JUDICIAL LEGISLATION IN CRIMINAL LAW

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I. *The Scope of the Inquiry.*

The decision of the House of Lords in *Shaw* v. *D.P.P.*[1] has raised issues of wider significance than the particular forms of conduct to which the case related. The essay which follows is not an examination of all the points raised by the decision and is concerned solely with the implications of the findings of the Court of Criminal Appeal and the House of Lords on the first of the three counts[2] in the indictment:

> Conspiracy to corrupt public morals. Particulars of offence . . . conspired with certain persons who inserted advertisements in issues of a magazine entitled "Ladies' Directory" numbered 7, 7 revised, 8, 9, 10 and a supplement thereto, and with certain other persons whose names are unknown, by means of the said magazine and the said advertisements to induce readers thereof to resort to the said advertisers for the purposes of fornication and of taking part in or witnessing other disgusting and immoral acts and exhibitions, with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of Our Lady the Queen and to raise and create in their minds inordinate and lustful desires.

The prosecution proceeded on the basis that the form of conspiracy was a conspiracy to commit an unlawful act and not a conspiracy to commit a lawful act by unlawful means. Counsel for the prosecution reserved the right to contend that a conspiracy to corrupt the morals of a particular individual was an indictable offence by reason of the conspiracy, even if such corruption would not be an offence if done by one person. The unlawful act alleged was the common law misdemeanour of corrupting public morals. Counsel supported two propositions. First, at common law any

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[1] Court of Criminal Appeal: [1962] A.C. 226, [1961] 2 W.L.R. 897, [1961] 1 All E.R. 330, (1961), 45 Cr. App. R. 113. House of Lords: [1962] A.C. 220, [1961] 2 W.L.R. 912, [1961] 2 All E.R. 446, (1961), 45 Cr. App. R. 113, [1961] Crim. L.R. 468.

[2] Second count: living on the earnings of prostitution, contrary to s. 30 of the Sexual Offences Act, 1956, 4-5 Eliz. 2, c. 69.

act calculated or intended to corrupt the morals of the public, or a portion thereof in general, is indictable as a substantive offence. Secondly, an act calculated or intended to outrage public decency is also indictable.[3]

After an examination of the cases considered to be relevant the Court of Criminal Appeal concluded:[4]

> In our opinion, having regard to the long line of cases to which we have been referred, it is an established principle of common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable misdemeanour.

Obiter, the court was of the opinion that a conspiracy to corrupt the morals of a particular person was indictable.[5] Thus the Court of Criminal Appeal decided that a substantive misdemeanour existed whereas the House of Lords took their stand on conspiracy.

The House of Lords, Lord Reid dissenting, were of the view that "conspiracy to corrupt public morals" was an existing offence.[6] Their Lordships, and particularly Viscount Simonds, emphasised the need to employ the category flexibly. In a passage which must rank surely in importance with parts of the judgments in cases such as *Liversidge* v. *Anderson*,[7] Viscount Simonds explained the judicial policy which their Lordships,[8] excluding Lord Reid, favoured:[9]

> I am concerned only to assert what was vigorously denied by counsel for the appellant, that such an offence is known to the common law, and that it was open to the jury to find on the facts of this case that the appellant was guilty of such an offence. I must say categorically that, if it were not so, Her Majesty's courts would strangely have failed in their duty as servants and guardians of the common law. Need I say, my Lords, that I am no advocate of the right of the judges to create new criminal offences? I will repeat well-known words: "Amongst many other points of happiness and freedom which your Majesty's

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Third count: publishing an obscene article, the Ladies' Directory, contrary to s. 2 of the Obscene Publications Act, 1959, 7-8 Eliz. 2, c. 66. The Court of Criminal Appeal dismissed the appeal on all counts. The House of Lords dismissed an appeal on counts 1 and 2.

[3] Argument in the Court of Criminal Appeal summarized *supra*, footnote 1, at p. 906 (W.L.R.).

[4] *Supra*, footnote 1, at pp. 233 (A.C.), 908 (W.L.R.).

[5] *Ibid.*, at pp. 234 (A.C.), 909-910 (W.L.R.).

[6] The precise legal content of the decision will be analysed below.

[7] [1942] A.C. 206.

[8] Viscount Simonds spoke on his own behalf but it is quite clear that Lord Tucker, Lord Morris of Borth-y-Gest and Lord Hodson supported his views. Lords Morris (*supra*, footnote 1, at p. 291 (A.C.)) and Hodson express agreement with Viscount Simonds' speech (at p. 292). Lord Tucker expresses similar views to those of Viscount Simonds but not at any length (at pp. 282, 285, 287).

[9] *Ibid.*, at pp. 266-268 (A.C.).

subjects have enjoyed there is none which they have accounted more dear and precious than this, to be guided and governed by certain rules of law which giveth both to the head and members that which of right belongeth to them and not by any arbitrary or uncertain form of government." These words are as true today as they were in the seventeenth century and command the allegiance of us all. But I am at a loss to understand how it can be said either that the law does not recognise a conspiracy to currupt public morals or that, though there may not be an exact precedent for such a conspiracy as this case reveals, it does not fall fairly within the general words by which it is described. I do not propose to examine all the relevant authorities. That will be done by my noble and learned friend. The fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the court before. It is not thus that the common law has developed. We are perhaps more accustomed to hear this matter discussed upon the question whether such and such a transaction is contrary to public policy. At once the controversy arises. On the one hand it is said that it is not possible in the twentieth century for the court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head. In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. That is the broad head (call it public policy if you wish) within which the present indictment falls. It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct. The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society. Today a denial of the fundamental Christian doctrine, which in past centuries would have been regarded by the ecclesiastical courts as heresy and by the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed. When Lord Mansfield, speaking long after the Star Chamber had been abolished, said[10] that the Court of King's Bench was the custos morum of the people and had the superintendency of offences contra bonos mores, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions

[10] *R.* v. *Delaval* (1763), 3 Burr. 1434, at p. 1439.

