THE COMMON LAW by OLIVER WENDELL HOLMES, JR.

LECTURE II.

THE CRIMINAL LAW.

In the beginning of the first Lecture it was shown that the appeals of the early law were directed only to intentional wrongs. The appeal was a far older form of procedure than the indictment, and may be said to have had a criminal as well as a civil aspect. It had the double object of satisfying the private party for his loss, and the king for the breach of his peace. On its civil side it was rooted in vengeance. It was a proceeding to recover those compositions, at first optional, afterwards compulsory, by which a wrong-doer bought the spear from his side. Whether, so far as concerned the king, it had the same object of vengeance, or was more particularly directed to revenue, does not matter, since the claim of the king did not enlarge the scope of the action.

It would seem to be a fair inference that indictable offences were originally limited in the same way as those which gave rise to an appeal. For whether the indictment arose by a splitting up of the appeal, or in some other way, the two were closely connected.

An acquittal of the appellee on the merits was a bar to an indictment; and, on the other hand, when an appeal was fairly started, although the appellor might fail to prosecute, or might be defeated by plea, the cause might still be proceeded with on behalf of the king.

The presentment, which is the other parent of our criminal procedure, had an origin distinct from the appeal. If, as has been thought, it was merely the successor of fresh suit and lynch law, this also is the child of vengeance, even more clearly than the other.

The desire for vengeance imports an opinion that its object is actually and personally to blame. It takes an internal standard, not an objective or external one, and condemns its victim by that. The question is whether such a standard is still accepted either in this primitive form, or in some more refined development, as is commonly supposed, and as seems not impossible, considering the relative slowness with which the criminal law has improved.

It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance. The argument will be made plain by considering those instances in which, for one reason or another, compensation for a wrong is out of the question.

Thus an act may be of such a kind as to make indemnity impossible by putting an end to the principal sufferer, as in the case of murder or manslaughter.

Again, these and other crimes, like forgery, although directed against an individual, tend to make others feel unsafe, and this general insecurity does not admit of being paid for.

Again, there are cases where there are no means of enforcing indemnity. In Macaulay's draft of the Indian Penal Code, breaches of contract for the carriage of passengers, were made criminal. The palanquin-bearers of India were too poor to pay damages, and yet had to be trusted to carry unprotected women and children through wild and desolate tracts, where their desertion would have placed those under their charge in great danger.

In all these cases punishment remains as an alternative. A pain can be inflicted upon the wrong-doer, of a sort which does not restore the injured party to his former situation, or to another equally good, but which is inflicted for the very purpose of causing pain. And so far as this punishment takes the place of compensation, whether on account of the death of the person to whom the wrong was done, the indefinite number of persons affected, the impossibility of estimating the worth of the suffering in money, or the poverty of the criminal, it may be said that one of its objects is to gratify the desire for vengeance. The prisoner pays with his body.

The statement may be made stronger still, and it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object. This is the opinion, at any rate, of two authorities so great, and so opposed in other views, as Bishop Butler and Jeremy Bentham. Sir James Stephen says, "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. At the same time, this passion is not one which we encourage, either as private individuals or as lawmakers. Moreover, it does not cover the whole ground. There are crimes which do not excite it, and we should naturally expect that the most important purposes of punishment would be coextensive with the whole field of its application. It remains to be discovered whether such a general purpose exists, and if so what it is. Different theories still divide opinion upon the subject.

It has been thought that the purpose of punishment is to reform the criminal; that it is to deter the criminal and others from committing similar crimes; and that it is retribution. Few would now maintain that the first of these purposes was the only one. If it were, every prisoner should be released as soon as it appears clear that he will never repeat his offence, and if he is incurable he should not be punished at all. Of course it would be hard to reconcile the punishment of death with this doctrine.

The main struggle lies between the other two. On the one side is the notion that there is a mystic bond between wrong and punishment; on the other, that the infliction of pain is only a means to an end. Hegel, one of the great expounders of the former view, puts it, in his quasi mathematical form, that, wrong being the negation of right, punishment is the negation of that negation, or retribution. Thus the punishment must be equal, in the sense of proportionate to the crime, because its only function is to destroy it. Others, without this logical apparatus, are content to rely upon a felt necessity that suffering should follow wrong-doing.

It is objected that the preventive theory is immoral, because it overlooks the ill-desert of wrong-doing, and furnishes no measure of the amount of punishment, except the lawgiver's subjective opinion in regard to the sufficiency of the amount of preventive suffering. In the language of Kant, it treats man as a thing, not as a person; as a means, not as an end in himself. It is said to conflict with the sense of justice, and to violate the fundamental principle of all free communities, that the members of such communities have equal rights to life, liberty, and personal security.

