and the prisoner was ordered to be detained in strict custody until the pleasure of the Government was made known.[2] On the face of it, it certainly appears that this procedure had a more satisfactory result than would have followed the quashing of the conviction and sentence without any order as to a new trial.

Conclusion

If it should seem that the foregoing propositions, tentative as they are, appear reactionary and show a desire to deprive accused persons of protection, the answer here suggested is that times have changed, and the accused is no longer in need of all the safeguards that formerly shielded him from possible injustice, maybe at the hands of the executive, maybe at the hands of the court itself. Today, there is so much publicity and freedom of criticism, that injustice would certainly be brought to light, and there would be immediate protest against anything savouring of oppression. Further, with ample rights of appeal, any defendant who feels himself aggrieved, should be able to have recourse to a higher court. It should no longer be necessary for judges and magistrates to act as counsel for the accused, but only to see that both sides are treated fairly. The Poor Prisoners Defence Act, 1930, rightly used, can supply the needs of those who would otherwise be unrepresented.

[1] (1946) Irish L.T., p. 23. [2] 80 Irish. L.T.N., 124.

It is certainly not suggested that juries or magistrates should take the risk of convicting when they have reasonable doubts, for the conviction of any man without full proof is an injustice that cries aloud for remedy; but a fact that should not be obscured by the passion for protecting the innocent is that it is a miscarriage of justice, though a less grievous one, when a guilty man escapes.

Finally, there is need to keep separate the two problems of the treatment of the accused and the treatment of the convicted. The policy of humane, often lenient treatment of offenders, is quite distinct from the question of investigation and proof and the rules of evidence and procedure. With regard to the latter, what Parke B. said in *R.* v. *Baldry*,[1] as to the law relating to confessions, may be of wider application today. "I think there has been too much tenderness towards prisoners in this matter."

[1] (1852) 2 Den. Cr. C. 430, at p. 445.

A DRAFT CODE OF MINIMUM RULES FOR THE TREATMENT OF PERSONS SUSPECTED OR ACCUSED OF CRIMES

By PROFESSOR S. GLASER, LL.D.

INTRODUCTORY NOTE

By THE EDITORS

At the suggestion of the Department of Criminal Science in the University of Cambridge, this subject was included in the Agenda of Conference held in Cambridge on November 14, 1941, *between the representatives of Allied Governments then resident in England and the Department. Professor Glaser who was asked to present an Address upon it to the Conference stated in the opening paragraph of his Address that this problem, although certainly not a new one but on the contrary discussed many times at international conferences and congresses, and in particular by the Fifth Committee of the Assembly of the League of Nations, by the Howard League for Penal Reform, the International Penal Law Association, the International Penal and Penitentiary Commission, and the International Law Association, was nevertheless of great topical interest at the present time. Professor Glaser ended by proposing the following resolution, which was carried unanimously: "That this Conference hereby establishes a Committee to consider the rights which should be accorded to persons suspected or accused of crimes, and to report thereon to the International Commission for Penal Reconstruction and Development."*[1]

In due course a Committee was appointed under the Chairmanship of Professor Glaser to investigate the subject. It was agreed that the main object of this investigation should be to facilitate the establishment of a code of minimum rules for the treatment of persons suspected or accused of crimes; accordingly Professor Glaser circulated a comprehensive Questionnaire which focused attention on the main aspects of this problem. Those who were invited to provide this information and

[1] See *Penal Reconstruction and Development; Proceedings of the Conference held in Cambridge on November* 14, 1941; edited by L. Radzinowicz and J. W. C. Turner, reprinted from the *Canadian Bar Review* for March, 1942.

who duly accepted were: Mr. Terjè Wold, Monsieur V. Bodson, Dr. J. Stransky, Dr. V. Benes, Professor S. B. Warner, Professor A. J. Harno, Miss Margery Fry, Mr. A. C. L. Morrison, and Mr. C. L. Hodgkinson. Written statements were also sent at a later stage by Professor Hassan Nachat Pasha, then the Egyptian Ambassador in London and General M. de Baer, then President of the Belgian Military Court.

After studying the answers to his Questionnaire, Professor Glaser drafted his Report and his suggestions for a minimum code of rules. A meeting of Professor Glaser's Committee was held on Thursday, June 17, 1943, at the British-Norwegian Institute in London.[1]

The above-mentioned two documents formed the basis of the deliberations. Each Article of the suggested Statement of Principles was discussed in turn and many useful suggestions and amendments were made. It was decided to redraft the statement in the light of the discussion and to add a short Memorandum.

The subject was discussed in great detail at another meeting held in London on Thursday, July 29, 1943, and certain suggestions were made which were to be incorporated in the Draft.

This new Draft was sent out for final consideration to Dr. M. de Baer, Monsieur V. Bodson, Monsieur J. Burnay, Professor A. L. Goodhart, Monsieur R. Golstein, Dr. R. M. Jackson, Dr. J. M. de Moor, Mr. A. C. L. Morrison, Professor Hassan Nachat Pasha, Dr. L. Radzinowicz, Monsieur C. Stavropoulos, Dr. J. Stransky, and Mr. Terjè Wold.

The attached document constitutes the final Report on the subject. Notes appended to the main body of the Report contain explanations relating to certain of the Articles. It will be observed that the Articles apply to the case of adults only.

[1] Those present were: Monsieur van Angeren, then Netherlands Minister of Justice; Mr. Terjè Wold, then Norwegian Minister of Justice; Mr. Peter Stabell, then Secretary to the Norwegian Ministry of Justice; Mr. Andreas Aulie, then of the Norwegian Ministry of Justice; Monsieur Gavrilovich, then Yugoslav Minister of Justice; General M. de Baer, then President of the Military Court of Belgium; Professor Renè Cassin and Dr. J. Burnay of France; Professor Hassan Nachat Pasha, then the Egyptian Ambassador in London; Professor S. Glaser, then Polish Minister to the Government of Belgium; Professor A. L. Goodhart, K.C., LL.D., Oxford; Miss Margery Fry, LL.D., J.P.; Mr. J. C. Maude, K.C., M.P.; and Mr. A. C. L. Morrison, C.B.E., then Chief Clerk, Bow Street Police Court. The Cambridge Department of Criminal Science was represented by Professor P. H. Winfield, K.C., LL.D.: Dr. R. M. Jackson: Dr. L. Radzinowicz and Mr. J. W. C. Turner.

DRAFT CODE

ARTICLE 1

The nature of the charge against the accused person shall be communicated to him immediately upon arrest and he shall be brought before the appropriate magistrate as soon as practicable but in no case later than three days after arrest, exclusive of public holidays and exclusive of time required for the journey from the place of arrest in either case. Immediately upon his arrest the arrested person shall be informed that if he so desires, notice of his arrest and of his place of detention and of any change in his place of detention will without delay be given to such person as he may select, and if he avails himself of this right such notice shall be given. No arrested person may be sent out of the jurisdiction of the courts of justice of the country except as the result of regular extradition proceedings.

ARTICLE 2

Subject to the provisions of Article 1 detention in custody before trial shall be regarded as an exceptional measure which may only be ordered by judicial authority. The period of detention so ordered shall not exceed four weeks, but the authority which ordered the detention may, upon application, renew the order for a further period not exceeding four weeks. Thereafter no further extension may be made except (*a*) by a higher judicial authority and then only for a period not to exceed four months, and after good cause for the same has been proved in public session; or (*b*) where a court of first instance commits an accused person to a higher court for trial the lower court may order that he be detained in custody until the next sitting (being a fixed date) of that higher court if such sitting be within four months of the date of such order.

ARTICLE 3

At any stage of the proceedings the accused person shall be allowed reasonable opportunity for consultation with his legal advisers. Such consultations shall, if the accused person so desires, take place out of hearing of the police or prison officials.

ARTICLE 4

Any poor person charged with an offence for which he may be sentenced to loss of life or to imprisonment for more than a short period, shall on his application at any stage of the proceedings be granted legal advice at the expense of the State.

ARTICLE 5

The accused person and his legal adviser shall be given a reasonable opportunity to inspect and challenge any documents or other evidence which the prosecution bring to the knowledge of the Court in support of their case against the accused. When needed an interpreter shall be provided at each interrogation or examination of the accused or of witnesses.

ARTICLE 6

No confession by the accused person shall be admissible in evidence against him unless it be shown affirmatively on the part of the prosecution that it was made without the accused's being induced to make it by any promise or threat proceeding from any person in authority in the prosecution, and any confession thus admitted shall be subjected to the same examination and tests as are applied to any other evidence.

ARTICLE 7

At any stage of the proceedings the accused may decline to answer questions put to him by the police or in Court: provided that if the accused elect himself to give evidence on oath, then he may be compelled in cross-examination to answer questions relevant to the charge then being made against him.

ARTICLE 8

At an appropriate time in every stage of the proceedings the accused person either himself or through his legal adviser shall have the right to produce evidence on his own behalf and to demand that facilities shall be given for the collection of information on matters relevant to his defence.

ARTICLE 9

An accused person may not be tried and convicted in his absence save with his consent, or if, after reasonable notice of the trial has been given to him, he neglects or refuses to attend.

ARTICLE 10

The period of detention, if any, which an accused person may have been compelled to undergo up to the time of his conviction of the offence in respect of which he has been detained must be taken into account by the Court in assessing the period of imprisonment to which he is to be sentenced. If a Court in a particular case decides that the period of detention ought not to be reckoned as part of the period of imprisonment appropriate to the offence the Court must state its reasons for such decision.

ARTICLE 11

If any appeal is made in favour of a person who has been convicted the court of appeal may not increase the sentence save only in the case where the appeal is against the sentence and then only if the court of appeal is unanimous.

ARTICLE 12

Save in cases where he manifests violence, the accused person shall appear before the Court unmanacled.

ARTICLE 13

Any person ordered to be kept in custody before trial shall not be subjected to any restrictions or regulations other than the minimum necessary for his detention and for the maintenance of good order and hygiene.

ARTICLE 14

Persons kept in custody before trial shall not be detained in association with convicted offenders. They shall be confined in separate buildings if available; if not, then in quarters separated from those used to house convicted offenders; such places of detention shall not be regarded as or called prisons.

Article 15

There shall be a special department of justice charged with the duty of supervising all places in which accused persons are detained, and of reporting periodically to an appropriate authority on the organisation and management of such places. The members of this department shall be appointed by authorities who are independent of the police and prison administration.

Article 16

Prison officials shall constitute a special body, separated from the police force and independent of police control.

Article 17

Provision shall be made for rendering amenable to punitive proceedings any official, judicial or otherwise, who shall be proved wilfully to have disregarded the rules relating to the treatment of suspected or accused persons. Such proceedings shall not prejudice the right of the person aggrieved by the official's conduct to take civil proceedings against him.

Article 18

Compensation shall be payable from public funds to any person who shall have proved affirmatively that he had suffered a period of detention before trial ordered in contravention of any of the principles laid down in the foregoing Articles.

NOTES ON THE FOREGOING ARTICLES

Article 1. If the accused person is arrested in a remote part of the country a considerable time may necessarily be taken up by the journey to the place where the magistrate officiates.

Article 2. Exceptional circumstances which are envisaged as warranting detention until trial are for example: the likelihood of a repetition of the offence, such as in sexual crimes; where a medical examination appears to be needed; when the accused has no fixed abode; where there is a prospect that the accused may leave the jurisdiction. Local conditions and needs will

vary, but as a general principle there should be no detention before trial for offences which, if proved, do not carry the sanction of death or of imprisonment for more than three months. The Article provides that no considerable extension of detention may be ordered unless the case has been considered in open Court by a higher judicial authority than that by which the first period of detention was ordered. The Article leaves open the question whether the earlier proceedings should be held in camera or in open Court.

Article 7. The latter part of this Article will of course only apply to those legal systems which admit the evidence of accused persons on oath.

Article 9. This Article states the minimum. It is recognised that some systems already go further in the protection of an accused person against conviction in absence.

Article 10. The purpose of this Article is that where the sentence for a particular offence is fixed by law the period of detention shall be subtracted from that legal period; where, however, the Court has discretion in deciding upon the sentence of imprisonment the effect will be to draw attention to the principle that any period of detention should be regarded by the Court as part of the total sentence. It has been stated that in some countries accused persons take advantage of every means of postponing trial in the hope that the evidence against them will weaken and that the case of the prosecution may deteriorate generally. The remedy for this would seem to lie in a modification of the rules which permit of such delays in criminal procedure. The aim of Article 10 is to protect an accused person against having to suffer excessively long periods of detention against his will, and it is so worded as to enable the Court to disregard periods of delay unreasonably caused by the accused himself.