> will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend Lord Tucker refers. Let it be supposed that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them.

This passage raises the question of the extent of the power of judicial legislation in criminal law and has wide implications. The policy defended involves the question of the constitutional relationship of the judicature and Parliament. The possible results of reliance on categories such as "public mischief" and "public morals" will need examining, for not only have their Lordships in substance asserted a right to declare new offences but they have affirmed the existence of offences which carry no clear definition and depend on contemporary value judgments. The fruitful search for old authorities by the Court of Criminal Appeal and the House of Lords makes it apparent that, in criminal law, legal history may be a potent ally of the diligent prosecutor. Apart from use of power, as *custos morum*, to declare new offences, the courts may still be tempted to rake among the accumulated debris of old cases for evidence of the existence of an applicable common law misdemeanour. Subsequently certain possible consequences of this *modus operandi* will be considered. For the present it may be remarked that references to works such as Lambard's *Eirenarcha* (1614) and Dalton's *Country Justice* (1619) which may be met with cannot be regarded as having an interest which is solely historical.[11]

Before considering these questions and their historical background, some preliminary explanations are necessary. In the first place, there is no intention to imply either that the conduct with which *Shaw* was concerned should not be punished or that it would be necessarily unreasonable to have in the law an offence which covered this type of activity provided that the offence were con-

[11] Apart from *Shaw* v. *D.P.P.*, *supra*, footnote 1, a considerable array of old authorities are to be found in the speeches in *Sykes* v. *D.P.P.*, [1962] A.C. 528, (1961), 45 Cr. App. R. 230 (H.L.) (misprision of felony affirmed as an existing offence). The first edition of the Eirenarcha was in 1581. Later, much cited, editions appeared in 1602, 1610 and 1614.

fined to sexual morals or otherwise given a more specific content.[12] However, as Shaw was convicted on two other counts, it is doubtful if the count of conspiracy to corrupt public morals was very vital. Secondly, the Court of Criminal Appeal attempted to draw a distinction between creating new offences and "applying existing law to new facts".[13] It is submitted, with respect, that, if very considerable enterprise is shown in applying the law to "new facts", this is a distinction without a difference. In either case what occurs is a form of judicial legislation. In any case Viscount Simonds' words carry a clear implication: "and moreover, even if this is a new offence, the court, as *custos morum*, has the power to create new offences in a proper case."

II. *The Historical Background.*

Whatever may be the consequences of the principles now affirmed by the House of Lords, the power of judicial legislation is in keeping with the historical bases and manner of development of the common law. The early criminal law, particularly in the sphere of indictable trespass or "transgressions", was fluid and the connection between law and morals intimate.[14] The "transgressions" and "trespasses" which were indictable provided the basis for the later proliferation of misdemeanours:[15] the justices of the peace in the fourteenth and fifteenth centuries punished a great variety of mischievous acts as indictable trespasses[16] and early in the sixteenth century the term "misdemeanour" served to describe the trespass which was indictable as opposed to being actionable.

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[12] See the Penal Code of the German Federal Republic, Art. 184 a (Endangering youth by shameless writings, which are not obscene [see Art. 184 on dissemination of obscene writings]).

[13] *Supra*, footnote 1, at pp. 234 (A.C.), 908 (W.L.R.). *Cf.* the words of Viscount Simonds, *supra*.

[14] In the thirteenth and fourteenth centuries the concept of trespass was broad and based on contemporary concepts of morality: "trespass" bore the meaning which it bears in the Lord's Prayer. This is the persuasive view of Milsom (1958), 74 L. Q. Rev. 195, 407, 561-590 (the writer is primarily interested in the development of civil liability, but see his remarks at pp. 584-585). See also Hall, (1957), 73 L. Q. Rev. 65-73, especially at pp. 69-73; Sayles (ed.), Select Cases in the Court of King's Bench under Edward II, Vol. IV (1955), 74 Selden Society, pp. lxi, 5-6 (No. 2), 73 (No. 26), 76 (No. 28), 86 (No. 34), 132 (No. 47), 133 (No. 48); and Fifoot, History and Sources of the Common Law (1949), pp. 46, 48-49, 53 (meanings of *transgressio*).

[15] Plucknett, A Concise History of the Common Law (5th ed., 1956), pp. 458-459; Putnam, Early Treatises on the Practice of the Justices of the Peace in the Fifteenth and Sixteenth Centuries (Oxford Studies in Social and Legal History, Vol. VII) (1924), p. 368 (Marowe, *De Pace*, Lect. XI). And see next footnote.

[16] Putnam (ed.), Proceedings before the Justices of the Peace in the

The justices showed great willingness to try experiments and often dealt with matters over which they had no jurisdiction either by statute or by commission.[17] Apart from cases of violence to the person short of felony and other cases involving breaches of the peace, there are other large and interesting classes of offence. General charges of disorderly and suspicious behaviour were permitted of which the following are examples: *communis insidiator viarum et depopulator agrorum, vagabundus, noctivagus, communis malefactor et perturbator pacis Domini Regis.*[18] Miscellaneous trespass cases dealt with included:[19] cutting down a hanged woman before she was dead, forgery of deeds, failure to perform civic duties, diverting a watercourse, changing a brand on a horse, and removing a corpse from a church. There is even a case in which the accused was convicted of undertaking vainly to cure a man of infirmities.[20] The flexibility is not confined to the decisions of the laymen commissioned and is apparent in the rolls of the itinerant King's Bench.