In spite of all this, probably most English-speaking lawyers would accept the preventive theory without hesitation. As to the violation of equal rights which is charged, it may be replied that the dogma of equality makes an equation between individuals only, not between an individual and the community. No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with

bayonets in their rear, to death. It runs highways and railroads through old family places in spite of the owner's protest, paying in this instance the market value, to be sure, because no civilized government sacrifices the citizen more than it can help, but still sacrificing his will and his welfare to that of the rest.

If it were necessary to trench further upon the field of morals, it might be suggested that the dogma of equality applied even to individuals only within the limits of ordinary dealings in the common run of affairs. You cannot argue with your neighbor, except on the admission for the moment that he is as wise as you, although you may by no means believe it. In the same way, you cannot deal with him, where both are free to choose, except on the footing of equal treatment, and the same rules for both. The ever-growing value set upon peace and the social relations tends to give the law of social being the appearance of the law of all being. But it seems to me clear that the ultima ratio, not only regum, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing.

The considerations which answer the argument of equal rights also answer the objections to treating man as a thing, and the like. If a man lives in society, he is liable to find himself so treated. The degree of civilization which a people has reached, no doubt, is marked by their anxiety to do as they would be done by. It may be the destiny of man that the social instincts shall grow to control his actions absolutely, even in anti-social situations. But they have not yet done so, and as the rules of law are or should be based upon a morality which is generally accepted, no rule founded on a theory of absolute unselfishness can be laid down without a breach between law and working beliefs.

If it be true, as I shall presently try to show, that the general principles of criminal and civil liability are the same, it will follow from that alone that theory and fact agree in frequently punishing those who have been guilty of no moral wrong, and who could not be condemned by any standard that did not avowedly disregard the personal peculiarities of the individuals concerned. If punishment stood on the moral grounds which are proposed for it, the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and all the other defects which are most marked in the criminal classes. I do not say that they should not be, or at least I do not need to for my argument. I do not say that the criminal law does more good than harm. I only say that it is not enacted or administered on that theory.

There remains to be mentioned the affirmative argument in favor of the theory of retribution, to the effect that the fitness of punishment following wrong-doing is axiomatic, and is instinctively recognized by unperverted minds. I think that it will be seen, on self-inspection, that this feeling of fitness is absolute and unconditional only in the case of our neighbors. It does not seem to me that any one who has satisfied himself that an act of his was wrong, and that he will never do it again, would feel the least need or propriety, as between himself and an earthly punishing power alone, of his being made to suffer for what he had done, although, when third persons were introduced, he might, as a philosopher, admit the necessity of hurting him to frighten others. But when our neighbors do wrong, we sometimes feel the fitness of making them smart for it, whether they have repented or not. The feeling of fitness seems to me to be only vengeance in disguise, and I have already admitted that vengeance was an element, though not the chief element, of punishment.

But, again, the supposed intuition of fitness does not seem to me to be coextensive with the thing to be accounted for. The lesser punishments are just as fit for the lesser crimes as the greater for the greater. The demand that crime should be followed by its punishment should therefore be equal and absolute in both. Again, a malum prohibitum is just as much a crime as a malum in se. If there is any general ground for punishment, it must apply to one case as much as to the other. But it will hardly be said that, if the wrong in the case just supposed consisted of a breach of the revenue laws, and the government had been indemnified for the loss, we should feel any internal necessity that a man who had thoroughly repented of his wrong should be punished for it, except on the ground that his act was known to others. If it was known, the law would have to verify its threats in order that others might believe and tremble. But if the fact was a secret between the sovereign and the subject, the sovereign, if wholly free from passion, would undoubtedly see that punishment in such a case was wholly without justification.

On the other hand, there can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment. The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed.

If this is a true account of the law as it stands, the law does undoubtedly treat the individual as a means to an end, and uses him as a tool to increase the general welfare at his own expense. It has been suggested above, that this course is perfectly proper; but even if it is wrong, our criminal law follows it, and the theory of our criminal law must be shaped accordingly.

Further evidence that our law exceeds the limits of retribution, and subordinates consideration of the individual to that of the public well-being, will be found in some doctrines which cannot be satisfactorily explained on any other ground.

The first of these is, that even the deliberate taking of life will not be punished when it is the only way of saving one's own. This principle is not so clearly established as that next to be mentioned; but it has the support of very great authority. If that is the law, it must go on one of two grounds, either that self-preference is proper in the case supposed, or that, even if it is improper, the law cannot prevent it by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat. If the former ground is adopted, it admits that a single person may sacrifice another to himself, and a fortiori that a people may. If the latter view is taken, by abandoning punishment when it can no longer be expected to prevent an act, the law abandons the retributive and adopts the preventive theory.

The next doctrine leads to still clearer conclusions. Ignorance of the law is no excuse for breaking it. This substantive principle is sometimes put in the form of a rule of evidence, that every one is presumed to know the law. It has accordingly been defended by Austin and others, on the ground of difficulty of proof. If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try. But every one must feel that ignorance of the law could never be admitted as an excuse, even if the fact could be proved by sight and hearing in every case. Furthermore, now that parties can testify, it may be doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into. The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the lawbreaker.