Article 11. It should be noted that the word "sentence" is used here in its technical meaning in English law, namely, the judicial determination of the *punishment* to be inflicted upon the convicted person.

Article 13. This Article will, for example, render it necessary that an accused person shall not be forced to work; it further envisages that the accused while detained shall be given

facilities for the proper care of his person such as the obtaining of medicines, medical appliances, and changes of clothing.

Article 18. This Article applies only to detention before trial; the burden of proof will rest on the aggrieved person who, in order to succeed, will have to establish affirmatively that there was no justification for the detention which he suffered. The fact that the accused may subsequently have been either acquitted or convicted is irrevelant to this point.

TRAINING FOR THE WORK OF A PROBATION OFFICER IN ENGLAND AND WALES

By W. G. MINN

Probation Branch, Home Office

THE social work of the courts increases steadily year by year. The demand for skilled workers in this field, as in other kinds of social work, far outnumbers the people qualified to undertake it. This demand is likely to expand as interest in human behaviour grows and the possibilities of rehabilitating delinquents become more widely understood. Few, even among the normally well-informed, have any detailed knowledge of the work of a probation officer. It may be helpful therefore, before describing the probation training scheme, to give a brief account of the work and its history.

The seeds of the probation system were sown in the days not so long ago in terms of history, when the Justices of the time in dealing with offences, many of which would now be regarded as venial, had little choice between punitive action and acquittal. Growth of public opinion began to weigh the scales in favour of acquittal where the offence was not serious. At this time the evils of alcoholism were a grave social danger and called forth voluntary reformative movements under the direction of various temperance societies. It is to the Church of England Temperance Society that the honour falls of having first sent missionaries to the courts in 1876, to attempt reclamation of the drunkards. These pioneers, though without official authority and often working against opposition, gradually won the confidence of the Justices and extended the scope of their work. The practice of asking them to assist and supervise other offenders who had been bound over by the courts gradually grew up. Their success was attributable to the possession of character and personality capable of influencing the offender for good. These early workers were ill-equipped, but their courage in spite of all obstacles built the foundation of the present Probation Service, which is evolving from a purely religious, and sometimes sentimental tradition, towards a skilled profession.

The appointment of probation officers was given legal sanction by the Probation of Offenders Act, 1907. In most areas the Justices appointed as probation officers the men and women who had served as police court missionaries. The Criminal Justices Act, 1925, prescribed the appointment of a probation officer for every petty sessional division, and made provision for improved organisation and for the payment of Exchequer Grant in aid of probation expenditure. A notable improvement resulting from the powers conferred by the 1925 Act was the combination of petty sessional divisions to form the probation areas, usually on a county basis. Now, only ten administrative counties in England and Wales have not been so combined. Combination enables full-time officers to be employed throughout the area where formerly only part-time service would have been justified. The Combined Area Probation Committee, formed of representatives of the petty sessional divisions, is responsible for the appointment of an adequate staff of probation officers and for the general administration of the Service. In each petty sessional division there is a local committee which retains the immediate responsibility for the oversight of the work in connection with the supervision of offenders and others placed under the care of probation officers.

The primary function of a probation officer is the personal supervision of offenders, both adult and juvenile, who are placed on probation by the courts, and the supervision of children and young persons found by the court to be in need of care or protection, or beyond control. This supervision is, in effect, a form of treatment. An essential feature of the release of an offender on probation is that he himself undertakes to do his best to lead an honest and industrious life and to accept supervision over a period of time. Thus, in the first instance, his rehabilitation depends upon his own efforts. It is the task of probation officer to contribute to this end—in the words of the Statute, to advise, assist and befriend.

Another important function of a probation officer is that of conciliation in matrimonial cases, where one or other of the parties makes an application to the court. Associated with this are matters such as making enquiries and advising the court on the custody of children and the means of the parties, where

efforts to conciliate have been unsuccessful. An increasingly important part of their work is connected with the resettlement and supervision of offenders who have been released on licence from institutional training.

It is now recognised that, if courts are to prescribe the right method of treatment for a particular offender, they must be apprised of his circumstances. The probation officer is accordingly called upon to make enquiries and report to the court on the social history and home circumstances of cases. For this work a clear and unbiased mind and sound judgment are essential.

From this bare outline of the work it is apparent that probation officers require a sound knowledge of human character and its development, and the best qualities of counsellor and friend. A wide knowledge of the various sources of help which are available from both stutory and voluntary bodies is necessary and must be called upon if success is to be achieved.

In 1930 a Probation Advisory Committee was appointed to advise the Secretary of State on the administration of the Probation Service. Among other things, the Committee recommended that training should be organised on an experimental basis with the object of improving the standard of candidate available for appointment. The Probation Rules, 1926, prescribe that, in appointing probation officers, Justices should have regard to the character, education and training of candidates, but did not specify the level of education or the kind of training. The result was that not only did the standard of selection vary widely but, even in areas where the standard was reasonably high, it was difficult to obtain candidates who had had any training which qualified them for work among delinquents. To overcome this deficiency the Committee suggested that a few men and women should be selected each year and be given training consisting partly of a University course in social science, and partly of practical work with probation officers. The experiment was successful within its limits and, between 1930 and 1936, 39 men and 9 women completed this type of training and obtained appointments. Several of these early trainees are now principal probation officers in county combined areas or in large county boroughs.

A Departmental Committee was appointed in 1935 to consider and report on the social services in the courts of summary jurisdiction. This Committee, which reported in 1936, made important recommendations designed to improve the conditions and organisation of the Probation Service, and stressed the need for better qualified probation officers. Following from this, a special branch of the Home Office was created in 1936 to deal with the central administrative problems of the Service, and in 1937 the Secretary of State appointed a Probation Training Board which was to be responsible for the selection of candidates and for the organisation of training on a wider basis. The object of this wider training was to provide a pool of qualified men and women from which the local Justices could select officers for appointment. The Board was charged also to arrange suitable refresher courses for serving probation officers. Between 1937 and 1939, 117 men and 40 women were trained and obtained appointments. During the early part of the war a much restricted scheme of training was in force. This was expanded in 1941, when the training course now provided began to take shape. The local authority associations co-operated by agreeing that the cost of training should be met in equal parts from local and exchequer funds, persons admitted to training being appointed as "assistant probation officers in training".

The training given under the scheme is adapted to the needs and capacity of the individual, and is of three types: a course, which comprises two years' social science diploma courses at a University, followed by practical training and a course of specialised lectures; and a short course, which lasts from 9 to 12 months and consisting of practical training in various types of courts and the specialised course of lectures. The long course is designed for younger candidates who are equipped by education and ability to profit by a University course. The short course is for older men and women, whose general education is more limited or who would find difficulty undertaking purely academic study, but who have had useful experience of ordinary conditions of employment and some experience of general social work. Both courses may include practical work in institutions and settlements, in addition to probation and other family case work. A third type of training

is available for younger graduates. This is flexible to meet individual needs of students who are thought to be too young and inexperienced to benefit immediately from either of the above schemes. Practical work or agreed training in some form of social work after a short period of industrial employment is arranged by the Board in consultation with the Universities. (It may comprise the study of conditions of social structure or experience with the police, prisons and other penal agencies and of the social welfare work of local authorities.) The period of training is in those cases extended for from three years upwards.

At first, the provision of practical training presented difficulty. Very few of the serving probation officers had been trained, and even fewer were successful as teachers. The trainees were too often looked upon as useful adjuncts to the staff, rather than as students. The steady increase in the number of trained officers (now about one-third of the total number) has made more adequate practical training possible in a number of areas in England and Wales.

Until 1939, Home Office students taking a University course devoted their vacations to probation work, while those taking the short course spent alternate days at lectures and practical work. Both these methods were found to be unsatisfactory. In the University course the students were deprived of experience in other forms of social work, while the short-course students tended to concentrate on the practical work, to the prejudice of their theoretical training. As a result of experience, those entered for University training now take the full social science diploma course, and short-course students do practical work for varying periods and then attend a theoretical course, followed by further practical training.

A probation officer must have a precise knowledge of the law as it affects his work, and sufficient acquaintance with the rules of procedure and evidence. He must be familiar with the statutory and voluntary bodies to which he can refer his cases for special help. It is not within his province to provide relief, but he must know how and where these can be found. While he may not be concerned personally in the running of youth clubs and community centres, he must be familiar with their

activities, as organisations of this kind can often be of vital assistance in aiding an offender or in providing fresh interests for parties involved in matrimonial troubles.

A background knowledge of economic history and sociology enables an officer to understand what can be attempted sucessfully within certain social groups. It is essential that the various patterns of accepted conduct in any given social group in society shall be known and understood. This will save the officer from false judgments and giving profitless advice. Some knowledge of ethics is also an advantage.

The main basis of the work, however, is the reaction of one character on another. The essential secret of this was possessed by the early pioneers. It becomes increasingly apparent that no amount of academic and scientific knowledge is of real and lasting avail in helping delinquents, unless it is backed by a strong element of human interest. Given this, the greater the knowledge of the complexities of human behaviour the more effective will be the work. The study of the elements of psychology, followed by study of the character problems arising in the courts, is therefore essential. A probation officer is not expected to have specialised knowledge in this field, but he should be able to recognise types and pick out those people who need the help of specialists. This knowledge will help him to avoid a great deal of wasted effort, as it is now known that certain types of personality do not appear to respond to case work in the open, while other types do not respond to punitive methods. The application of the wrong form of treatment may be as dangerous to the community as to the individual concerned.

This same general knowledge of the make-up and mechanism of human behaviour is also invaluable in the work of matrimonial conciliation, where success depends upon recognising the underlying causes of disharmony.

The three months' specialised lecture course is based on an introduction to these subjects—law, economic and social background, theory and practice of case work, psychology linked to criminology, and matrimonial work.

The form of training in the future might follow the present basis in its general lay-out, consisting of the background of the social science course or its equivalent, and followed by a longer

and more detailed study of at least three of the present subjects —sociology, matrimonial work and psychology.

It may be expected that, as the Service develops, a higher degree of skill will be required, and it is hoped that the Service will be staffed eventually by men and women who have a good general academic background and detailed training in the specialised work. At the present time the Service is expanding so rapidly that training given, even over a period of two and a half years, cannot be made more than an introduction to the various fields of knowledge which officers need in their work. The increasing awareness of the appointing Justices of the need for trained candidates for this work is a hopeful pointer for the future. At present the supply of trained people still falls short of the demand. At a later date, if the numbers in the Service become more or less stabilised, it may be that professional training over a longer period will be the rule rather than the exception.

During the specialised theoretical training the students are in residence in a hostel—an arrangement that provides facilities for the interchange of ideas and for the individual aspect of the training scheme, which is essential to its success. Candidates from all walks of life are accepted for training if they have the necessary intelligence and suitable personality. The introduction to new methods of thought and the widening of outlook make careful individual guidance desirable.

Large numbers of applications for probation training are being received at the present time, many from candidates who have served in His Majesty's Forces, but the general standard of these applicants is disappointingly low. It is greatly to be hoped that increasing knowledge of the potentialities of the probation system will be accompanied by a marked increase in the quality of the candidates for entry into the Service. Much of this work is still in its pioneer stage, and its future development depends not only on its wise administration but on the quality and initiative of its field workers.

The work of the Probation Training Board in connection with refresher courses for serving officers was interrupted during the early years of the war, but it is a part of its duty which is likely to develop in the future. In these courses it has been

found that the residential method of teaching has very great advantages over a series of lectures given at intervals. As the staffing of the country generally becomes more adequate it is hoped to arrange courses on these lines. Much valuable help has been given by University authorities in arranging these courses in the past. As knowledge in the field of human behaviour is increasing rapidly, there should be time for the study of new ideas. It seems likely that it is in this field of providing refresher courses for those already engaged in the social services of the courts that the main work of the Board will lie in the future.

THE POLICE EXHIBITION

By F. T. TARRY, C.B.E.