The powers exercised by the justices of assize and the King's Bench on circuit in respect of lesser offences are of a quality similar to those of the Council: the executive, judicial and administrative functions are interwoven. The courts in the middle ages were necessarily concerned with the business of government in its wider aspects. It was not until the late fourteenth century that the King's Bench acquired independence of the Council. The records of the King's Bench in the reign of Edward II include many indictable trespasses.[21] Occasionally criticism is made of indictments for being too general. In 1308 the court said this of an indictment:[22]

> . . . it is found in it that William was indicted on the ground that he is a common obstructor of the peace without any mention being made in the indictment about any definite obstruction of the peace or any definite trespass committed by him, for which he ought to be arraigned or accused in the king's court in accordance with the law, etc.

Fourteenth and Fifteenth Centuries (Ames Foundation), (1938), pp. cxii-cxxviii, cliv-clx (commentary by Plucknett). Many of the sessions were of the King's Bench on circuit.

[17] *Ibid.*, pp. cxiv, cxxxi.

[18] *Ibid.*, p. cxviii, Roll xxxvi (Nos. 39, 68, 91), Roll xiv (No. 19), Roll xxix (p. 154).

[19] *Ibid.*, p. cxx.

[20] Roll xiv, (No. 7); Nottinghamshire Assize Roll, 17-19 Rich. II (a typical assumpsit).

[21] See *supra*, footnotes 13 and 15. See, in particular, the articles of inquiry to the King's Bench in 1323 (Sayles, *op. cit.*, footnote 14, Roll No. 48, p. 133) which provide a very extensive catalogue of sundry mischiefs.

[22] Sayles, *op. cit.*, *ibid.*, Roll No. 2, p. 5, at p. 6.

The Council had an extensive jurisdiction in criminal cases which was exercised through the Court of Star Chamber during and after the reign of Henry VII (1485-1507).[23] The subject matter of many of the offences punished did not fall within the definition of pleas of the crown and probably could not have been punished adequately, or at all, at common law.[24] A decree of the Council in 1494 indicates that that body was prepared to concern itself with "evil living":[25]

> A decree made in affirmance of an order taken by the Maior of Plimworthe and the Commons of the same, for the expulsinge of Nicholas Lowe and Avice his wiffe out of Plimworthe for the misdemeaninge and evil livinge in keepinge of Bawedrye, nighte watchinge beyonde reasonable howers, maintayninge and keepinge Dysars, Carders, Hasarders, and other misgoverned and yvile disposed people.

William Hudson in his *Treatise on the Court of Star Chamber*, written in the reign of Charles I, describes[26] "the great and high jurisdiction of this Court, which, by the arm of sovereignty, punished errors creeping into the commonwealth, which otherwise might prove dangerous and infectious diseases, or giveth life to the execution of laws, or the performance of such things as are necessary in the commonwealth, yea, although no positive law or continued custom of Common Law giveth warrant to it".

The connections between the executive power and the administration of criminal law, and between law and morals, had other early manifestations. The justices had a power to take sureties for good behaviour ("good abearing") and to take recognisances for the keeping of the peace,[27] a power which to this day can be used against eavesdroppers and "night-walkers". The practice of impeachment by both Houses of Parliament for "high misdemeanours" appears as early as 1376 and between 1620 and 1715 fifty impeachments were brought to trial.[28] Moreover the very concept and term "misdemeanour" seems to have entered the law from the

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[23] He established his Council in 1486.

[24] C. G. Bayne and W. H. Dunham (ed.), Select Cases in the Council of Henry VII (1956), 75 Selden Society, pp. cliv. See also generally, *ibid.*, pp. lxix-lxx, cl-cliv.

[25] *Ibid.*, p. 27, f.4d, May 6th, 1494. The side note is "Ill rule". See also p. 26 (heresy).

[26] Written c. 1633, printed in Hargrave, *Collectanea Juridica* (1792), Vol. II, p. 107. Generally on the Star Chamber: Bayne and Dunham, *op. cit.*, footnote 24; Ogilvie, The King's Government and the Common Law, 1471-1641 (1958), pp. 98-112; Elton, The Tudor Constitution, Documents and Commentary (1960), pp. 158-184.

[27] Lambard, *Eirenarcha* (1610), pp. 114-123.

[28] Holdsworth, History of English Law, Vol. 1 (1922), pp. 382-384. During the Tudor period and in the reign of James I the Act of Attainder was

usage of the layman and to have carried its non-technical and moralistic connotations. Its use in legal sources is rather loose.[29] In contrast the idea of felony has a technical origin and appears in literary sources as a borrowing from the law. In the early period there was an obvious need for judicial initiative in the making of criminal law. Before the Tudor period legislation was not a very important source[30] and, in contrast to the civil side, the criminal work could not be based on pre-existing feudal custom, on which our law rested, or local customs.[31]

In the sixteenth and seventeenth centuries the extent of the resources of the law in dealing with a wide variety of wrongdoing is reflected in the manuals on the practice of justices and in indictments before the Court of King's Bench. Lambard refers, *inter alia*, to "seditious sectarie", not going to church, conjuring and witchcraft, prophecying, price fixing and conspiracy of artificers.[32] Yet, significantly, all the offences are based on statute. References to drunkenness, adultery, incontinency and "bawdrie", appear in Lambard and Dalton under "surety for good behaviour".[33] Coke in his *Third Institute*, published in 1644, remarks that adultery and fornication belong to the ecclesiastical court.[34] However, he

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used instead of impeachment: *cf.* the attainder of James Naylor for "blasphemy and other misdemeanours" in 1956 (5 St. Tr. 802). See also the charge of "forging, framing and publishing a copy of a pretended Act of Parliament" in 1647 (4 St. Tr. 951, impeachment), and the impeachments of Pett (1668), 6 St. Tr. 866 and Penn, *ibid.*, 870.