The principle cannot be explained by saying that we are not only commanded to abstain from certain acts, but also to find out that we are commanded. For if there were such a second command, it is very clear that the guilt of failing to obey it would bear no proportion to that of disobeying the principal command if known, yet the failure to know would receive the same punishment as the failure to obey the principal law.

The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

If the foregoing arguments are sound, it is already manifest that liability to punishment cannot be finally and absolutely determined by considering the actual personal unworthiness of the criminal alone. That consideration will govern only so far as the public welfare permits or demands. And if we take into account the general result which the criminal law is intended to bring about, we shall see that the actual state of mind accompanying a criminal act plays a different part from what is commonly supposed.

For the most part, the purpose of the criminal law is only to induce external conformity to rule. All law is directed to conditions of things manifest to the senses. And whether it brings those conditions to pass immediately by the use of force, as when it protects a house from a mob by soldiers, or appropriates private property to public use, or hangs a man in pursuance of a judicial sentence, or whether it brings them about mediately through men's fears, its object is equally an external result. In directing itself against robbery or murder, for instance, its purpose is to put a stop to the actual physical taking and keeping of other men's goods, or the actual poisoning, shooting, stabbing, and otherwise putting to death of other men. If those things are not done, the law forbidding them is equally satisfied, whatever the motive.

Considering this purely external purpose of the law together with the fact that it is ready to sacrifice the individual so far as necessary in order to accomplish that purpose, we can see more readily than before that the actual degree of personal guilt involved in any particular transgression cannot be the only element, if it is an element at all, in the liability incurred. So far from its being true, as is often assumed, that the condition of a man's heart or conscience ought to be more considered in determining criminal than civil liability, it might almost be said that it is the very opposite of truth. For civil liability, in its immediate working, is simply a redistribution of an existing loss between two individuals; and it will be argued in the next Lecture that sound policy lets losses lie where they fall, except where a special reason can be shown for interference. The most frequent of such reasons is, that the party who is charged has been to blame.

It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear. It is only intended to point out that, when we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are external, and independent of the degree of evil in the particular person's

motives or intentions. The conclusion follows directly from the nature of the standards to which conformity is required. These are not only external, as was shown above, but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest. For it is precisely to those who are most likely to err by temperament, ignorance, or folly, that the threats of the law are the most dangerous.

The reconciliation of the doctrine that liability is founded on blameworthiness with the existence of liability where the party is not to blame, will be worked out more fully in the next Lecture. It is found in the conception of the average man, the man of ordinary intelligence and reasonable prudence. Liability is said to arise out of such conduct as would be blameworthy in him. But he is an ideal being, represented by the jury when they are appealed to, and his conduct is an external or objective standard when applied to any given individual. That individual may be morally without stain, because he has less than ordinary intelligence or prudence. But he is required to have those qualities at his peril. If he has them, he will not, as a general rule, incur liability without blameworthiness.

The next step is to take up some crimes in detail, and to discover what analysis will teach with regard to them.

I will begin with murder. Murder is defined by Sir James Stephen, in his Digest of Criminal Law, as unlawful homicide with malice aforethought. In his earlier work, he explained that malice meant wickedness, and that the law had determined what states of mind were wicked in the necessary degree. Without the same preliminary he continues in his Digest as follows:--

"Malice aforethought means any one or more of the following states of mind ..... "(a.) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; "(b.) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; "(c.) An intent to commit any felony whatever; "(d.) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed."

Malice, as used in common speech, includes intent, and something more. When an act is said to be done with an intent to do harm, it is meant that a wish for the harm is the motive of the act. Intent, however, is perfectly consistent with the harm being regretted as such, and being wished only as a means to something else. But when an act is said to be done maliciously, it is meant, not only that a wish for the harmful effect is the motive, but also that the harm is wished for its own sake, or, as Austin would say with more accuracy, for the sake of the pleasurable feeling which knowledge of the suffering caused by the act would excite. Now it is apparent from Sir James Stephen's enumeration, that of these two elements of malice the intent alone is material to murder. It is just as much murder to shoot a sentry for the purpose of releasing a friend, as to shoot him because you hate him. Malice, in the definition of murder, has not the same meaning

as in common speech, and, in view of the considerations just mentioned, it has been thought to mean criminal intention.

But intent again will be found to resolve itself into two things; foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act. The question then is, whether intent, in its turn, cannot be reduced to a lower term. Sir James Stephen's statement shows that it can be, and that knowledge that the act will probably cause death, that is, foresight of the consequences of the act, is enough in murder as in tort.

For instance, a newly born child is laid naked out of doors, where it must perish as a matter of course. This is none the less murder, that the guilty party would have been very glad to have a stranger find the child and save it.

But again, What is foresight of consequences? It is a picture of a future state of things called up by knowledge of the present state of things, the future being viewed as standing to the present in the relation of effect to cause. Again, we must seek a reduction to lower terms. If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen.