H.M. Inspector of Constabulary

In celebration of the Jubilee Conference of the Chief Constables' (Cities and Boroughs) Association of England and Wales, an exhibition was held at Brighton in June, 1946, the Fine Art Galleries and the King's Apartments of the famous Royal Pavilion being lent for the purpose by the civic authorities. The exhibition marked the first occasion on which exhibits in famous criminal trials, which are preserved in the Black Museum at Scotland Yard, and the large number and range of exhibits from the collections of Chief Officers of Police and of Directors of the Home Office Forensic Science Laboratories have been grouped together for inspection by the public. The popularity of the venture was pronounced. In three weeks over 24,000 persons visited the public section in the Fine Art Galleries. The applications for permission to visit the private section were so numerous that the Mayor of Brighton readily facilitated the continued use of the King's Apartments from the five days originally planned to the full period of three weeks during which the main exhibition was open to the public.

In a foreword to the illustrated brochure published for the exhibition, the Home Secretary observed that the country is justly proud of the police, of the way in which a comparatively small body of unarmed men can keep the King's peace, and of the relationship of trust and confidence which exists between the police and the public. Although a comparatively modern creation, the police service has its roots deep in history. The exhibition would give to a wide public some conception of the many-sided activities of the modern police service. It would also show in its historical side the way in which the traditions of the police have been built up and how the police have come to occupy their unique position in the community.

The brochure included a brief historical outline of the police of England and Wales, with notes on police uniform and

equipment, specimens of which were exhibited. Among the historical exhibits, pride of place was given to a collection, illustrative of the development of the police in London, arranged by Sir Arthur Dixon, until his recent retirement Principal Assistant Under-Secretary of State at the Home Office, and a noted collector. A large number of truncheons, tipstaves, engravings, historical documents and other exhibits, were lent by this collector.

A unique and complete collection of police helmet and cap badges and belt buckles, lent by the Reverend G. Hawkes Field, made a remarkable display, and the same collector displayed interesting collections of medals awarded to the police of the Empire. Rare truncheons and tipstaves lent by various collectors and chief constables made interesting relics of the days when the truncheon or the tipstaff was the sole emblem of the office of constable, inspector, tipstaff or other officer of the law and was occasionally used, as shown in rare engravings, for corrupt as well as for legitimate purposes.

The exhibits were classified into various groups—portraits, cartoons and historical engravings, books and documents, including a number of great value lent by the Bodleian Library, Oxford, truncheons, tipstaves, handcuffs, and various instruments of correction which included a scold's bridle. The Peeler's uniforms displayed on attractive models, some of which were lent for the purpose by Mr. Louis Tussaud, were in striking contrast with the uniform of the modern constable, and that of the woman constable whose services are becoming increasingly recognised. Forensic science and criminal exhibits indicated the striking developments in this branch of police work in the past ten years. Many of the criminal relics from the Black Museum at Scotland Yard were on view.

Opening the Exhibition on 4th June in the presence of a large company in Brighton's Dome, Mr. Chuter Ede declared that it was a notable event in police history. Its main objects were to stimulate wider public interest in the work and problems of the police, to demonstrate the advances made in recent years in various branches of police work, and to revive interest in the plans for a Central Police Museum of exhibits and specimens as part of a central technical organisation. He would not speculate

or discuss in any detail the plans which might be made for a Central Police College, with a Central Police Museum and Library, but the place of a Central Museum and Exhibition were clearly among the matters falling to be considered in connection with any such proposal.

It was all to the good, said the Home Secretary, that the exhibition should stimulate interest in these problems and that attention should be given to long-term questions of that kind. From a preliminary inspection he had found the exhibition of immediate and absorbing interest. It was an assemblage of historical material relating to the police forces of this country which every citizen ought to have an opportunity of seeing and studying—"if he is a law-abiding citizen he will be much reassured; if he is not a law-abiding citizen his spirits will be considerably dampened, for it shows how during the last two or three centuries—it goes back a good way—the resources of society to deal with those who fail to accept its reasonable rules are continually being brought up-to-date and keep the forces making both for progress and sanity one jump ahead of those who would like to take us back to the ages of barbarism". The exhibition would certainly be of enormous interest to the general public who seemed to delight in reading about crime and criminals, but whose knowledge of police history and organisation was sometimes not all it might be.

Inaccurate knowledge of police methods and organisation was not the sole preserve of the general public. Those who professed to make a special study of crime, namely, detective story writers, were apt with unfailing consistency to fall into major errors when they came to describe how the police actually do their work. Those who visited the exhibition were able to learn that the professional had his moments of genius as well as the inspired amateur. The probability was that in many cases the village policeman had seen the elementary clue long before and realised that it led into a cul-de-sac.

The exhibition fulfilled two main things—it provided a record of the history, purposes, and work of the police of England and Wales, and it gave some idea of how the police are organised and how they operate at the present time. Not all the secrets were revealed—just enough was shown to lure the incipient

criminal along the path with Nemesis in pursuit and recognising that at last he was on the path along which he was bound to be overtaken.

It was noteworthy that the contributions to the exhibition came from over a wide field, making an impressive and representative collection from a variety of sources. The exhibition helped materially to enlarge the public understanding of the police, and could not fail to improve the public appreciation of the police. Mr. Chuter Ede observed that the exhibition would advertise to a wide public the way in which police organisation in this country has been built up, and the complicated and elaborate provisions which are now needed, and are made, to protect the community by preserving law and order and defeating the criminal. It was sometimes insufficiently realised what a field of knowledge the ordinary constable on the beat has to have if he is going to do his job efficiently; and also it was insufficiently realised what a wealth of specialist resources there is behind the constable on the beat. The exhibits served to bring home the difficult and comprehensive nature of the tasks which are likely to fall to the ordinary constable, and the training which is needed to equip him for his work. The exhibits also indicated the nature of the elaborate provision which is necessary, for instance, in the Criminal Investigation Department, the Traffic Branch, the Forensic Science Laboratory, and elsewhere, in order to give to the police the technical resources and advantages necessary to enable them to keep ahead of the criminal.

The exhibition was not intended to be startling or sensational, although some of the exhibits in the private section had a gruesome history and inspection of these was limited to professional and other visitors already hardened in the study of crime. The effort as a whole was an honest and faithful representation of the police service as it was, and as it is, with some hint of what developments were possible and likely in the future.

The committee which organised the exhibition, drawn from representatives of the Home Office, the Association of Municipal Corporations, and of Chief Officers of police, resolved that the unique assembly of exhibits should be classified and recorded for future reference. It was found impracticable to

act upon several requests, accompanied though they were by offers of the use of several municipal museums and art galleries, that the exhibition staged at Brighton should be sent "on tour". A number of private collectors generously arranged for their collections to be kept intact, and, by benefaction, to leave them in trust for the benefit of the police service. Thus the need for a central and permanent building for a Police Museum is demonstrated, and pending this provision some collectors, led by the example and expert guidance of Sir Arthur Dixon, have sent specimens from their collections of truncheons, tipstaves, badges, and other trophies, on loan to the Police District Training Centres, recently opened under the Home Office scheme for the initial instruction of the 16,000 police constables required to make good the wastage in the police service during the war years.

As in the case of the Royal Navy and the Army, tradition plays an important part in the police service, particularly in the training of constables, and a considerable part can be taken by historical exhibits and museum pieces in providing the right atmosphere which a training establishment should possess. A museum is today accepted as an essential corollary to every educational institution and should be regarded as an integral part of the technical and specialist training of the police.

The exhibition proved a useful and practical step in the fulfilment of the aim of the committee on Detective Work and Organisation to see established a central institution in which both the scientist and the practical investigator would be mutually "at home, combining and pooling their fields of knowledge and experience and meeting on equal terms".

A recommendation from the Exhibition Committee suggested to the Home Office that the display should be made the beginning of a central register of exhibits and this was adopted, and before the dispersal of the collections displayed at Brighton this work was put in hand. When in due time a building becomes available for the National Police Museum, there is thus an assurance that an immediate start can be made in its furnishing with exhibits whose range and classification will cover the whole field of police education, history and experience.

THE PRINCIPLES OF THE CRIMINAL LAW RELATING TO INSANITY [1]

By G. ELLENBOGEN

An Outline of the Law

English law steers a middle course between those systems of jurisprudence which regard insanity as *per se* inconsistent with criminal responsibility, and those which make no exception in favour of the insane. An enquiry into the practice of English law in its older and harsher days is now of no more than historical interest, as the set of rules which the judges formulated in answer to the House of Lords after the Macnaghten case in 1843[2] has ever since been regarded as the sole repository of the present law on the subject.

According to these rules, "the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

The burden of proof on the defence has several times in recent years been the subject of dispute. On the one hand, the terms of the Macnaghten rules—proved to the satisfaction of the jury and "clearly proved"—were reiterated in *Att.-Gen.* v. *Boylan*,[3] and it was held in that case and in *Att.-Gen.* v. *Fennell*[4] that if the jury is left in doubt, the benefit of the doubt is not to be given to the accused; on the other hand it has been held, in *Sodeman* v. *The King*[5] and *R.* v. *Carr-Briant*,[6] that the burden of proof on the

[1] This article reproduces the Lee Prize Essay 1946; the Editors are indebted to the Benchers of Grays Inn for their approval of its publication.

[2] 10 Cl. & F. 200. [3] [1937] I.R. 449. [4] [1940] I.R. 445.

[5] [1936] W.N. 190. [6] [1943] 1 K.B. 607.

defence is not so onerous as that which rests on the prosecution to prove the facts it has to establish, being, indeed, no greater than that which rests on the plaintiff or the defendant in civil proceedings.[1]

The question of insanity is (apart from some statutory provisions) the only exception to the principle that the prosecution must prove the guilt of the prisoner. Apart from this, "throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt" (*Woolmington* v. *D.P.P.*).[2] It is submitted, however, that the exception is not a very real one. The administration of the law would be impossible if the prosecution could not take it for granted, in the absence of the strongest evidence to the contrary, that the accused was responsible for his actions. For the same reason, it is not for the prosecution, in England today, to prove, where a crime is committed through the ignoring of a prominently-displayed notice, that the accused is able to read; it is for the defence to raise and establish the plea of illiteracy, since it traverses a normally justified presumption. It is sufficient that the law gives every opportunity for the rebuttal of the presumption of sanity, and that the prosecution, in practice, offers the defence any evidence in its possession that might point to the insanity of the accused.

The Macnaghten rules will be discussed in detail below. Here we shall merely say that they are based upon the cognitive principles of *mens rea*, and take no account of the conative or affective disorders of the mind. In consequence, irresistible impulse is no defence in English law, and those dicta which support it[3] are clearly contrary to principle. Nevertheless, evidence of an irresistible impulse frequently serves to indicate that the accused did not know the nature and quality of his act, or did not know he was doing wrong. And it cannot be doubted that in practice, out

[1] The courts of the U.S.A. are divided on the question of presumption of sanity. 19 States, and certain Federal courts, cast the burden on the prosecution. (Weihofen, *Insanity as a Defense in Criminal Law*, New York, 1933).

[2] (1935) 25 Cr. A.R. 72, at p. 95.

[3] e.g. per Denman J. in *R.* v. *Oxford* (1840) 9 C. & P. 525: "If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible." Cf. also *R.* v. *Fryer* (1915) 24 Cox 403; *R.* v. *Jolly* (1919) 83 J.P. 296; and, of dubious authority on this point, *R.* v. *Hay* (1911) 22 Cox 268.

of generous if misguided motives, the interpretation of the Macnaghten rules is strained beyond the clear meaning of the words.

One form of irresistible impulse is indeed recognised, though perhaps not in so many words, in the lower courts; viz. kleptomania. This is one of the few relics of the generally abandoned psychological theory of monomania, but its frequent restriction to certain times (such as pregnancy) or to some special class of objects would seem to imply that it may be a form of mental rather than "moral" disease. It is fairly safe to raise a plea of insanity in courts of Petty Sessions, for they do not possess the power of ordering the accused "to be kept in custody as a criminal lunatic";[1] in higher courts the plea is, as Lord Sumner said,[2] a "speculative defence", which is only raised when the consequences of conviction are more formidable than detention during His Majesty's pleasure. It is submitted that the recognition of kleptomania as a valid defence against conviction (whatever its relevance to the sentence) is contrary to principle, and would not be admitted in the superior courts.

English criminal law recognises the existence of temporary insanity,[3] or insanity broken by intervals of lucidity.[4] "Semel furibundus, semper furibundus praesumitur";[5] it must therefore be proved that the offender has "lucida intervalla";[6] but once this is proved, there is a presumption that the offence was committed in a lucid interval, and the onus rests on the defence in the usual way. In such a case, however, it will obviously be much easier to discharge the burden of proof. Any conduct of the accused which is at any time suggestive of insanity may be adduced in evidence, to show that he was insane when he committed the offence.[7] Similarly, evidence as to the insanity of his relatives is admissible, as tending to prove his own insanity at the

[1] Trial of Lunatics Act, 1883, s.2.