[29] See "An Act giving the Court of Star Chamber authority to punish divers misdemeanours" (1487: 3 Hen. VII, c. 1), Stat. Realm, II, 509; "An Act for justices of the peace, for the due execution of their commissions" (1489: 4 Hen. VII, c. 12), *ibid.*, 536 (" . . . by the negligence and misdemeaning, favour, and other inordinate causes of the justice of peace . . . the laws and ordinances . . . be not duly executed . . ."); *De Retentionibus Illicitis* (Statute of Liveries, 1504: 19 Hen. VII, c. 14) *ibid.*, 658, para. 8; Bacon, Charge Touching Duels (1614), p. 22; *Trial of Reading* (1679), 7 St. Tr. 259 (indictment in King's Bench for a trespass and misdemeanour, *viz.* subornation of perjury); *Trial of Knox and Lane* (1679), *ibid.*, 763 (misdemeanour, *viz.* conspiracy to defame and scandalize Dr. Oates and Mr. Bedloe); *Trial of Hampden* (1684), 9 St. Tr. 1054 (high misdemeanour, *viz.* sedition); *Trial of Sir Samuel Barnardiston* (1684), *ibid.*, 1334 (high misdemeanour, *viz.* seditious libel).

[30] But by 1600 it had a scope far wider than is generally appreciated. The number of offences (economic offences, recusancy, extortion, *etc.*) appearing in works on the practice of justices is considerable: Lambard, *Eirenarcha* (1610), *in fine* (14 pp. devoted to a table of statutes); Dalton, Country Justice (1643), CHS. 77, 85, 89, 106, 107.

[31] Although it is possible that the content of trespass was derived in part from the work of local courts. *Cf.* Plucknett, *op. cit.*, footnote 15, p. 370 (but he is concerned with procedure and the giving of damages).

[32] *Op. cit.*, footnote 30, pp. 204, 224, 227, 415, 417, 419, 454-455, 459, 461. See also Dalton, *op. cit.*, footnote 30, CH. 55 (swearing).

[33] Lambard, *op. cit.*, *ibid.*, pp. 119, 459; Dalton, *op. cit.*, *ibid.*, pp. 232-233.

[34] Cap. XCVIII, p. 205.

also refers to "bawdry, *Lenocinium, unde ribawdry et ribaude*" without defining these terms.[35]

Some of the indictments on which convictions occurred in the King's Bench contain charges which employ phraseology reminiscent of the rolls of the justices of assize in the fourteenth and fifteenth centuries.[36] The charge of being a common night-walker and frequenting a suspected bawdy house appears,[37] and a variety of conduct is punished, including blasphemy, frauds on the public, sedition, extortion, being a barretor, libel and slander, neglect of office and conspiracy.[38] The courts also gave an extensive meaning to high treason.[39] In 1638 one Harrison was convicted of misdemeanour for accusing Mr. Justice Hutton of treason.[40]

After the Restoration there was a vigorous public movement to strengthen the law and to enforce existing laws against immorality.[41] On May 30, 1660, Charles II issued a proclamation

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[35] Cap. XCVIII, p. 206. *Lenocinium* means the trade of pimp or pander. He refers also to *impudicus rabula* which seems to mean shameless brawling or conduct.

[36] See *supra.*

[37] *Wheelhorse's* case (1627), Popham 208, 79 E.R. 1297; the same (*semble*) Latch 173, 82 E.R. 331; *Timberlye's* case (1658), 2 Sid. 89, 82 E.R. 1274, *in fine*,.

[38] *Richardson* (1654), Style, 430, 82 E.R. 837; *Cover* (1662), 1 Sid. 91, 82 E.R. 989; *Ayers* (1666), Sid. 307, 2 Keble 100, 84 E.R. 63; *Payton* (1668), Vaughan 137, 2 Keble 404, 84 E.R. 253 (extortion); *Martin and Long* (1653), Style 374, 82 E.R. 790 (failure to carry out public duties); *Taylor* (1676), 1 Vent. 293, 86 E.R. 189, 3 Keble 608, 621, 84 E.R. 906, 914 (blasphemy); *Wallengen* (1662), 1 Sid. 106, 82 E.R. 998; *Dudly* (1658), 2 Sid. 71, 82 E.R. 1263 (perjury at common law); *Marsh* (1664), 2 Keble 539, 584, 84 E.R. 338, 368; *Bloom and Hudson* (1668), 2 Keble 412, 84 E.R. 259; *Burgen* (1669), 2 Keble 477, Sid. 409, 84 E.R. 299, 82 E.R. 1185 (frauds on the public); *Winne* (1668), 2 Keble 336, 84 E.R. 210 (slander); *Summers & Summers* (1664), 1 Lev. 139, 83 E.R. 337 (letter tending to breach of the peace); *Banks* (1666), 2 Keble 4, 22, 84 E.R. 3, 14 (contempt); *Buck* (1666), 2 Keble 139, 141, 84 E.R. 87, 89 (Libel); *Wood* (1649), Style 145, 82 E.R. 598 (false pretences: offence at common law); *Cooke's* case. Kel. 23, 84 E.R. 1064-1065 (seditious libels); *Pym* (1664), 1 Sid. 219, 82 E.R. 1068 (libel against the government); *Deakins* (1663), 1 Sid. 142, 82 E.R. 1020 (counterfeiting and extortion); *Herham* (1666), 2 Keble 132, 84 E.R. 83 (neglect of office); *Hardwicke* (1666) Sid. 282, 2 Keble 25, 84 E.R.16, 27 (common barretor); *Clayton* (1669), 2 Keble 409, 84 E.R. 257; *Ladsingham* (1670), Sir T. Raym. 193, 1 Mod. 71, 288, 83 E.R. 101, 108 (common disturber of the peace and oppresion of his neighbours); *Davies and Blith* (1667), 2 Keble 59, 84 E.R. 38; *Tayler and Gard* (1668), 2 Keble 397, 84 E.R. 247 (conspiracy [to pervert the course of justice]); *Parkehurst and Eling* (1677), 3 Keble 799, 84 E.R. 1019 (conspiracy).