On the other hand, there must be actual present knowledge of the present facts which make an act dangerous. The act is not enough by itself. An act, it is true, imports intention in a certain sense. It is a muscular contraction, and something more. A spasm is not an act. The contraction of the muscles must be willed. And as an adult who is master of himself foresees with mysterious accuracy the outward adjustment which will follow his inward effort, that adjustment may be said to be intended. But the intent necessarily accompanying the act ends there. Nothing would follow from the act except for the environment. All acts, taken apart from their surrounding circumstances, are indifferent to the law. For instance, to crook the forefinger with a certain force is the same act whether the trigger of a pistol is next to it or not. It is only the surrounding circumstances of a pistol loaded and cocked, and of a human being in such relation to it, as to be manifestly likely to be hit, that make the act a wrong. Hence, it is no sufficient foundation for liability, on any sound principle, that the proximate cause of loss was an act.

The reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise. But the choice must be made with a chance of contemplating the consequence complained of, or else it has no bearing on responsibility for that consequence. If this were not true, a man might be held answerable for everything which would not have happened but for his choice at some past time. For instance, for having in a fit fallen on a man, which he would not have done had he not chosen to come to the city where he was taken ill.

All foresight of the future, all choice with regard to any possible consequence of action, depends on what is known at the moment of choosing. An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known. A fear of punishment for causing harm cannot work as a motive, unless the possibility of harm may be foreseen. So far, then, as criminal liability is founded upon wrong-doing in any sense, and so far as the threats and punishments of the law are intended to deter men from bringing

about various harmful results, they must be confined to cases where circumstances making the conduct dangerous were known.

Still, in a more limited way, the same principle applies to knowledge that applies to foresight. It is enough that such circumstances were actually known as would have led a man of common understanding to infer from them the rest of the group making up the present state of things. For instance, if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not. If a death is caused by the act, he is guilty of murder. But if the workman has reasonable cause to believe that the space below is a private yard from which every one is excluded, and which is used as a rubbish heap, his act is not blameworthy, and the homicide is a mere misadventure.

To make an act which causes death murder, then, the actor ought, on principle, to know, or have notice of the facts which make the act dangerous. There are certain exceptions to this principle which will be stated presently, but they have less application to murder than to some smaller statutory crimes. The general rule prevails for the most part in murder.

But furthermore, on the same principle, the danger which in fact exists under the known circumstances ought to be of a class which a man of reasonable prudence could foresee. Ignorance of a fact and inability to foresee a consequence have the same effect on blameworthiness. If a consequence cannot be foreseen, it cannot be avoided. But there is this practical difference, that whereas, in most cases, the question of knowledge is a question of the actual condition of the defendant's consciousness, the question of what he might have foreseen is determined by the standard of the prudent man, that is, by general experience. For it is to be remembered that the object of the law is to prevent human life being endangered or taken; and that, although it so far considers blameworthiness in punishing as not to hold a man responsible for consequences which no one, or only some exceptional specialist, could have foreseen, still the reason for this limitation is simply to make a rule which is not too hard for the average member of the community. As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law. Subject to these explanations, it may be said that the test of murder is the degree of danger to life attending the act under the known circumstances of the case.

It needs no further explanation to show that, when the particular defendant does for any reason foresee what an ordinary man of reasonable prudence would not have foreseen, the ground of exemption no longer applies. A harmful act is only excused on the ground that the party neither did foresee, nor could with proper care have foreseen harm.

It would seem, at first sight, that the above analysis ought to exhaust the whole subject of murder. But it does not without some further explanation. If a man forcibly resists an officer lawfully making an arrest, and kills him, knowing him to be an officer, it may be murder, although no act is done which, but for his official function, would be criminal at all. So, if a man does an act with intent to commit a felony, and thereby accidentally kills another; for instance, if he fires at chickens, intending to steal them, and accidentally kills the owner, whom he does not see. Such a case as this last seems hardly to be reconcilable with the general principles which have

been laid down. It has been argued somewhat as follows:--The only blameworthy act is firing at the chickens, knowing them to belong to another. It is neither more nor less so because an accident happens afterwards; and hitting a man, whose presence could not have been suspected, is an accident. The fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.

Still, the law is intelligible as it stands. The general test of murder is the degree of danger attending the acts under the known state of facts. If certain acts are regarded as peculiarly dangerous under certain circumstances, a legislator may make them punishable if done under these circumstances, although the danger was not generally known. The law often takes this step, although it does not nowadays often inflict death in such cases. It sometimes goes even further, and requires a man to find out present facts, as well as to foresee future harm, at his peril, although they are not such as would necessarily be inferred from the facts known.