[2] House of Lords Debate, 15th May 1924 (57 H.L.Deb., 5th series).

[3] But not that "mania transitoria" of which the sole evidence is the commission of the crime!

[4] So too does the civil law; e.g. *In re Walker, etc.* (1912) 28 T.L.R. 466.

[5] Littleton, Co. Litt. 246b, note 1. [6] Hale, I. 31, 33.

[7] To quote but one among an infinity of examples; "Other witnesses deposed to his 'vacancy of mind', and strange ways. He had been known to eat a piece of soap and a piece of a cat, and to bite a candle . . . On other occasions, however, he seemed sensible enough" (*R.* v. *Burton* (1863) 3 F. & F. 772).

time. In particular, the law allows great latitude to expert medical witnesses,[1] and the defence is given every opportunity of proving the insanity of the accused.

Apart from its bearing on responsibility, insanity is in other respects a matter of importance to criminal law.[2] Thus a man who becomes insane after committing a crime cannot be tried until his recovery; nor can a man be hanged who becomes insane after his conviction for murder. In these cases, any form of insanity which is certified by medical experts is enough, and it need not be such as is covered by the Macnaghten rules.

Before 1800, an accused person who was found so insane as to be irresponsible was acquitted, and no further order was made regarding him. By the Criminal Lunatics Act, 1800, s.1, it was provided that if evidence of insanity was given at the trial of any person charged with treason, murder or felony, and the person was acquitted, the jury were to find specially whether such person was acquitted by them on the ground of insanity, and if they so found, the person was ordered to be detained during His Majesty's pleasure. That the accused had committed the act was of course implied in the finding that he was acquitted on the ground of insanity. The law continued in this state until 1883, when after another attempt on the life of Queen Victoria it was provided, by the Trial of Lunatics Act, 1883, s.2, that "where in any indictment or information any act or omission is charged against a person as an offence and it is given in evidence on the trial of such person that he was insane so as not to be responsible according to law for his actions at the time when the act was done or the omission made, then, if it appears to the jury that he did the act or made the omission charged, but was insane as aforesaid at the time, the jury shall return a special verdict that the accused was guilty of the act or omission charged, but was insane as aforesaid at the time when he did the act or made the

[1] Short of permitting them to answer that very question that it is for the jury to determine (Cf. *R.* v. *Thorne* (1925) 18 Cr.A.R. 186).

[2] There are, in all, six occasions on which a prisoner may be officially recognised as insane: (i) while awaiting trial (ii) on arraignment (iii) in the special verdict (insane at the time of the act) (iv) between verdict and judgment (v) under a reprieve on the ground of insanity (vi) while undergoing imprisonment.

omission". The verdict is illogical, for it is in fact an acquittal;[1] yet the word "guilty" connotes the commission of a "crime", which is what the finding on the accused's state of mind negatives. Lord (Justice) Atkin's Committee on Insanity and Crime (1924) recommended the special verdict, "That the accused did the act (or made the omission) charged, but is not guilty on the ground that he was insane so as not to be responsible according to law at the time".[2] At present, as Sir Herbert Stephen pointed out to the Committee,[3] juries are frequently, for the sake of brevity, instructed to return a verdict of "guilty of the act but insane at the time", or even "guilty but insane".[4] The omission of the words "insane *as aforesaid*", i.e. "so as not to be responsible according to law for his actions, etc.," gives rise to confusion, for it obscures the fundamental fact that it is not "insanity" but "that degree of insanity to which the law attaches irresponsibility" that is at issue. This confusion encourages the mistaken medical contention that the law is presuming to determine insanity, and gives some colour to the more popular fallacy that all insane persons are irresponsible.[5]

There is, however, one class of cases in which insanity *per se*, and not merely that degree of it which amounts to legal irresponsibility, may confer immunity from conviction. By the Mental Deficiency Acts of 1913 and 1927, it is provided that in the case

[1] Thus no appeal is allowed from it or from any part of it. It is "one and indivisible"; per Reading L.C.J. in *Felstead* v. *D.P.P.* (1914) 30 T.L.R. 469. Insanity is a plea voluntarily raised by the defence; having been accepted, and a verdict given accordingly, it cannot be withdrawn or supplemented on appeal.

[2] Report of the Committee, Cmd. 2005, p. 12.

It may be noted that this recommendation reverts to the ancient practice (for which Stephen quotes 14th-century authority; *History of the Criminal Law*, 1883, Vol. II, p. 151) by which "proof of madness appears not to have entitled a man to be acquitted, but to a special verdict that he committed the offence when mad" (Stephen, *loc. cit.*). In those days the accused had the right to a pardon; today he is of course "detained during His Majesty's pleasure".

[3] Cmd. 2005, p. 11.

[4] But the special verdict must be found in unequivocal language; the Court has refused to treat as equivalent thereto a verdict of "Guilty, with the strongest possible recommendation to mercy, and we consider she was in a frenzied state of mind" (*R.* v. *Harding* (1908) 1 Cr.A.R. 219).

[5] Nevertheless it is interesting to see that in America some favour the adoption of the English verdict of "Guilty but insane", in order to prevent abuse of the writ of *habeas corpus* on behalf of the offender detained in an institution. (Weihofen, *op. cit.*, p. 263.)

of summary proceedings, where the charge is proved, the court may order an accused person who has been mentally deficient from before the age of 18 to be placed under guardianship, or may send him to an Institution for mental defectives, without proceeding to a conviction.

The Home Secretary has a wide discretion where there is any question of insanity, and the judges are only too glad to fall back upon it where the stringency of the substantive law threatens undue hardship.[1] This applies in particular to murder trials, in which the plea of insanity is most frequently raised,[2] and in which the judge has no discretion as to sentence. Thus in *R.* v. *Macdonald*,[3] where it was urged that the condemned murderer was suffering from *petit mal*, a form of epileptic insanity, the Court of Criminal Appeal refused application for leave to appeal, but said, "Though this application must be refused, because the evidence brought before the Court will not justify them in granting the leave asked for, still, matters have been laid before them which, in their opinion, might properly be brought to the notice of the Home Secretary."[4] The Home Secretary is "not only unfettered by the unchangeable rule of law, but has better opportunities than the Court of reviewing such circumstances as heredity, family history, and the general antecedents of the prisoner".[5]

The Necessity for a Legal Criterion of Insanity

Before turning to an examination of the Macnaghten rules, it would be as well to dispel the radical misunderstanding which underlies medical criticism of the law. The law is essentially static; medical science is progressing by leaps and bounds. Is it

[1] In *R.* v. *Tebbitt* (not reported, but quoted by Stroud, *Mens Rea*, p. 96), Coleridge J. sentenced a prisoner (who was obviously insane but was held by the jury fit to plead, and who pleaded guilty to a charge of attempted murder) to 20 years, but said he was satisfied that the prisoner would be detained during His Majesty's pleasure.

[2] The Report of the Atkin Committee showed that over the period 1901–1922 the proportion of insane to the total charged in murder cases was over 33 per cent., while in charges of attempted murder, manslaughter, wounding, and attempted suicide the proportion fell to 2 per cent., and in other crimes to less than ·2 per cent.

[3] (1908) 1 Cr. A.R. 262.

[4] Cf. *R.* v. *Codere* (1916) 12 Cr. A.R. 21, at pp. 28, 29.

[5] Stroud, *Mens Rea*, p. 84.

not time, then, to dismiss the legal view of insanity as obsolete, and to regard every person whom medical science declares to be insane as automatically exempt from criminal liability?

Approaching this question with the best will in the world, we are first obliged to determine what we mean by insanity. It would obviously be rash in the extreme to adopt the criterion of abnormal social behaviour. As Dr. Johnson said of the poet Christopher Smart (who was "confined in a madhouse"), "Madness frequently discovers itself merely by unnecessary deviation from the usual modes of the world. My poor friend Smart shewed the disturbance of his mind, by falling upon his knees, and saying his prayers in the street, or in any other unusual place. Now although, rationally speaking, it is greater madness not to pray at all, than to pray as Smart did, I am afraid there are so many who do not pray, that their understanding is not called in question:" he continued, "Another charge was, that he did not love clean linen; and I have no passion for it." The social criterion is so patently inadequate and dangerous that we must turn without further ado to medical science. And here we find, to our surprise, that instead of having a clear-cut definition of insanity to substitute for the present criterion of liability which they so vigorously attack, the neurologists, the alienists and the psychoanalysts (Freudian, Jungian, and Adlerian after their kind), each offer a variety of definitions,[1] or frankly confess their inability to define what is, after all, indefinable.[2]

In the days when a lunatic was thought to be possessed by spirits, or "under the visitation of God",[3] it was natural enough to regard sanity and insanity as distinct entities. But to-day we know that they merge imperceptibly one into the other:[4] the extreme of insanity is manifest enough, but it is a matter of choice where we "draw the line" across the mental continuum,

[1] At sight of which the lawyer may well exclaim, with Pope,
"Who shall decide, when Doctors disagree . . .?"

[2] Shakespeare, as usual, hit the nail on the head;
"To define true madness,
What is't but to be nothing else but mad?"

[3] Per Tracey J., in *R.* v. *Arnold* (1724) 16 St.Tr. 764.

[4] "Insanity is not a clinical entity": and "The difference between normal and abnormal mental functioning is quantitative, not qualitative." A. MacNiven, "Psychoses and Criminal Responsibility," in *Mental Abnormality and Crime* (Ed. by L. Radzinowicz and J. W. C. Turner), p. 50, 51.

and we shall not necessarily draw it in the same place for all purposes.[1] We should all agree that a boy of eight is young and a man of eighty is old. But when does one cease to be young, and become old? Obviously, the question cannot be answered in the abstract. But an employer may advertise a post for a man of forty or over; we then call an applicant of thirty-nine young; he is too young for that particular purpose. Now for the sake of rule and order, the law finds it necessary to erect artificial barriers across nature: it cannot be content to lay down that in order to be criminally responsible a child must understand the meaning of "wrong",[2] or that to make a valid contract a young man must have attained discretion. It must fix certain ages as those at which a child is presumed to understand the meaning of wrong and a young man to have attained discretion. These are known as "legal presumptions": and in a sense the whole of criminal law is one vast legal presumption: for the law presumes that those who infringe the rules which it establishes are deserving of punishment as offenders against morality, or whatever name we care to give to the Platonic idea of justice.

Even supposing we could find a satisfactory definition of insanity, it could not possibly replace the legal notion of responsibility. Sanity and insanity are inherent qualities of the human mind; responsibility is not. As Dr. Heinrich Oppenheimer pointed out (in 1909),[3] in Chinese penal law insanity is no ground of exemption from conviction, while in France insanity is *per se* an excuse; thus a person of unsound mind in China is responsible; a person in exactly the same state of mind in France is irresponsible. The fundamental distinction between insanity and irresponsibility invalidates every attempt to dispense with the legal criterion. The State of New Hampshire has rejected the Macnaghten rules both in their strict interpretation and as extended to admit irresistible impulse. The rule it has adopted says: "There is no legal test of irresponsibility by reason of insanity.

[1] As Kenny says (*Outlines of Criminal Law*, 15th Ed. p. 59), "English law as a whole is complex with regard to Insanity"; he quotes McCardie J., "As to crimes, contracts, wills, detention in asylums, and other matters, about eight different tests are applied by it."

[2] As applicable to his particular act; this moot point is treated more fully on p. 91, 94 ff. *infra*.

[3] *The Criminal Responsibility of Lunatics*, Chapter I.

It is a question of fact for the jury in each case whether the defendant had a mental disease, and if so, whether it was of such character or degree as to take away the capacity to form or entertain a criminal intent."[1] Now what is "a criminal intent", and how is one to determine the presence or absence of the capacity to form or entertain it? Obviously, a criminal intent can only mean "that type of intent which the law describes as criminal", in other words, an intent that can be subsumed under the rules of the criminal law. Now just as we cannot say whether a man of thirty-nine is young or old unless we are given some criterion whereby to judge the question, so we can only determine the presence or absence of capacity to form a criminal intent by the use of a legal criterion. That criterion, as will be shown more fully below,[2] is in England a modification of the ordinary rules of *Mens Rea*. The only consequence, therefore, of the New Hampshire rule is that the legal question, which it is impossible to avoid, and which in this country has been settled by the highest judicial authority, is there left to the whims of lay and ephemeral juries under the tendencious influence of medical witnesses.[3]

Unchastened by the experience of their earlier Committee (1896), which found the grounds of criticism shifting under its feet, and impervious to the arguments advanced above,[4] the Medico Psychological Association recommended to the Atkin Committee measures essentially similar to the practice of New Hampshire. These were as follows :—

1. The legal criteria of responsibility expressed in the rules in

[1] Weihofen, *op. cit.*, p. 16.