[39] *Trial of Twyn et al.* (1663), 6 St. Tr. 514; *Trial of Reading* (1679), 7 Tr. St. 259; See further the political charges of "misdemeanour" before the King's Bench in the *Trial of Knox and Lane, supra,* footnote 29 and in the *Trial of Hampden* for "high misdemeanour", *supra,* footnote 29. *Cf.* the *Trial of Sir Samuel Barnardiston, supra.* footnote 29.

[40] 3 St. Tr. 1370.

[41] Details in Radzinowicz, A History of English Criminal Law, Vol. II, (1948), pp. 2-29.

against vicious, debauched and profane persons, urging the magistrates to enforce the laws against all such offenders.[42] Accounts were published by various societies of the progress made in suppression of prophaneness and debauchery. "An Account of the Societies for Reformation of Manners, in London and Westminster" published in 1699 states that in that year "many thousands" had been punished for swearing and cursing, as well as "*Drunkards*, and *Prophaners* of the *Lord's Day*", and "some *Thousands* of *Lewd Persons*".[43] In 1697 a further Royal Proclamation appeared "for preventing and punishing immorality and prophaneness"[44] which commanded Judges of Assize and Justices of the Peace to give strict charges for the due prosecution and punishment of persons offending in the ways specified.

An indictment for blasphemy had been upheld in 1676.[45] In *Curl* in 1727 the publication of an obscene book was held to be a libel and indictable as such.[46] Manuals for justices and other works current in the eighteenth century commonly include the rubric "lewdness" and contain statements that "all open lewdness grossly scandalous" is indictable at common law.[47] During the first half of the century a number of statutes were passed extending the concept of vagrancy to cover unlicensed players and other performers, and attempting to restrict consumption of spirits.[48]

III. *Star Chamber and Custos Morum.*

The jurisdiction of the Star Chamber as such was abolished by statute in 1641. After the Restoration the King's Bench is seen to be assuming the role of "*custos morum* of all the King's subjects", the first reported instance being in Sir Charles Sidley's case in 1663[49] when the court remarks that this had formerly been the task of the Star Chamber. It is commonly said that the King's Bench adopted the jurisdiction of the Star Chamber so far as it

[42] *Ibid.*, p. 3. Reissued on August, 13th, 1660, and in August, 1663.

[43] *Ibid.*, pp. 7-8. See also references to presentments of Grand Juries, and charges to them, in the early eighteenth century: *ibid.*, p. 7, note 24.

[44] *Ibid.*, p. 438. It refers to "Excessive Drinking, Blasphemy, Prophane Swearing and Cursing, Lewdness, Prophanation of the Lord's Day, or other Dissolute, Immoral or Disorderly Practices".

[45] *Taylor*, *supra*, footnote 38.

[46] 2 Stra. 788, 93 E.R. 849.

[47] Hawkins, Pleas of the Crown (1716), p. 196; Burn's, Justice (9th ed., 1764), II, pp. 392, 393; Ward's Justice (1769), II, p. 72; Barry's Justice, (1790), I, p. 23; Blackstone, Commentaries, IV, p. 64. See also East, Pleas of the Crown (1803), p. 3.

[48] Radzinowicz, *op. cit.*, footnote 41, pp. 8-13.

[49] Name and date variously reported. *Sir Charles Sidley* (1663), 1 Sid. 168, 82 E.R. 1036; *Sir Charles Sydlyes* Case (1663), 1 Keble 620, 83 E.R.

found this convenient.[50] This cannot be gainsaid but it is doubtful if there was any simple succession. The King's Bench had long had extensive powers by virtue of its early close association with the Council.[51] After the Restoration the court did not so much receive powers which it did not have previously as take up a heavier burden by reason of the disappearance of its rival. The royal prerogative in judicial matters was still very powerful after 1660 and the King's Bench might well have resurrected a jurisdiction as wide as that of the Star Chamber.[52] In fact the judges on occasion referred wistfully to the usefulness of that institution[53] and assumed a power to create offences when they felt this to be necessary.[54] In reported cases in the late seventeenth century references to the practice of the Star Chamber in the King's Bench do not seem very frequent or at all systematic: the court of King's Bench had a buoyancy and power of its own.[55]

In 1727 Lord Raymond C.J., referred to the court as the "censor morum" of the King's subjects.[56] In the *Commentaries* Blackstone remarked:[57] "Upon this dissolution of the old common law authority of the court of King's bench, as the *custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived

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1146; index to Keble: "Sidley". See also references in Fort. 99, 92 E.R. 777, "Sir Charles Sidley"; and 17 St. Tr. 155 and 2 Str. 790, 93 E.R. 850, "Sir Charles Sedley".

[50] Blackstone, *op. cit.*, footnote 47, p. 266; Holdsworth, *op. cit.*, footnote 28, Vol. V, p. 197, Vol. VIII, pp. 306, 407, Vol. XII, p. 513; Potter, *Historical Introduction to English Law* (4th ed., 1958), p. 361; Plucknett, *op. cit.*, footnote 15, pp. 496-497; Lord Sumner in *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406, at p. 457.