Thus it is a statutory offence in England to abduct a girl under sixteen from the possession of the person having lawful charge of her. If a man does acts which induce a girl under sixteen to leave her parents, he is not chargeable, if he had no reason to know that she was under the lawful charge of her parents, and it may be presumed that he would not be, if he had reasonable cause to believe that she was a boy. But if he knowingly abducts a girl from her parents, he must find out her age at his peril. It is no defence that he had every reason to think her over sixteen. So, under a prohibitory liquor law, it has been held that, if a man sells "Plantation Bitters," it is no defence that he does not know them to be intoxicating. And there are other examples of the same kind.

Now, if experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the lawmaker may consistently treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends. I do not, however, mean to argue that the rules under discussion arose on the above reasoning, any more than that they are right, or would be generally applied in this country.

Returning to the main line of thought it will be instructive to consider the relation of manslaughter to murder. One great difference between the two will be found to lie in the degree of danger attaching to the act in the given state of facts. If a man strikes another with a small stick which is not likely to kill, and which he has no reason to suppose will do more than slight bodily harm, but which does kill the other, he commits manslaughter, not murder. But if the blow is struck as hard as possible with an iron bar an inch thick, it is murder. So if, at the time of striking with a switch, the party knows an additional fact, by reason of which he foresees that death will be the consequence of a slight blow, as, for instance, that the other has heart disease, the offence is equally murder. To explode a barrel of gunpowder in a crowded street, and kill people, is murder, although the actor hopes that no such harm will be done. But to kill a man by careless riding in the same street would commonly be manslaughter. Perhaps, however, a case could be put where the riding was so manifestly dangerous that it would be murder.

To recur to an example which has been used already for another purpose: "When a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all."

The law of manslaughter contains another doctrine which should be referred to in order to complete the understanding of the general principles of the criminal law. This doctrine is, that provocation may reduce an offence which would otherwise have been murder to manslaughter. According to current morality, a man is not so much to blame for an act done under the disturbance of great excitement, caused by a wrong done to himself, as when he is calm. The law is made to govern men through their motives, and it must, therefore, take their mental constitution into account.

It might be urged, on the other side, that, if the object of punishment is prevention, the heaviest punishment should be threatened where the strongest motive is needed to restrain; and primitive legislation seems sometimes to have gone on that principle. But if any threat will restrain a man in a passion, a threat of less than death will be sufficient, and therefore the extreme penalty has been thought excessive.

At the same time the objective nature of legal standards is shown even here. The mitigation does not come from the fact that the defendant was beside himself with rage. It is not enough that he had grounds which would have had the same effect on every man of his standing and education. The most insulting words are not provocation, although to this day, and still more when the law was established, many people would rather die than suffer them without action. There must be provocation sufficient to justify the passion, and the law decides on general considerations what provocations are sufficient.

It is said that even what the law admits to be "provocation does not extenuate the guilt of homicide, unless the person provoked is at the time when he does the deed deprived of the power of self-control by the provocation which he has received." There are obvious reasons for taking the actual state of the defendant's consciousness into account to this extent. The only ground for not applying the general rule is, that the defendant was in such a state that he could not be expected to remember or be influenced by the fear of punishment; if he could be, the ground of exception disappears. Yet even here, rightly or wrongly, the law has gone far in the direction of adopting external tests. The courts seem to have decided between murder and manslaughter on such grounds as the nature of the weapon used, or the length of time between the provocation and the act. But in other cases the question whether the prisoner was deprived of self-control by passion has been left to the jury.

As the object of this Lecture is not to give an outline of the criminal law, but to explain its general theory, I shall only consider such offences as throw some special light upon the subject, and shall treat of those in such order as seems best fitted for that purpose. It will now be useful to take up malicious mischief, and to compare the malice required to constitute that offence with the malice aforethought of murder.

The charge of malice aforethought in an indictment for murder has been shown not to mean a state of the defendant's mind, as is often thought, except in the sense that he knew

circumstances which did in fact make his conduct dangerous. It is, in truth, an allegation like that of negligence, which asserts that the party accused did not come up to the legal standard of action under the circumstances in which he found himself, and also that there was no exceptional fact or excuse present which took the case out of the general rule. It is an averment of a conclusion of law which is permitted to abridge the facts (positive and negative) on which it is founded.

When a statute punishes the "wilfully and maliciously" injuring another's property, it is arguable, if not clear, that something more is meant. The presumption that the second word was not added without some meaning is seconded by the unreasonableness of making every wilful trespass criminal. If this reasoning prevails, maliciously is here used in its popular sense, and imports that the motive for the defendant's act was a wish to harm the owner of the property, or the thing itself, if living, as an end, and for the sake of the harm. Malice in this sense has nothing in common with the malice of murder.

Statutory law need not profess to be consistent with itself, or with the theory adopted by judicial decisions. Hence there is strictly no need to reconcile such a statute with the principles which have been explained. But there is no inconsistency. Although punishment must be confined to compelling external conformity to a rule of conduct, so far that it can always be avoided by avoiding or doing certain acts as required, with whatever intent or for whatever motive, still the prohibited conduct may not be hurtful unless it is accompanied by a particular state of feeling.