[2] p. 90 ff. *infra*.

[3] The excesses in which American ingenuity can indulge are amusingly illustrated in the following item, recently culled from a popular newspaper: "If he is charged with murdering his wife, Fred Hills, of Los Angeles, California, is going to plead "American insanity", his lawyer said yesterday. According to a well-known criminal lawyer in New York, "American insanity" is "a mental disorder peculiar to Americans; it is temporary loss of control of mental functions and any violent act occuring during this condition is never premeditated and therefore not criminal." This lawyer maintains that psychiatrists accept "American insanity" as a defence in tragedies where tranquillity of the home has been threatened with disruption.

[4] The essential point of which, viz. that the law is concerned with responsibility and not with insanity as such, was clearly stated by Maule J. in his separate answer to the House of Lords in 1843, and has been constantly reiterated by Sir James F. Stephen and other authorities.

Macnaghten's case should be abrogated and the responsibility of a person should be left as a question of fact to be determined by the jury on the merits of the particular case.

2. In every trial in which the prisoner's mental condition is in issue the judge should direct the jury to answer the following questions:—

(*a*) Did the prisoner commit the act alleged?

(*b*) If he did was he at the time insane?

(*c*) If he was insane, has it nevertheless been proved to the satisfaction of the jury that his crime was unrelated to his mental disorder?

The effect of adopting such a recommendation has been sufficiently noted already. But the phrase we have underlined is so surprising as to merit separate consideration. In the course of their evidence before the Atkin Committee (as the Report indicates[1]) the Association's witnesses agreed that this phrase cast a burden on the prosecution which could not be discharged: and it was eventually altered to "the mental disorder was not calculated[2] to influence the commission of the act". An amendment which a learned medical writer[3] has more recently suggested, that the last clause should read "if he was *not* insane, has it nevertheless been proved to the satisfaction of the jury that his crime was unrelated to his mental disorder?" seems only to make confusion worse confounded. To put to the proof an alleged connection between any act of the offender and his mental disorder is beyond the power of human reason. Fitzjames Stephen, Esq., LL.B. (as he then was), cited[4] the case of a man who had an obsession about windmills. In order to take his mind off them, his friends took him to a place where there were no windmills. While he was there, he mutilated and nearly killed a small girl. It later transpired that he did so in the hope that this act would bring about his removal to a place where there were windmills. Now in the light of this illustration it is patently obvious (though not, apparently, to the Medico-Psychological Association) that

[1] Cmd. 2005, p. 4.

[2] It is respectfully submitted that the word "calculated" is not calculated to clarify the issue.

[3] MacNiven, *op. cit.* p. 71.

[4] In a paper read before the Juridical Society, 1855 (Vol. I, p. 67). He repeated the illustration in his later works.

the prosecution can *never* prove absence of connection between an act and a mental disorder. Furthermore, even if the onus of proving the connection is put upon the defence, however tenuous and improbable the connection alleged, the prosecution can never *disprove* it; "the Devil himself knoweth not the thought of man."

Our criticism of the New Hampshire rule applies equally to the rule that insanity excuses *per se*. For it is obvious that some persons of unsound mind are capable of committing offences for which they can be held responsible, and for which they ought to be punished.[1] The question therefore remains, what degree of unsoundness of mind should be called "insanity",[2] so as to exempt the offender from liability: and where the aforementioned rule prevails, this is a question which medical science must determine in each case. It is interesting to observe that, as Oppenheimer pointed out, the consequence of this rule in France (under the Code Pénal of 1810) was a protest by the medical profession that it was being obliged to answer a question that should be left to the law. In this country medicine accuses the law of interfering in medical questions. How true it is that "the grass is always greener on the other side of the fence!"

The Macnaghten Rules; an Analysis and Vindication

We have now seen that the law is obliged to adopt a legal criterion of responsibility, and that it does not presume to determine simply whether a man is insane. The criterion it has adopted is embodied in the Macnaghten rules; we must now, therefore, examine the questions (a) whether these rules are authoritative, and (b) whether they represent a complete statement of the present law. Then, and only then, shall we be in a

[1] The punishment of the insane is evidently not pointless and gratuitous cruelty, for every lunatic asylum resorts to it for the maintenance of its own discipline. That the lunatic ought never to be punished is a dangerous doctrine of which he would be quick to take advantage. "When Martin, the incendiary of York Minster, was to be tried, various inmates of a madhouse were talking over his case. One of them remarked, "Oh, they cannot punish him; he is one of us." (Stephen's paper, p. 92.)

[2] Our own law rightly discourages the distinction. "It is impossible to distinguish between unsoundness of mind and insanity"; *Smith* v. *Smith* [1940] P. 179, per Merriman P., at p. 181.

position to decide the fundamental issue of whether they should now be extended to cover irresistible impulse.

The first question is important, for as the leading work on medical jurisprudence says,[1] "in no single instance has . . . any court sitting *in banco* delivered . . . written judgment on the relation of insanity to criminal responsibility." It is evident that there is no binding authority inherent in the opinion of the judges delivered outside the court on abstract questions of law; but at the same time it cannot be seriously contended that the Macnaghten rules are not for all purposes an authoritative statement of the law. They rest on the support of both prior and subsequent authority.[2] They were delivered in answer to the House of Lords as a statement of the then existing law (the judges "confined their answers to the statement of that which they hold to be the law"[3]), and, like a codifying statute, were a convenient formulation of the rules established by judicial precedent. Since their pronouncement, they have acquired a derivative authority by virtue of their constant citation in Court and the judicial adoption of their terminology. They have never been overruled.

[1] Taylor, *Medical Jurisprudence*, (9th Ed.), Vol. I., p. 801.

[2] It seems hardly necessary to discuss in the body of the text the question whether the rules were a correct summary of the common law. The question has only been raised by those who have an ulterior motive for minimising their authority. In this connection it is perhaps worth pointing out that Sir James F. Stephen cannot be acquitted of misrepresentation. In his *General View of the Criminal Law* (1890) p. 80, he wrote of the judges' answers:—

> "They do not explain that the knowledge that an act is wrong, which is the test not of insanity but of responsibility—that is, liability to punishment—means, not knowledge of the truth of the general proposition that a particular class of actions are wrong, but a power of appreciating the moral quality of a particular action."

Now though this is a fair criticism of the separate answers given by Maule J., whose standard of "unsoundness" was "such as rendered (the accused) . . . incapable of knowing right from wrong" (10 Cl. & F. 205), it is wholly misdirected against the Macnaghten rules proper; for the judges specifically rejected this test, saying, "The mode of putting . . . the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged."

(The discredited version is given as the law in Stone's Justice Manuals', 78th Ed., at p. 191.)

[3] 10 Cl. & F. 208.

Our second preliminary question threatens to plunge us forthwith *in medias res*. But the irresistible impulse controversy is really concerned with the law as it ought to be rather than as it is. In spite of the powerful advocacy of Sir James F. Stephen it is, hardly open to question to-day that the Macnaghten rules are regarded as a complete statement of the law, and that the defence of irresistible impulse is not legally recognised.[1] Only isolated instances to the contrary can be quoted from the law reports; as, for example, in *R.* v. *Fryer*,[2] where Bray J. said that the Macnaghten rules did not seem to him to state the law as it is to-day, and that he proposed to follow Stephen in allowing the plea of uncontrollable act. In general, courts are reluctant to commit themselves on the question.[3] It must be admitted that, because the Crown cannot appeal from an acquittal (and that is the effect of the verdict "guilty but insane"), a vast number of cases—as is evident from newspaper reports—are disposed of far more leniently than a strict application of the Macnaghten rules could possibly permit. But this leniency, which is natural and perhaps proper to juries, has never been sanctioned in the Court of Criminal Appeal. That Court, in *R.* v. *True*,[4] repudiated McCardie J.'s admission of irresistible impulse, and held that "there is no foundation for the suggestion that the rule derived from Macnaghten's case has been in any way relaxed."[5] At all events, the argument that the defence of irresistible impulse is already a part of the law (whether through judicial admission or, as Sir James F. Stephen ingeniously argued, by implication in the Macnaghten rules) is conclusively answered by the fact, as Viscount Cave pointed out in the House of Lords debate on the Criminal Responsibility (Trials) Bill,[6] that if that were so, there would have been no need for the recommendation by the Atkin Committee,[7] and no need for the Bill.

[1] That is to say, in England. In the U.S.A. it has been adopted in seventeen States, the District of Columbia, and the Supreme Court (see Weihofen *op. cit.*). It is recognised in three of the six States of Australia and in South Africa.

[2] (1915) 24 Cox C.C., at p. 405. Yet the evidence in this case would seem to have brought it comfortably within the Macnaghten rules.

[3] See for example the two Irish cases cited on page 81, *supra*.

[4] (1922) 16 Cr. A.R., 164, at p. 170.

[5] Cf. *R.* v. *Kopsch* (1925) 19 Cr. A.R. 50.

[6] 15th May, 1924.

[7] Cmd. 2005 (1924), p. 21.

We are now in a position to discuss the main problem, which may be formulated thus: Has the time come to regard the Macnaghten rules as a formulation of historical interest, based upon an outmoded psychology; are they, whatever their value in the past, too narrow and restrictive in the light of modern knowledge; and should they be extended to admit the defence of irresistible impulse? These questions are here answered in the negative, and the attempt will be made in this essay to demonstrate that the Macnaghten rules are based upon sound and fundamental principles of criminal liability, that those principles are at least as firmly embedded in the criminal law to-day as they have ever been,[1] and that all the advantages which are urged by the protagonists of irresistible impulse can be made available without undermining the foundations of the law.

It cannot be denied that the Macnaghten rules were formulated at a time when much less was known about the working of the mind than is known to-day. The philosophic background[2] was the associationist doctrine of Locke (subsequently developed by Hume, J. S. Mill, and Bain) which regarded ideas as the basic phenomena of mental activity, and approached the problems of emotion and volition from an intellectualist viewpoint. Locke defined a madman as "one who reasons correctly from false premises". In Hadfield's case[3] Erskine argued that "delusion . . , where there is no frenzy or raving madness, is the true character of insanity". The exception of "frenzy or raving madness" indicates that Locke's paradoxical epigram was not held to be the whole truth of the matter. But it is certain that the law regarded delusion as the essence of insanity, or more accurately (and the point is of fundamental importance, as we shall see later), it regarded delusion as essential to the plea of insanity. As Parke B. said in *R.* v. *Barton*,[4] "These circumstances" (i.e. that the accused wanted to commit suicide, made no attempt to escape, showed no regret for the murder of his wife) "ought all to be taken into consideration, but it was difficult to see how they

[1] And indeed are considerably more apparent since Mr. J. W. C. Turner shed light upon them in his article, "The Mental Element in Crimes at Common Law," *The Modern Approach to Criminal Law* (Ed. by L. Radzinowicz and J. W. C. Turner), p. 195.

[2] See Vinogradoff, *Historical Jurisprudence*, Vol. I, pp. 37 ff.

[3] (1800) 27 How. St. Tr. 1282.

[4] (1848) 3 Cox, 275.

could establish the plea of insanity in a case where there was a total absence of all delusion." It is clear enough, then, why the questions which the House of Lords propounded to the judges in 1843 referred explicitly[1] to insane delusion; not only did they arise directly out of a case involving delusion (Macnaghten), but they were propounded at a time when delusion was regarded as the *sine qua non* of insanity.

In the course of the last hundred years, and particularly from the beginning of the twentieth century, the science of the mind has made great progress. The old "faculty psychology" (like its concomitant technique of phrenology), has been exploded;[2] and it has been judicially noted that "It is quite out of accord with modern research in psychology to assert an absolute gap between cognition and conation".[3] Is it not time, then, that the Macnaghten rules, if not put aside, were at any rate extended to admit the defence of irresistible impulse?