[51] *Supra*, In *Bagg's* case (1616), 11 Co. Rep. 936, at p. 98a, 77 E.R. 1271, at p. 1277 the court said: "To this court belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanours extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be reformed or punished in due course of Law". *Cf.* Sayre, (1927-28), 41 Harv. L. Rev. 821, at p. 829.

[52] See Holdsworth, *op. cit.*, footnote 28, Vol. VI, pp. 214-216, 263.

[53] See the words of Judge Hale at an assize at Cambridge, reported by Sir Philip Warwick, Memoirs of the Reign of Charles I (1701), p. 175, quoted by Ogilvie, *op. cit.*, footnote 26; *cf.* Sayre, *op. cit.*, footnote 51, at p. 851.

[54] See *supra*, *op. cit.*, footnote 51.

[55] Search in the English Reports, volumes 82-84, revealed the following references: *Lake* v. *King* (1668), 2 Keble 462, at p. 463, 84 E.R. 290, at p. 291; 2 Keble 659, 84 E.R. 415; Kelyng, 71, 84 E.R. 1087-1088 (incidental reference, not on a technical point); and *Earl of Shaftsbury* (1677), 3 Keble 792, 84 E.R. 1015.

[56] *Curl*, *supra*, footnote 46, at p. 789.

[57] IV, p. 310. His references are not relevant to the question under discussion.

in practice." In *Burrows*, Lord Mansfield, in the *Delaval* case, is reported as saying:[58] "I remember a cause in the Court of Chancery, where in it appeared that a man had formally assigned his wife over to another man: and Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so is the present case. It is time that many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical Court, and are appropriated to it. But, if you except those appropriated cases, this Court is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores:* and upon this ground, both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here." In *Entick* v. *Carrington* (1765)[59] Lord Camden referred to the Lord Chief Justice of the King's Bench as "the great executive hand of criminal justice". In *Jones* v. *Randall* (1774)[60] Lord Mansfield said: "Whatever is *contra bonos mores et decorum*, the principles of our law prohibit, and the king's court, as the general censor and guardian of the public manners, is bound to restrain and punish." In 1788 grave-snatching was punished as "highly indecent, and *contra bonos mores*".[61]

In 1854 the judges were required to comment on a proposed scheme of codification. Mr. Justice Crompton observed:[62] "I think it unadvisable to lose the advantage of the power of applying the principles of the common law to new offences and combinations arising from time to time, which it is hardly possible that any codification, however able and complete, should effectually anticipate." Sir William Erle, former Chief Justice of the Common Pleas, expressed the view that the common law had a natural capacity for growth, in the context of a discussion on criminal conspiracy in his book *The Law Relating to Trade Unions*.[63] General statements

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[58] (1763), 3 Burr. 1434, at p. 1438, 97 E.R. 913, at p. 915. In another report his words appear as: "Though there are species of indecency and immorality, particularly in cases of incontinency, which are confined to the Ecclesiastical Courts (and I am very glad they are so); yet the general inspection and superintendence of the morals of the people belongs to this Court, as *custos morum* of the nation" (1 W. Black, 439, at p. 440, 96 E.R. 251). See also *Rollo* (1754), Sayer 158, 96 E.R. 837, and *cf.* Crown Counsel in *Tallard* (1733), 2 Barn. K.B. 328, at p. 345, 94 E.R. 532, at p. 543.

[59] 19 St. Tr. 1030, at p. 1064.

[60] Lofft 384, 98 E.R. 706, 1 Cowp. 38, 98 E.R. 954.

[61] *Lynn*, 2 T.R. 733, 100 E.R. 394, Leach 497, 168 E.R. 350.

[62] Quoted: Stephen, A History of Criminal Law (1883), III, p. 359. Most of the other judges were of a similar opinion. See also Seaborne Davies, Annual Survey of English Law (1932), pp. 276-277.

[63] (1869), pp. 31-53.

on the need to create common law without a precedent appear in *Mirehouse* v. *Rennell*[64] and *Jefferys* v. *Boosey*.[65]

Reference to the function of the court occurred in Lord Sumner's speech in *Bowman* v. *Secular Society Ltd.*[66] where he said: "The time of Charles II was one of notorious laxity both in faith and morals, and for a time it seemed as if the old safeguards were in abeyance or had been swept away. Immorality and irreligion were cognisable in the Ecclesiastical Courts, but spiritual censures had lost their sting and those civil courts were extinct, which had specially dealt with such matters viewed as offences against civil order. The Court of King's Bench stepped in to fill the gap."

In *Shaw* v. *D.P.P.*, in reliance on most of the precedents, or dicta, just quoted, the Court of Criminal Appeal and the House of Lords reaffirmed the role of the judges as *custodes morum*.

IV. *Cases of Judicial Restraint.*

There can be little doubt that by the early eighteenth century the role of the King's Bench as *custos morum* was generally recognised. However, there is some evidence that the court exercised its powers, which were in theory wide, with a certain restraint, at least after about 1700. Indictments were held to be defective because of generality[67] and in a number of cases wrongs were classified as civil rather than criminal.[68] In a number of important instances Parliament had to intervene to develop the law.[69] Apart from cases of "public lewdness" there was no systematic policy of expansion. Lord Mansfield himself would quash indictments which went beyond the law as "established and settled".[70] However, the

[64] (1833), 1 Cl. & Fin. 527, at p. 546, 6 E.R. 1015, at p. 1023.

[65] (1854), 4 H.C.L. 814, 10 E.R. 681, per Chief Baron Pollock, referring to a dictum of Willes, J., in *Millar* v. *Taylor* (1769), 4 Burr. 2312, 98 E.R. 201.