Common disputes about property are satisfactorily settled by compensation. But every one knows that sometimes secret harm is done by neighbor to neighbor out of pure malice and spite. The damage can be paid for, but the malignity calls for revenge, and the difficulty of detecting the authors of such wrongs, which are always done secretly, affords a ground for punishment, even if revenge is thought insufficient.

How far the law will go in this direction it is hard to say. The crime of arson is defined to be the malicious and wilful burning of the house of another man, and is generally discussed in close connection with malicious mischief. It has been thought that the burning was not malicious where a prisoner set fire to his prison, not from a desire to consume the building, but solely to effect his escape. But it seems to be the better opinion that this is arson, in which case an intentional burning is malicious within the meaning of the rule. When we remember that arson was the subject of one of the old appeals which take us far back into the early law, we may readily understand that only intentional burnings were redressed in that way. The appeal of arson was brother to the appeal de pace et plagis. As the latter was founded on a warlike assault, the former supposed a house-firing for robbery or revenge, such as that by which Njal perished in the Icelandic Saga. But this crime seems to have had the same history as others. As soon as intent is admitted to be sufficient, the law is on the high-road to an external standard. A man who intentionally sets fire to his own house, which is so near to other houses that the fire will manifestly endanger them, is guilty of arson if one of the other houses is burned in consequence. In this case, an act which would not have been arson, taking only its immediate consequences into account, becomes arson by reason of more remote consequences which were manifestly likely to follow, whether they were actually intended or not. If that may be the effect of setting fire to things which a man has a right to burn, so far as they alone are concerned, why, on principle, should it not be the effect of any other act which is equally likely under the surrounding circumstances to cause the same harm. Cases may easily be imagined where firing a gun, or making a chemical mixture, or piling up oiled rags, or twenty other things, might be manifestly dangerous in the highest degree and actually lead to a conflagration. If, in

such cases, the crime is held to have been committed, an external standard is reached, and the analysis which has been made of murder applies here.

There is another class of cases in which intent plays an important part, for quite different reasons from those which have been offered to account for the law of malicious mischief. The most obvious examples of this class are criminal attempts. Attempt and intent, of course, are two distinct things. Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after tomorrow. The law only deals with conduct. An attempt is an overt act. It differs from the attempted crime in this, that the act has failed to bring about the result which would have given it the character of the principal crime. If an attempt to murder results in death within a year and a day, it is murder. If an attempt to steal results in carrying off the owner's goods, it is larceny.

If an act is done of which the natural and probable effect under the circumstances is the accomplishment of a substantive crime, the criminal law, while it may properly enough moderate the severity of punishment if the act has not that effect in the particular case, can hardly abstain altogether from punishing it, on any theory. It has been argued that an actual intent is all that can give the act a criminal character in such instances. But if the views which I have advanced as to murder and manslaughter are sound, the same principles ought logically to determine the criminality of acts in general. Acts should be judged by their tendency under the known circumstances, not by the actual intent which accompanies them.

It may be true that in the region of attempts, as elsewhere, the law began with cases of actual intent, as those cases are the most obvious ones. But it cannot stop with them, unless it attaches more importance to the etymological meaning of the word attempt than to the general principles of punishment. Accordingly there is at least color of authority for the proposition that an act is punishable as an attempt, if, supposing it to have produced its natural and probable effect, it would have amounted to a substantive crime.

But such acts are not the only punishable attempts. There is another class in which actual intent is clearly necessary, and the existence of this class as well as the name (attempt) no doubt tends to affect the whole doctrine. Some acts may be attempts or misdemeanors which could not have effected the crime unless followed by other acts on the part of the wrong-doer. For instance, lighting a match with intent to set fire to a haystack has been held to amount to a criminal attempt to burn it, although the defendant blew out the match on seeing that he was watched. So the purchase of dies for making counterfeit coin is a misdemeanor, although of course the coin would not be counterfeited unless the dies were used.

In such cases the law goes on a new principle, different from that governing most substantive crimes. The reason for punishing any act must generally be to prevent some harm which is foreseen as likely to follow that act under the circumstances in which it is done. In most substantive crimes the ground on which that likelihood stands is the common working of natural causes as shown by experience. But when an act is punished the natural effect of which is not harmful under the circumstances, that ground alone will not suffice. The probability does not exist unless there are grounds for expecting that the act done will be followed by other acts in connection with which its effect will be harmful, although not so otherwise. But as in fact no such acts have followed, it cannot, in general, be assumed, from the mere doing of what has been done, that they would have followed if the actor had not been interrupted. They would not have followed it unless the actor had chosen, and the only way generally available to show that he would have chosen to do them is by showing that he intended to do them when he did what he did. The accompanying intent in that case renders the otherwise innocent act harmful, because

it raises a probability that it will be followed by such other acts and events as will all together result in harm. The importance of the intent is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequences.