It is submitted that the question is due to a basic misunderstanding of the nature of criminal responsibility; for this cannot be directly affected by any new facts that medical science may discover about the mind. Criminal responsibility is purely an artifact of the law.[4] The law declares that certain acts, which it defines, are prohibited, and that it will convict any person who under certain conditions commits any such act. Those conditions are not identical for all offences, but in the case of common law offences (excepting Public Nuisance) they are all variations

[1] And, it is submitted, *exclusively* to insane delusion. Although it is our purpose to vindicate the adequacy of the Macnaghten rules, we cannot agree with those who maintain that Answer II, III covers a wider field than delusion.

[2] Mr. Cockburn, defending Macnaghten, said, "Modern science has incontrovertibly established that any one of these intellectual and moral functions of the mind may be subject to separate disease . . ." (Quoted by Lord Darling in the House of Lords debate, 15th May, 1924). May the word "incontrovertibly" be a lasting lesson to "modern science"!

[3] *Sodeman* v. *The King* (1936) 55 Commonwealth L.R. 192, per Evatt J.

[4] The argument throughout this essay is of course confined to criminal law. It is beside the point to discuss the many differences between criminal and civil law: the essential difference, for the present purpose, is that in civil cases the court has to adjudicate between two conflicting claims of right, where generally there is no precedent established beyond doubt, while the criminal law has in every case already determined what it condemns, and has therefore only to decide whether the accused has committed the forbidden act, and whether the circumstances can be subsumed under the rule which the criminal law has established.

on the theme of *Mens Rea*. The maxim of English criminal law has long been "*Actus non facit reum nisi mens sit rea*". The history of *Mens Rea* is discussed by Mr. Turner in his article "The Mental Element in Crimes at Common Law". His conclusions as to the essence of *Mens Rea* to-day are stated in the following rule of liability: "It must be proved that the accused person *realised at the time* that his conduct would, or might *produce results of a certain kind*, in other words that he must have foreseen that certain consequences were likely to follow on his acts or omissions."[1] Now this description of *Mens Rea* explicitly[2] refers to *normal* persons only: if it were intended to enumerate the conditions of liability so as to cover a wider field than the normal, it would be necessary to add certain requirements which are normally *presumed* and are tacitly implied in the above statement. Among these, it is submitted, are the following conditions of liability:—

(1) It must be proved that the accused knew what he was doing, and what its physical effect would be.

(2) It must be proved that he knew that what he was doing was something of which society in general does not approve.[3]

A person who does not know the above is labouring under an *ignorance of fact*; and ignorance of fact may be a defence in criminal law.

Now in the case of a normal adult person accused of crime, there is a presumption that he knew the nature of his act and knew that it was wrong; and if he raises the defence of mistake, he must prove to the satisfaction of the court that his mistake was *reasonable*. But in the case of children there is a contrary presumption. Indeed the child under the age of eight[4] is conclusively presumed to be ignorant of the above facts, and is therefore in no circumstances criminally liable. The presumption continues between the ages of 8 and 14, but is no longer irrebuttable. There is also an *abnormal* class of adults, who may raise the

[1] *Op. cit.*, p. 199. Mr. Turner lays down as a separate rule of liability that the accused's conduct must be voluntary. It is submitted (*infra*, p. 97) that in this context the word "voluntary" is properly used only in terms of extrinsic coercion.

[2] *Op. cit.*, p. 198.

[3] This may appear, for the moment, to be begging a question; it is discussed more fully on page 94 ff *infra*.

[4] Before 1933 (by common law) under 7.

defence of mistake even though the mistake is not reasonable: they are persons "labouring under . . . a defect of reason, from disease of the mind . . .".[1] The ignorance of fact which such a person is allowed to plead in defence, in spite of its unreasonableness, is his delusion; for the purpose of the criminal law, *delusion* may be defined as *a mistake which though not based on reasonable grounds may yet be a valid defence because the mistaken person is of unsound mind.*[2]

This view is supported, if not implied, by Cave J. in *R.* v. *Tolson*:[3] "At common law an honest and reasonable belief in the existence of circumstances, which if true would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim: '*Actus non facit reum nisi mens sit rea.*' Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy." The same view is implied (but with disfavour) by Stephen,[4] who criticised the Macnaghten rules on the ground that they reduce madness to "a possible cause of innocent mistakes as to matter of fact and matters of common knowledge."

It may be convenient to observe here that the rules have been criticised on the ground that Answer IV recognises a condition of "partial delusion", which is unacceptable to modern psychology.[5] But it will, it is hoped, become clear in the course of the

[1] MacN. Rules, Answer II, III.

[2] In enumerating the grounds of exemption from responsibility, Kenny, in common with other authorities, gives separate treatment to Infancy, Insanity, and Intoxication on the one hand, and to Ignorance of Fact on the other. From the point of view of exposition of the law it may be more convenient to treat them separately, but it seems regrettable that they should be regarded as distinct, the first three in the category "Where there is no will," the fourth in "Where the will is not directed to the deed" (Kenny, *Op. cit.*, 15th Ed., Chapter IV). The present submission is that they are all forms of Ignorance of Fact (real or presumed). Intoxication has not been dealt with above, because though the established rules fully support this thesis, the subject would take us too far for the present purpose.

[3] (1889) 23 Q.B.D. 168, at p. 181.

[4] *History*, Vol. II, p. 168.

[5] And was not, indeed, universally acceptable at the time. As Lord Brougham said in *Waring* v. *Waring* (1848) 6 Moo. P.C. 341; "Mind is one and indivisible. We cannot, therefore, in any correctness of language, speak of general and partial insanity. If the being or essence which we term the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound upon other subjects."

argument that this concept is quite redundant, though the issue was raised in the questions put to the judges; it is contained in the general principle of immunity by reason of mistake, and it in no way weakens the validity of the rules as a whole.

In pursuance of our argument that the defence permitted to an insane person is merely an extension of the ordinary rules of *Mens Rea*, so as to admit unreasonable mistake, let us now examine more closely that passage of the judges' answers which has been most frequently quoted in the courts, and may be regarded as the nucleus of the Macnaghten rules. This lays down that "to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

The words "nature and quality of the act" and the word "wrong" have been variously interpreted. Those who take "wrong" to mean "illegal" are of course able to interpret "quality" as referring to moral quality, i.e. "wrongness". Others have declared that whatever "wrong" may mean, in this context it is certainly not equivalent to "illegal". Stephen evidently regarded the dispute as of no great moment: "I do not in connection with this subject," he wrote,[1] "attach practical importance to the controversies connected with the nature of the distinction between right and wrong." But this indifference (which led him to interpret "wrong" sometimes as illegal, sometimes as immoral, in an objective or a subjective sense) provides its own object-lesson in the redundancy into which he lapses; for example,[2] "Hadfield clearly knew the nature of his act, namely, that he was firing a loaded horse-pistol at George III. He also knew the quality of the act, namely, that it was what the law calls high treason. He also knew that it was wrong (in the sense of being forbidden by law), for the very object for which he did it was that he might be put to death that so the world might be saved."

The consequence of indifference to the exact meaning of these terms is well illustrated in *R.* v. *Hay*[3] (a curious anticipation of the notorious Loeb case in America). In that case a man was

[1] *History*, Vol. II, p. 167. [2] *Ibid.*, p. 159. [3] (1911) 22 Cox, 268.

indicted for shooting with intent to murder: he had fired several shots at a man whom he had met casually, and remarked that "he had experienced practically every sensation; that full knowledge came from experience; that he had never experienced the killing of a man; and that he had weighed the *pros* and *cons* of what he was going to do." The prison doctor pronounced him of unsound mind, and said that in his opinion the prisoner knew he was firing a revolver, but owing to disease of the mind was incapable of controlling his homicidal impulse. Under Darling J.'s direction (which admitted the defence of irresistible impulse), the jury returned the verdict of "guilty but insane". The official report of the case (155. O.B. Sess. Prs. 337) says it was found that the prisoner "knew the nature of the act, but he did not know the quality of it"!

It is submitted that the correct meaning of the words "nature and quality" was laid down by Reading L.C.J. in *R.* v. *Codere*,[1] when he said that they refer to "the physical character of the act". No attempt was made there to discriminate between the two words "nature" and "quality", and perhaps no differentiation is strictly necessary; but it is submitted that the words do admit of differentiation, and that in the "light" of such a decision as *R.* v. *Hay*, and in view of the controversy that has raged around them, it is desirable to discriminate between them. Let us take an example which Stephen cited in another connection.[2] "An idiot once cut off the head of a man whom he found asleep, remarking that it would be great fun to see him look for it when he woke."[3] It is submitted that the idiot knew the *nature* of his act, i.e. he knew he was hacking at a human head and not at a loaf of bread; but he did not know the *quality* of his act, i.e. he did not know that the hacking off of a human head is the *sort* of act which is *fatal*, the sort of act which makes it impossible for a man ever to wake up again. In other words, "nature" may be interpreted as referring to the act itself, "quality" to its physical

[1] (1916) 12 Cr. A.R. 21, at p. 27.

[2] *History*, Vol. II, p. 166.

[3] Stephen argued that he would not be responsible because he did not himself regard the act as wrong, though he knew it was wrong in the sense that he knew people in general would not approve. With all respect, this seems to me a typical consequence of Stephen's confessed indifference to the exact meaning of "wrong". If we were to adopt this criterion, Townley (see *infra*, p. 95) could not have been found guilty.

effects, to the sort of consequences to which it may be expected to give rise. Now let us take a rather less far-fetched illustration. A man, in full possession of all his faculties, deliberately fires a loaded gun into a dense shopping crowd, and so kills a woman. He is undoubtedly guilty of murder. But suppose a lunatic does the same, for the simple reason that he likes to hear the shrieks of frightened women. His act might be covered by the Macnaghten rules. For even though he knew the *nature* of the act, i.e. that he was firing a gun at a crowd, it might be shown to the satisfaction of the court that he did not know the *quality* of the act, i.e. that firing a gun at a crowd was such an act as would as probably lead to death as to panic. Now every sane man is presumed to know what he is doing, and to intend the natural consequences of his act: and because this is normally presumed, it is not explicitly stated in the usual definitions of *Mens Rea*. But in the case of a person suffering from mental disease, the presumption may be rebutted; and although "every man is to be presumed to be sane",[1] if it is proved to the satisfaction of the jury that he did not know the nature and quality (or physical consequences) of his act, i.e. that he did not fulfil a condition tacitly implied in the normal concept of *Mens Rea*, he will not be held responsible.

Next we come to the word "wrong". According to Oppenheimer, Stroud, Stephen (at times), and other authorities, this means illegal. They point to Answer I, in which the judges said, "he . . . is punishable . . . if he knew . . . that he was acting contrary to law; by which expression we understand your lordships to mean the law of the land," and argue that to interpret "wrong" as meaning anything other than illegal is to convict the judges of inconsistency. This argument, with all respect, does not stand up to examination. In Answer I, the judges replied to a question in which the specific circumstances supposed were that "the accused knew he was acting contrary to law";[2] and with their natural leaning to exactitude, the judges said that by the expression "law" they understood their lordships to mean "the law of the land". The second and third questions were framed more generally, and it is in the answer to these that we find the

[1] Macn. rules; Answer II, III.

[2] The actual circumstances, in fact, of the Macnaghten case; as also of the earlier eading case of Hadfield.

conditions of criminal responsibility of the insane fully expressed. Now it is true that every man is presumed to know the law; but it is also notorious that not every man does; and if ignorance of the law were regarded as peculiar to insanity, everyone outside the legal profession (and not a few within it) would run the risk of being certified. The explanation of this apparent paradox is very simple. For the purposes of legal administration, it is inevitable that every man should be presumed to know the law; for the defence of ignorance would be well nigh impregnable, and as Lord Ellenborough said,[1] "there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case." At the same time, in the ordinary intercourse of life, it is recognised that the law is an infinite agglomeration of technicalities, and cannot be known by the light of nature alone. Now although everyone is to some extent ignorant of the law, there are certain ideas current in society of which every sane man is presumed to be aware; and foremost among these are the current ideas of "right" and "wrong". They are "common knowledge".[2] These ideas may be founded upon a substratum of religious or philosophical doctrine; but whether they are or not (and let us remember that "the use of the words right and wrong preceded metaphysics, and extends into classes of society which know nothing of them"[3]) they are objective in the sense that they are facts, just as a "custom of the trade" is a fact. A man may disagree with them, but provided he is sane he will not be heard to say that he does not know of their existence. He is not permitted "non intellegere quod omnes intelligunt".[4] It has been stated[5] that "in modern times criminal liability is no longer based upon a moral standard when the wrong-doer is deemed to be sane. The case of a wrong-doer who is insane has presented problems which cannot be said yet to have been solved." It is submitted that there is no external "moral standard" in the case of the insane wrong-doer either; the question is simply, did he know what every sane man is presumed (not

[1] *Bilbie* v. *Lumley* (1802), 2 East, 469.