[66] *Supra*, footnote 50, at p. 456. At p. 457 he quotes the passage on *custos morum* in *Sir Charles Sidley's* case. It is not at all clear whether his Lordship is merely making an historical reference or referring to a present power. Probably the former from the context. See the C.C.A. in *Shaw* v. *D.P.P.*, *supra*, footnote 1, at pp. 231 (A.C.), 906 (W.L.R.).

[67] *Cf. Thomson* (1677), 3 Keble 760, at pp. 782, 817, 84 E.R. 996, at pp. 1009, 1030. Objections to indictments on this ground are not necessarily incompatible with a readiness to make innovations.

[68] See the citations in Russell on Crime (11th ed., 1961), pp. 11-13; Archbold, Pleading, Evidence and Practice in Criminal Cases (35th ed., 1962), para. 11.

[69] Offences created by statute: obtaining property by false pretences (1757), embezzlement (1799), fraudulent conversion (1812). See Glanville Williams, Criminal Law, The General Part (2nd ed., 1961), p. 594.

[70] See *R.* v. *Wheatley* (1761), 2 Burr. 1125, 97 E.R. 746; 1 W.Bl. 273, 96 E.R. 151; *R.* v. *Pedley* (1782), 1 Leach 242, 168 E.R. 224. In the latter he said "as to the point of the present case, it is firmly settled, and the

examples of restraint cannot alter the fact that Lord Mansfield was prepared to innovate when he found it necessary.[71] In *R.* v. *Vaughan*[72] he held that it was a misdemeanour to bribe a privy councillor to procure the grant of an office. In *R.* v. *Bembridge*[73] he stated that "where there is a breach of trust, fraud or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and subject it is indictable" and further that "all misdemeanours whatsoever of a public evil example against the common law may be indicted; but no injuries of a private nature unless they someway concern the King". Other judicial creations of the period include forgery and the punishment of attempt.[74]

V. *Some Constitutional Problems.*

Before the constitutional changes of the period 1688-1700 the position of the King's Bench as *custos morum* could not lead to obvious incongruity with the other pieces of the structure of State. The judges of the King's Bench were in some degree delegates of the Crown and were able to share in the exercise of the prerogative power.[75] In the Star Chamber and in committees of the Council established by statute[76] justices of the King's Bench took part in work closely associated with the executive aspect of government and the prerogative.[77] By the early seventeenth century it could be argued that what had been delegated could not be taken away arbitrarily, if at all, and the decisive battles of the period were

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legislature alone can alter it". The two cases are referred to in Fifoot, Lord Mansfield (1936), pp. 207-208.

[71] See Holdsworth, *op. cit.*, footnote 28, Vol. XII, pp. 513-514.

[72] (1769), 4 Burr. 2494, 98 E.R. 308. See Sayre, *op. cit.*, footnote 51, p. 833, note 47.

[73] (1783), 3 Dougl. 327, at p. 332, 99 E.R. 679, at p. 681.

[74] Forgery in *Ward* (1727), 2 Ld. Raym. 1461, 92 E.R. 451. Attempt at least as early as 1784 in *Scofield*, Cald. 397; see Sayre, *op. cit.*, footnote 51, at p. 834; Jackson, Common Law Misdemeanours (1937), 6 Camb. L.J. 196. Attempts were punished by the Star Chamber, but modern scholars doubt if the common-law rules are based on Star Chamber doctrine. See also Russell, *op. cit.*, footnote 68, pp. 183-7; and Jerome Hall, General Principles of Criminal Law (1947), p. 64 *et seq.*; (2nd. ed., 1960), p. 560 *et seq.*

[75] It was, after all, the original court *coram rege*. See Holdsworth, *op. cit.*, Vol. I, footnote 28, pp. 206-209. And see the court's pronouncement in *Bagg's* case (1616), *supra*, footnote 51. The courts sat by virtue of royal authority and pleasure. *Cf.* the system of commissioners of assize, oyer and terminer and gaol delivery.

[76] *E.g.* the Act of 1487 "Pro Camera Stellata", 3 Hen. VII, c.1.

[77] *Cf.* Mackie, The Earlier Tudors 1485-1558 (1957), p. 564; Ogilvie, *op. cit.*, footnote 26, pp. 106-107; Keir and Lawson, Cases in Constitutional Law (4th ed., 1954), pp. 69-70.

fought (in their formal aspect) between the Crown on the one hand, and, on the other, the common-law courts and Parliament, in which the common lawyers exercised much influence. By 1700 the outcome was a victory for Parliament and the courts. The issue which was left at large was the relation between the two victors. The powers of Parliament were to be consolidated and increased in the two centuries following but the powers which the King's Bench retained after 1700 were considerable.[78] That these powers had qualities originally deriving from the royal prerogative did not cause concern. The reasons for this lack of concern can only be put forward as hypotheses. The courts were on the winning side, or, more precisely, were not seen definitely to be on the other side.[79] Their reserve powers were not publicised by any event of political significance, and were vague. And perhaps the most important factor was the reserve and intuition shown in the exercise of these powers.[80] The only serious quarrel to arise concerned the doctrine of parliamentary privilege.[81]

With some exceptions, the public law issues considered by the modern books are related to the questions of what Parliament can do, the control of subordinate legislation, and judicial control of the administration. General propositions are found to the effect that "Parliament is sovereign" but the implications of this doctrine are not closely considered in relation to the functions which the courts have actually assumed. The courts are willing to admit that they have to apply Acts of Parliament[82] but are not partic-

[78] *Supra,*

[79] The judges as individuals were often supporters of the Stuarts and the bench no doubt included some Talleyrands — but the courts as such were not committed to the Crown politically. See A. F. Havighurst, The Judiciary and Politics in the Reign of Charles II (1950), 66 L.Q. Rev. 62-78, 229-250: On Sir John Holt, Holdsworth, *op. cit.*, footnote 28, Vol. VI, pp. 516-517. On the subservience of the judiciary under James II, Havighurst (1953), 69 L.Q. Rev. 522-546.