It will be readily seen that there are limits to this kind of liability. The law does not punish every act which is done with the intent to bring about a crime. If a man starts from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped by the draw and goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion. On the other hand, a slave who ran after a white woman, but desisted before he caught her, has been convicted of an attempt to commit rape. We have seen what amounts to an attempt to burn a haystack; but it was said in the same case, that, if the defendant had gone no further than to buy a box of matches for the purpose, he would not have been liable.

Eminent judges have been puzzled where to draw the line, or even to state the principle on which it should be drawn, between the two sets of cases. But the principle is believed to be similar to that on which all other lines are drawn by the law. Public policy, that is to say, legislative considerations, are at the bottom of the matter; the considerations being, in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt. When a man buys matches to fire a haystack, or starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match, or cocked and aimed the pistol, there is very little chance that he will not persist to the end, and the danger becomes so great that the law steps in. With an object which could not be used innocently, the point of intervention might be put further back, as in the case of the purchase of a die for coining.

The degree of apprehension may affect the decision, as well as the degree of probability that the crime will be accomplished. No doubt the fears peculiar to a slaveowning community had their share in the conviction which has just been mentioned.

There is one doubtful point which should not be passed over. It has been thought that to shoot at a block of wood thinking it to be a man is not an attempt to murder, and that to put a hand into an empty pocket, intending to pick it, is not an attempt to commit larceny, although on the latter question there is a difference of opinion. The reason given is, that an act which could not have effected the crime if the actor had been allowed to follow it up to all results to which in the nature of things it could have led, cannot be an attempt to commit that crime when interrupted. At some point or other, of course, the law must adopt this conclusion, unless it goes on the theory of retribution for guilt, and not of prevention of harm.

But even to prevent harm effectually it will not do to be too exact. I do not suppose that firing a pistol at a man with intent to kill him is any the less an attempt to murder because the bullet misses its aim. Yet there the act has produced the whole effect possible to it in the course of nature. It is just as impossible that that bullet under those circumstances should hit that man, as to pick an empty pocket. But there is no difficulty in saying that such an act under such circumstances is so dangerous, so far as the possibility of human foresight is concerned, that it should be punished. No one can absolutely know, though many would be pretty sure, exactly where the bullet will strike; and if the harm is done, it is a very great harm. If a man fires at a block, no harm can possibly ensue, and no theft can be committed in an empty pocket, besides that the harm of successful theft is less than that of murder. Yet it might be said that even such things as these should be punished, in order to make discouragement broad enough and easy to understand.

There remain to be considered certain substantive crimes, which differ in very important ways from murder and the like, and for the explanation of which the foregoing analysis of intent in criminal attempts and analogous misdemeanors will be found of service.

The type of these is larceny. Under this name acts are punished which of themselves would not be sufficient to accomplish the evil which the law seeks to prevent, and which are treated as equally criminal, whether the evil has been accomplished or not. Murder, manslaughter, and arson, on the other hand, are not committed unless the evil is accomplished, and they all consist of acts the tendency of which under the surrounding circumstances is to hurt or destroy person or property by the mere working of natural laws.

In larceny the consequences immediately flowing from the act are generally exhausted with little or no harm to the owner. Goods are removed from his possession by trespass, and that is all, when the crime is complete. But they must be permanently kept from him before the harm is done which the law seeks to prevent. A momentary loss of possession is not what has been guarded against with such severe penalties. What the law means to prevent is the loss of it wholly and forever, as is shown by the fact that it is not larceny to take for a temporary use without intending to deprive the owner of his property. If then the law punishes the mere act of taking, it punishes an act which will not of itself produce the evil effect sought to be prevented, and punishes it before that effect has in any way come to pass.

The reason is plain enough. The law cannot wait until the property has been used up or destroyed in other hands than the owner's, or until the owner has died, in order to make sure that the harm which it seeks to prevent has been done. And for the same reason it cannot confine itself to acts likely to do that harm. For the harm of permanent loss of property will not follow from the act of taking, but only from the series of acts which constitute removing and keeping the property after it has been taken. After these preliminaries, the bearing of intent upon the crime is easily seen.

According to Mr. Bishop, larceny is "the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein; and perhaps it should be added, for the sake of some advantage to the trespasser, a proposition on which the decisions are not harmonious."

There must be an intent to deprive such owner of his ownership therein, it is said. But why? Is it because the law is more anxious not to put a man in prison for stealing unless he is actually wicked, than it is not to hang him for killing another? That can hardly be. The true answer is, that the intent is an index to the external event which probably would have happened, and that, if the law is to punish at all, it must, in this case, go on probabilities, not on accomplished facts. The analogy to the manner of dealing with attempts is plain. Theft may be called an attempt to permanently deprive a man of his property, which is punished with the same severity whether successful or not. If theft can rightly be considered in this way, intent must play the same part as in other attempts. An act which does not fully accomplish the prohibited result may be made wrongful by evidence that but for some interference it would have been followed by other acts co-ordinated with it to produce that result. This can only be shown by showing intent. In theft the intent to deprive the owner of his property establishes that the thief would have retained, or would not have taken steps to restore, the stolen goods. Nor would it matter that the thief afterwards changed his mind and returned the goods. From the point of view of attempt, the crime was already complete when the property was carried off.