[2] See the first quotation from Stephen on p. 92 *supra*.

[3] Stephen, paper read before the Juridical Society, Vol. I, p. 75.

[4] *Digest* 50. 16. 213. 2.

[5] Turner *op. cit.*, p. 223. For a discussion of the moral standard of former times, see pp. 201 ff.

merely in law, but for all purposes) to know, viz. that the act he committed is not approved by society? Or was he so affected by mental disease as "non intellegere quod omnes intelligunt"? If he was so affected, then he is not responsible, because he lacks an indispensable condition of *mens rea*; he is *mistaken* as to a *fact* which every sane man is presumed to know—of which the presumption is so strong as to be implied and not expressed in the ordinary conditions of *mens rea*.

It is submitted that this interpretation of "wrong" as "what is reputed to be wrong, what society condemns"[1] recommends itself as inevitable for two reasons. In the first place, it brings the insane wrong-doer within the ordinary conditions of *mens rea*, whereas the alternative interpretations either postulate a "moral standard" for him which no longer exists for others, or else grant him a meaningless and unnecessary exemption from the general presumption that every man knows the law. Secondly, this interpretation is valid for all the leading cases—(apart from Hadfield[2] and Macnaghten, which, through the eloquence of Erskine and Cockburn respectively, were wrongly decided on any interpretation). Let us take the case of *R.* v. *Townley*,[3] for example. Here the accused was charged with the murder of his fiancée. He argued with the prison doctor that he was entitled to treat her as a chattel, and the doctor was unable to dislodge him from this perverse conviction. If we adopt the purely subjective test of "wrong",[4] it is difficult to see how Townley could have been convicted, so long as he continued to insist that he was right.

[1] This is the interpretation which Reading L.C.J. may have had in mind when he said (*R.* v. *Codere* (1916) 12 Cr. A.R. 21, at p. 27), "the standard to be applied is whether according to the ordinary standard adopted by reasonable men the act was right or wrong," though Mr. Turner appears to regard this definition as an "objective test of *moral blame*"; *op. cit.*, p. 223 and *Mental Abnormality and Crime* (Ed. by L. Radzinowicz and J. W. C. Turner), p. XII.

[2] Stephen poses the question, "Suppose the Almighty really *had* told Hadfield that he should commit his crime and so be sent to his death?" but dismisses it as hardly "decent". To rush in where the learned writer feared to tread, it is submitted that if the Almighty had given Hadfield this command, as He certainly knew the laws of England it would presumably have been with the intention that he should be hanged; we could hardly take it upon ourselves *in foro humano* to interfere with this project; and it would not be for us, as Lord Birkenhead said in a very different context, "to attempt to question the inscrutable ways of Providence."

[3] (1863) 3 F. & F. 839.

[4] As Stephen did in the case of the idiot mentioned on p. 93 *supra*.

But it is evident from the facts of the case that he knew he had committed an act condemned by public opinion (and the law). Those cases (and they are frequent) in which the accused knows he has broken the law are explicable *a fortiori* on this interpretation of "wrong"; for no man (any more than society itself) can set himself up as wiser than the law; what the law condemns must be *reputed to be wrong, frowned upon by society*. That is why there is no inconsistency between Answer I and Answer II, III; the first replies to a narrower, the second to a wider question, and the first is contained in the second.

We may conveniently at this point reply to the argument that Answer II, III was intended to cover a wider field than delusion. As Stroud[1] put it: "the combined answer to questions 2 and 3 . . . was framed with the intention of covering a wider ground, and has always been accepted as defining the rule of law applicable to any case (whether of alleged delusions or not) where irresponsibility is claimed on the ground of unsoundness of mind." But the fallacy behind this view is apparent from the example which Oppenheimer cited in support of it. He gave the case of a lunatic who had lost his memory through general paralysis of the insane or through senile dementia, and having forgotten that he was married went through a form of marriage; will such a person, he asked, not be protected by Answer II, III? The answer is, of course he will. But is not this a case of delusion? Owing to loss of memory the lunatic labours under the mistaken belief (i.e. the delusion) that he is not married. It does not matter to the law whether this mistaken belief arises out of a total loss of memory caused by general mental degeneration, or whether it is due to a concussion or other accident that gives rise (by processes of which we know very little) to some partial and specific amnesia or to hallucinations. As far as the law is concerned, there is in every case that comes within the Macnaghten rules a delusion, i.e. a mistaken belief which though unreasonable is excused because it is held by a person of unsound mind.

The Macnaghten rules are, of course, not above criticism. They are verbose and repetitive, and they take for granted psychological conditions which we do not recognise to-day. Nevertheless, it is submitted that they are fundamentally sound

[1] *Mens Rea*, p. 73.

and consistent. Their repetitiveness is mainly due to the form in which the questions were propounded. Their inconsistencies are apparent and not real. Comprehending with true insight the fundamental principles of criminal responsibility, the judges applied those principles with unimpeachable logic to the special problem of the insane.

The Inadmissibility of Irresistible Impulse

Having demonstrated the relation between the Macnaghten rules and the concept of *mens rea*, we are now in a better position to consider the claims of irresistible impulse. The admission of this defence is generally opposed on two distinct grounds. The first ground is difficulty of proof.[1] As Lord Hewart said in the House of Lords debate,[2] "In practice if this new limb were to be added to the alternatives in the Rules in Macnaghten's case it would be impossible to distinguish between the impulse of the person said to be suffering from mental disease, and the impulse of the ordinary offender who is moved to commit a crime by the desire for gain or revenge." Impulsive insanity, at present "the last refuge of a hopeless defence",[3] would be pleaded in answer to every grave charge. For as Tarde observed,[4] "It becomes more and more easy for a lawyer, with the writings of alienists at his disposal, to demonstrate the irresistible nature of the criminal impulse which carried his client off his feet." The second ground of objection is the necessity to maintain every deterrent. In the well-known words of Bramwell B.,[5] "If an influence be so powerful as to be termed irresistible, so much more reason is there why we should not withdraw any of the safeguards tending to counteract it." A Canadian judge[6] put the same point more brusquely: "If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help." Both these grounds of objection seem perfectly valid; but it is submitted that the fundamental argument against the admission of

[1] See e.g. Prof. Goodhart, *Essays in Jurisprudence*, pp. 46-47.
[2] 15th May, 1924.
[3] Per Darling J. in *R.* v. *Thomas* (1911) 7 Cr. A.R. 36.
[4] *Penal Philosophy*, p. 15 (quoted by Vinogradoff, *Hist. Jur.*, Vol. I, p. 33).
[5] *R.* v. *Haynes* (1859) 1 F. & F. 666.
[6] Riddell J. in *The King* v. *Creighton* (1908) 14 Can. Crim. Cases 349.

irresistible impulse is that it introduces a volitional exemption from liability which (unlike the cognitive rules of *mens rea*) is wholly unknown to the law.

It is true that a man is not responsible for an act which is not voluntary; but it is submitted that this rule is not so wide in its scope as it is sometimes represented to be. It obviously covers a fit of convulsions, and cases of physical compulsion, as "if A by force take the arm of B and the weapon in his hand, and thereof stabs C whereof he dies: this is murder in A, but B is not guilty";[1] for in these cases the man "*agitur non agit*". But apart from this, it is limited to a few exceptional cases of obedience to orders, duress, unwilling agency, and of course accident. In no case does it apply to a man's constitutional inability to control himself. Thus we must respectfully disagree with the learned author[2] who wrote, "The result of the Macnaghten rules is that a different test of responsibility is applied in the case of the sane and the insane. If either knowledge or control of his actions is proved to be absent in a sane man, he is held not to have intended or not to have willed the act with which he is charged. But under the rules, in the case of the insane, power of control is inferred from the possession of knowledge." According to the same writer, "If uncontrollable impulse were recognised as a ground of exemption from responsibility it would be because in such cases there is no *actus reus*."[3] The analogy is thus drawn between this and somnambulism; "if a man walking in his sleep do something it is not his *act* at all."[4] Now it is respectfully submitted that in the case of the somnambulist it is *mens rea* that is lacking. The *somnambulist* may know what he is doing; but it is the *wide-awake man* who stands in the dock, and he cannot be held responsible for the *mens rea* of the somnambulist. Dr. Jekyll, (*pace* Scrutton J.)[5] would not have been hanged for the murder that Mr. Hyde had committed; he would have been acquitted, or more technically, found "guilty but insane".

[1] Dalton, c. 145, p. 473.

[2] Dr. Stallybrass, in *The Modern Approach to Criminal Law* (Ed. by L. Radzinowicz and J. W. C. Turner), p. 416.

[3] *Ibid.*, p. 405.

[4] Lord Hewart; quoted by Kenny, *op. cit.*, p. 42.

[5] In *R.* v. *Chetwynd*, where "automatism" was set up as a defence: *The Times*, 4th Nov. 1912.

Thus we come back to the position that *mens rea* is the cornerstone of common law liability. Exemption on the ground that the act is "involuntary" (except in the narrow sense noted above) would introduce an entirely new principle; it is the thin end of a wedge that would split the criminal law from top to bottom, and is therefore wholly inadmissible.[1]

Before leaving this subject, it may be instructive to advert to a code which did endeavour to make responsibility depend upon "free will". Oppenheimer quotes the Aargau (Switzerland) Penal Code of 1857, Article 45 (in part):

> "A crime presupposes the free will of the actor. As a general rule the free will is presumed. It is, however, presumed to be absent: . . .
>
> (*b*) In those whose mental powers are not sufficiently developed to enable them to understand the consequences and the criminality of an act.
>
> (*c*) In persons completely deprived, by disease of the mind, of the use of reason. . . .
>
> (*e*) In case of confusion of the senses or of mind, not due to the actor's own fault, provided that the actor was not aware of what he was doing or that his act was punishable."

As Oppenheimer observes,[2] "The text of this article is remarkable: it expressly declares destruction of freedom of will to be the general ground of immunity in cases of lunacy; but the test by which the existence or non-existence of a free will is to be determined is in (b) and (e) the knowledge or ignorance of the nature, consequences, and illegality of the act, in (c) the complete abolition of the reasoning powers, i.e. in all three cases a criterion having reference exclusively to the intellect."

In conclusion, it must be said that none of the above arguments in any way detracts from the importance of "irresistible impulse" as evidence of insanity within the meaning of the Macnaghten rules. It is no doubt because the fullest account is

[1] "Some medical theories seem to go to the length of maintaining that all crime is of the nature of disease, and that the very existence of criminal law is a relic of barbarism" (Stephen, *Hist. Crim. Law*, Vol. II, p. 126). Those who take this attitude—and it may be perfectly defensible—will not object to the disintegration of the criminal law: but the argument above is addressed to those who believe it fulfils a necessary function and should be preserved.

[2] *Op. cit.*, p. 64.

normally taken of such evidence that the Atkin Committee (though itself in favour of extending the rules) agreed that in the present state of the law "to the insane person justice is done".[1]

The Direction of Reform

Up to now we have been concerned to vindicate the present legal test of insanity, and to repel the defence of irresistible impulse. This argument might seem to indicate a repressive attitude towards the mentally unsound. But in fact such an impression would be far from the truth. We have so far been concerned solely with the responsibility (or "guilt") of the insane; not a word has been said about punishment. The two questions are essentially distinct, and are indeed on different metaphysical planes. Responsibility (or guilt) is a legal "concept"; punishment is a course of action. Nevertheless, there is an inveterate confusion between the two, which constitutes a considerable obstacle to penal reform. The reason for this confusion is not far to seek. From time immemorial the same judicial dignitary has declared a man "guilty", that is, liable to punishment, and has determined what his punishment is to be; and often the same law which prohibits certain acts simultaneously prescribes the penalties for transgression.