It may be objected to this view, that, if intent is only a makeshift which from a practical necessity takes the place of actual deprivation, it ought not to be required where the actual deprivation is wholly accomplished, provided the same criminal act produces the whole effect. Suppose, for instance, that by one and the same motion a man seizes and backs another's horse over a precipice. The whole evil which the law seeks to prevent is the natural and manifestly certain consequence of the act under the known circumstances. In such a case, if the law of larceny is consistent with the theories here maintained, the act should be passed upon according to its tendency, and the actual intent of the wrong-doer not in any way considered. Yet it is possible, to say the least, that even in such a case the intent would make all the difference. I assume that the act was without excuse and wrongful, and that it would have amounted to larceny, if done for the purpose of depriving the owner of his horse. Nevertheless, if it was done for the sake of an experiment, and without actual foresight of the destruction, or evil design against the owner, the trespasser might not be held a thief.

The inconsistency, if there is one, seems to be explained by the way in which the law has grown. The distinctions of the common law as to theft are not those of a broad theory of legislation; they are highly technical, and very largely dependent upon history for explanation.

The type of theft is taking to one's own user It used to be, and sometimes still is, thought that the taking must be lucri catesa, for the sake of some advantage to the thief. In such cases the owner is deprived of his property by the thief's keeping it, not by its destruction, and the permanence of his loss can only be judged of beforehand by the intent to keep. The intent is therefore always necessary, and it is naturally stated in the form of a self-regarding intent. It was an advance on the old precedents when it was decided that the intent to deprive the owner of his property was sufficient. As late as 1815 the English judges stood only six to five in favor of the proposition that it was larceny to take a horse intending to kill it for no other purpose than to destroy evidence against a friend. Even that case, however, did not do away with the universality of intent as a test, for the destruction followed the taking, and it is an ancient rule that the criminality of the act must be determined by the state of things at the time of the taking, and not afterwards. Whether the law of larceny would follow what seems to be the general principle of criminal law, or would be held back by tradition, could only be decided by a case like that supposed above, where the same act accomplishes both taking and destruction. As has been suggested already, tradition might very possibly prevail.

Another crime in which the peculiarities noticed in larceny are still more clearly marked, and at the same time more easily explained, is burglary. It is defined as breaking and entering any dwelling-house by night with intent to commit a felony therein. The object of punishing such a breaking and entering is not to prevent trespasses, even when committed by night, but only such trespasses as are the first step to wrongs of a greater magnitude, like robbery or murder. In this case the function of intent when proved appears more clearly than in theft, but it is precisely similar. It is an index to the probability of certain future acts which the law seeks to prevent. And here the law gives evidence that this is the true explanation. For if the apprehended act did follow, then it is no longer necessary to allege that the breaking and entering was with that intent. An indictment for burglary which charges that the defendant broke into a dwelling-house and stole certain property, is just as good as one which alleges that he broke in with intent to steal.

It is believed that enough has now been said to explain the general theory of criminal liability, as it stands at common law. The result may be summed up as follows. All acts are indifferent per se.

In the characteristic type of substantive crime acts are rendered criminal because they are done finder circumstances in which they will probably cause some harm which the law seeks to prevent.

The test of criminality in such cases is the degree of danger shown by experience to attend that act under those circumstances.

In such cases the mens rea, or actual wickedness of the party, is wholly unnecessary, and all reference to the state of his consciousness is misleading if it means anything more than that the circumstances in connection with which the tendency of his act is judged are the circumstances known to him. Even the requirement of knowledge is subject to certain limitations. A man must find out at his peril things which a reasonable and prudent man would have inferred from the things actually known. In some cases, especially of statutory crimes, he must go even further, and, when he knows certain facts, must find out at his peril whether the other facts are present which would make the act criminal. A man who abducts a girl from her parents in England must find out at his peril whether she is under sixteen.

In some cases it may be that the consequence of the act, under the circumstances, must be actually foreseen, if it is a consequence which a prudent man would not have foreseen. The reference to the prudent man, as a standard, is the only form in which blameworthiness as such is an element of crime, and what would be blameworthy in such a man is an element;--first, as a survival of true moral standards; second, because to punish what would not be blameworthy in an average member of the community would be to enforce a standard which was indefensible theoretically, and which practically was too high for that community.

In some cases, actual malice or intent, in the common meaning of those words, is an element in crime. But it will be found that, when it is so, it is because the act when done maliciously is followed by harm which would not have followed the act alone, or because the intent raises a strong probability that an act, innocent in itself, will be followed by other acts or events in connection with which it will accomplish the result sought to be prevented by the law.