Now although for historical reasons conviction and judgment (to use the corresponding terms of the legal process) have gone hand in hand, there is clearly no reason in the nature of things why they should continue to do so. They are regarded as distinct in the ordinary practice of the courts. Even after conviction the prisoner may have "something to say why the court should not proceed to pass sentence upon him". But whether sentence is passed or not is immaterial to the question of responsibility; that question is resolved by conviction or acquittal. It may be expedient for conviction and judgment to be combined in the same process; but it is not inevitable. It is perfectly feasible for A to determine, by the ordinary rules of evidence, whether a man is liable to punishment, and then, if the man is convicted, for B to make enquiries as to his state of health, his motives, and an infinite variety of other circumstances irrelevant to the deter-

[1] Cmd. 2005 (1924) p. 21.

mination of the question "guilty or not guilty", with a view to deciding what to do with him. It is submitted that all our efforts to improve the condition of the insane offender should be concentrated upon the perfection of this second stage. It is unnecessary, dangerous and unrewarding to meddle with the legal principles of liability; our business is with the penological practice of correction.

"The modern administrator of justice", Sir Henry Maine wrote,[1] "has confessedly one of his hardest tasks before him when he undertakes to discriminate between the degrees of criminality which belong to offences falling within the same technical description. It is always easy to say that a man is guilty of manslaughter, larceny, or bigamy, but it is often most difficult to pronounce what extent of moral guilt he has incurred, and consequently what measure of punishment he has deserved. There is hardly any perplexity in casuistry, or in the analysis of motive, which we may not be called upon to confront, if we attempt to settle such a point with precision; and accordingly the law of our day shows an increasing tendency to abstain as much as possible from laying down positive rules on the subject. In France, the jury is left to decide whether the offence which it finds committed has been attended by extenuating circumstances; in England, a nearly unbounded latitude in the selection of punishments is now allowed to the judge; while all States have in reserve an ultimate remedy for the miscarriages of law in the Prerogative of Pardon, universally lodged with the Chief Magistrate." The question of guilt can only be answered "Yes" or "No". The term "partial responsibility" is meaningless in criminal law. "Criminal responsibility means liability to be convicted of or punished for crime, and such liability either exists or does not exist; there is no *tertium quid*."[2] The question of punishment, on the other hand, admits of an infinite variety of decisions. Furthermore, the answer to the first question is generally dictated by precedent; the precedent is firmly entrenched in the abiding principles of the law; it is neither easy nor desirable to displace it. But when it comes to the question of punishment, we are virtually unfettered. Owing to the fact that "the law of our day shows an increasing tendency to abstain as much as possible

[1] *Ancient Law*, Chapter X.

[2] Oppenheimer, *op. cit.*, p. 226.

from laying down positive rules on the subject", we are able to vary our penological practice in accordance with the progress of science. The substantive law strikes roots, and becomes difficult to dislodge; punishments set no precedent.

It is submitted, therefore, that in all cases of insanity which are not covered by the Macnaghten rules (and those cases so serious as to require confinement for the protection of society would normally be so covered) the cause of justice would best be served by proceeding to a conviction, and taking all the circumstances into account in passing judgment. This would imply an exhaustive psychiatrical examination; and it is evident that the medical experts should have the predominant voice in determining the mode of correction or punishment. It is here, and not on the question of conviction, that medical opinion should be permitted, in large measure, to dictate to the administrators of the law.

Similar consideration should be given to those offences which are at present treated for the most part like ordinary crimes, but which are evidently symptomatic of mental disorder. It might be argued that an act like indecent exposure is so evidently psychopathological that it ought to be immune from the sanctions of the criminal law. But it is obvious that indecent exposure is socially undesirable, and equally obvious that if the act were not visited with the displeasure of the law, it would be more frequent. Are we then faced with the dilemma of punishing a man for what he cannot help doing, or else giving him licence to do it wherever and as often as he likes? There is no such dilemma. It is the function of the criminal law, first to decide upon the prohibition of indecent exposure and to define exactly what acts constitute that offence, and then, when an alleged offender is brought into court, to determine whether he is guilty. A medical witness may, of course, testify that the accused is so insane as not to know a hawk from a handsaw, and this evidence would probably persuade the court that he did not know the nature and quality of his act, etc. The vast majority of exhibitionists, however, are well aware that they are committing an offence, and they will be rightly convicted. After conviction, the question of how to deal with each case should be left very largely to medical experts.

If the court is satisfied that an irresistible impulse (or a very powerful impulse) contributed to the commission of any crime, it can, except in one case, take this into account in passing judgment, exactly as it can take into account such considerations as motive. The one exception is of course murder; and as it is in murder cases that the defence of insanity is most frequently raised, it may be argued that there is no alternative to admitting the defence of irresistible impulse. But though murder looms large in the problem of criminal insanity, it must be remembered that the discretion of the Home Secretary is a powerful safeguard against any miscarriage of justice, and it is at least open to question whether the recognition of irresistible impulse as a valid defence would make any difference to the number of executions. Nevertheless, the present system, with its "solemn mockery"[1] of a make-believe death sentence, has nothing to recommend it. Reform is certainly overdue;[2] but it is reform of the fixed sentence for murder, and not of the legal test of insanity, that is needed.

[1] The "solemn mockery" is trenchantly criticised by Professor Seaborne Davies in his article, "Child-Killing in English Law"; *The Modern Approach to Modern Law* (Ed. by L. Radzinowicz and J. W. C. Turner), p. 301: but it is respectfully submitted that in general there is much to be said for "the perennial tendency to avoid reforms of the substantive law by relying upon a recourse to judicial or executive discretion" (*ibid* p. 324), and that the substitution of such discretion for the immutable death sentence would obviate many of the fixed and artificial distinctions (such as "being a child under the age of twelve months" in the Infanticide Act, 1938) which in spite of all reforms the substantive law, by its very nature, cannot avoid.

The same learned writer's article "Irresistible Impulse in English Law," *Canadian Bar Review*, Vol. xvii, p. 147, gives an account of the attempts which have been made to reform the law by admitting irresistible impulse as a defence, and of the influence which capital punishment has exercised upon the dissension in this matter between the legal and medical professions.

[2] Manslaughter is probably the most obscure offence in our criminal law: it is because the judge has no discretion as to sentence that intentional killing under serious provocation, which is really murder in extenuating circumstances, is treated as "voluntary manslaughter" (Turner, *op. cit.*, pp. 223-224).

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ENGLISH STUDIES IN CRIMINAL SCIENCE

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It has frequently been a source of surprise to foreign students that no school of law in any of our older Universities had an institution devoted to investigating the great social and legal problems created by the law-breaker. What originally led the University of Cambridge to establish within the Faculty of Law a permanent centre devoted to such investigations was the realisation of the fact that although England had taken in recent years a prominent part in penal reform, very little scientific study of crime and of the administration of criminal law had been achieved in this country. It was also hoped that some useful service might be rendered in connection with the problems of post-war reconstruction and subsequent penal developments. Among the work which has been initiated is the publication of the series called *English Studies in Criminal Science*, the aim of which is to stimulate interest in the solution of the problems created by criminality and to promote further research. Each volume is a work of collaboration on a definite plan between authors well known for their achievements in medicine, law or the social services. The subjects dealt with are mental abnormality in relation to crime, penal developments in India, English criminal law, the machinery of justice and the after-conduct of convicted offenders, and the books are designed to be of use not only to the medical and legal professions, but also to all who realize the extent to which social stability depends upon a proper attitude towards the problems of crime.

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Preface by PROFESSOR P. H. WINFIELD, K.C., LL.D., F.B.A.

The startlingly high percentage of mental cases of various kinds which has been revealed by modern official investigations is exercising the minds of all who are interested in the welfare of the community. This phenomenon is especially disturbing to those concerned with the administration of criminal justice. The Cambridge Department accordingly procured the collaboration of the distinguished authors of these studies with the aim of explaining in concise and plain terms the relation between mental defect and criminal behaviour. This is the first publication of its kind in England and it is hoped that it will not only assist

those who have to decide upon the treatment to be accorded to the mentally affected delinquent, but will also provide much needed information for workers in the social and moral sciences.

VOLUME III

MODERN PRISON SYSTEM OF INDIA

BY

LT.-COL. F. A. BARKER, C.I.E., C.B.E., O.St.J., M.A., M.D., B.C., I.M.S. (Rt.), formerly S.M.O. PORT BLAIR AND Inspector-General of Prisons, C.P. and Punjab.

Notes by Sir LOUIS STUART, C.I.E., and A. CAMPBELL, M.A., I.C.S., late Judge, High Court, Lahore.

Foreword by Lord HAILEY, G.C.S.I., G.C.I.E., G.C.M.G., HON. D.C.L.

Preface by PROFESSOR P. H. WINFIELD, K.C., LL.D., F.B.A.

It is now coming to be realised that political development and social welfare throughout the British Commonwealth of Nations are linked with the establishment and maintenance of a proper standard of criminal justice. This book describes the main reforms introduced in India since the appearance of the 1919-1920 Report of the "East Indian Jail Committee". Its purpose is to stimulate wider interest in this branch of colonial administration and the author, Colonel Barker, who had taken a prominent part in Indian penal administration for nearly thirty years, is exceptionally qualified to appraise the work so far accomplished. Sir Louis Stuart and Mr. A. Campbell have drawn upon their experience as Indian Judges to add a Note on some peculiar characteristics of criminality in India. This well illustrates the nature of the problems created by local traditions and circumstances.

VOLUME IV

THE MODERN APPROACH TO CRIMINAL LAW

STUDIES BY

D. SEABORNE DAVIES, LL.B., R. M. JACKSON, LL.D., the late PROFESSOR C. S. KENNY, L. RADZINOWICZ, LL.D., W. T. STALLYBRASS, D.C.L., J. W. C. TURNER, M.A., LL.B., E. C. S. WADE, LL.D., and B. A. WORTLEY, LL.D.

Preface by PROFESSOR P. H. WINFIELD, K.C., LL.D., F.B.A.

This book, promoted by the Cambridge Department, carries on the tradition initiated some fifty years ago by the late C. S. Kenny, renowned, as Downing Professor of English Law, for his expositions of

criminal law as an academic discipline, and for his far-sighted appreciation of the need for the scientific study of criminality. Jurists of the Universities of Oxford, Cambridge, London and Manchester have collaborated in producing this work on the larger problems of criminal law and its administration at the present day. The volume comprises essays which elucidate major principles of criminal law, indicate the main lines in the development of our penal administration and demonstrate the importance of comparative studies in criminal science. The plan upon which these essays have been chosen and arranged has been constructed so as to emphasize the relation which criminal law bears to the other branches of criminal science.

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VOLUME V

AFTER-CONDUCT OF DISCHARGED OFFENDERS

BY

SHELDON GLUECK, Ph.D., LL.M., Professor of Criminal Law and Criminology, Harvard Law School, and ELEANOR T. GLUECK, Ed.D., Research Associate in Criminology, Harvard Law School.

Foreword by Dr. FELIX FRANKFURTER, Justice of the Supreme Court of U.S.A.

Preface by PROFESSOR P. H. WINFIELD, K.C., LL.D., F.B.A.

What happens to the former inmates of our prisons and reformatories? How many return to a life of crime and vice? What proportion of them change from aggressive and dangerous criminals to misdemeanants, vagrants, chronic alcoholics and the like? Is imprisonment a preventive of recidivism? To these and similar questions even today we in this country cannot give adequate answers. Some years ago Professor and Mrs. Sheldon Glueck of the Harvard Law School opened a new chapter in criminal science by initiating what are known as "Follow-up Investigations" to obtain the information needed, and the Cambridge Department asked them to make a report on the methods and results of their labours. This book summarises their findings and gives the answers to the questions stated above. The importance of the work which these distinguished authors have promoted is emphasized in the foreword written by Dr. Felix Frankfurter, Judge of the Supreme Court of the U.S.A.

VOLUME VI

AN INTRODUCTION TO THE CRIMINAL LAW OF AUSTRALIA

BY

J. V. BARRY, K.C., Judge of the Supreme Court of Victoria

and

G. W. PATON, M.A., B.C.L., of Gray's Inn, Barrister-at-Law, Professor of Jurisprudence of Melbourne.

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O. F. DIXON, LL.M.

Preface by PROFESSOR P. H. WINFIELD, K.C., LL.D., F.B.A.

The aim of the authors has been "not to produce a technical work of reference, but to delineate broadly the characteristic features of the criminal law in Australia in order to stimulate interest in comparative law". This difficult task they have accomplished with admirable precision and thoroughness. Their book will be found of great value not only by those concerned with the administration of criminal law in Australia but also by those who are interested in the development of criminal law generally.

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