[80] Except perhaps during the wars with revolutionary and Napoleonic France, 1793-1815, and in the years of the Canning regime.

[81] E. N. Williams, The Eighteenth Century Constitution 1688-1815 (1960), pp. 221-248; Keir and Lawson, *op. cit.*, footnote 77, p. 121 *et seq.* The powers of the courts do not receive consideration in the books. *Cf.* Taswell-Langmead, English Constitutional History (11th ed. by Plucknett, 1960).

[82] Willes J. in *Lee* v. *Bude and Torrington Junction Railway Co.* (1871), L.R. 6 C.P., at p. 582, said: "I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from parliament. It was once said, — I think in Hobart, — that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained

ularly zealous in finding practical applications of the principle of parliamentary sovereignty. Keir and Lawson have observed:[83]

> For the rule, however, that Parliament is sovereign it has always been difficult to find judicial authority apart from *obiter dicta*. Counsel having refrained from direct attacks on it, no enunciation of the doctrine appears as part of the *ratio decidendi* in a case. Of course the assertion, in such cases as *R.* v. *Hampden*[84] and *Godden* v. *Hales*,[85] that the Crown has certain inseparable prerogatives was a denial of the unlimited competence of Parliament to alter the law, and the reversal of those decisions removed the only serious obstacle to its effectiveness; but the reversal was in every case done by statute, and Parliament can but claim sovereignty, whereas what we are looking for is an admission by the courts.

Judicial innovation in the field of criminal law raises the issue in an acute form. Stephen[86] was aware of the problem and judges on the bench have adverted to it. In *Entick* v. *Carrington*[87] Lord Camden condemned arguments that the law should be set aside or qualified in any way for "reason of state". In the *Dean of St. Asaph's* case[88] Lord Mansfield castigated the view that the jury should be asked to decide on the broad question of seditious libel or not:

> . . . what is contended for? that the law shall be in every particular cause what any twelve men, who shall happen to be the jury, shall be inclined to think, liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town. . . . Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.

To decide *de novo* that a category of acts is to be the subject of criminal responsibility is to legislate on matters which should be within the scope of public debate and the pale of parliamentary law-making.[89] The *custos morum* is a relict of a constitutional structure which existed before 1700 and sorts ill with the relationships existing in 1961. It becomes absurd if, Parliament having legis-

improperly, it is for the legislature to correct it by repealing it; but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."

[83] *Op. cit.*, footnote 77, p. 2.

[84] (1637), 3 St. Tr. 825.

[85] (1686), 11 St. Tr. 1165.

[86] *Op. cit.*, footnote 62, III, pp. 353, 359-360. See also the Supreme Court of South Australia (Full Court) in *The Queen* v. *Todd* [1957], S.A.S.R. 305, at pp. 319-321. For a contrary view, Sir William Erle, *op. cit.*, footnote 63, pp. 31-37, 47-53.

[87] *Supra.*

[88] (1784), 21 St. Tr. 876. *Cf.* the words of Viscount Simonds, *supra.*

[89] See W. A. Elliott, *Nulla Poena Sine Lege* (1956), 1 Jur. Rev. (n.s.), 22, at p. 24.

lated in a certain form on obscene publications, the judicature can then reveal that the debate on the meaning of obscenity and the careful drafting had been rather pointless: the *custos morum* may still be able to catch Lady Chatterley.

VI. "*The Unravished Remnants of the Common Law*".

As a prelude to a consideration of the problems of judicial legislation in their modern setting it will be of no little interest to devote some attention to offences which may be said to exist if one adopts the *modus operandi* of the Lords in *Shaw*. Each of those now to be mentioned can be supported by a very old case—we hesitate to say precedent—and, or, by a reference in Hawkins, Blackstone or Russell. A search in the sources produced the following conscripts for the rearguard of English criminal jurisprudence: raising a false hue and cry;[90] deceit causing a judge to divert time from his public duties;[91] refusal to undertake parochial office;[92] neglect of office by constables;[93] buying and selling offices of a public nature;[94] a variety of malpractices by public officers characterised as "extortion";[95] publishing false news;[96] being a religious imposter;[97] omission to pay customs to a foreign sovereign;[98] and citing a foreign ambassador, accredited to this country, as a criminal.[99] This list is by no means exhaustive of the results obtainable by examining the numerous artifacts of the common law.[100] No doubt some at least of the activities referred to require punishment. Unfortunately the use of proscriptions laid down in many cases before 1750 and, though not enforced, retained since principally as a consequence of the conservatism of the institutional writers, has an aspect of arbitrariness. The selection offered varies as between

[90] Russell, *op. cit.*, footnote 68, pp. 503, 736, 1799; and see the observations in *Todd, supra*, footnote 86, at p. 326.

[91] *Todd, ibid.*, at p. 330; mentioned as a possible inference from *Emerton* (1675), 2 Shower K.B. 20, 89 E.R. 767.

[92] Russell, *op. cit.*, footnote 68, pp. 420-421 (no precedents since 1823).

[93] *Ibid.*, p. 412 (last precedent in 1703).

[94] *Ibid.*, p. 422.

[95] *Ibid.*, pp. 418-420.

[96] *Ibid.*, pp. 1327, 1698. And yet *Scandalum Magnatum* disappeared in 1888 (by the Statute Law Revision Act).

[97] 1 Hawk P.C. 7; Blackstone, *op. cit.*, footnote 47, IV (1826 ed. by Chitty), p. 62.

[98] *Indicalmois* (1660), 1 Sid. 143, 82 E.R. 1021.

[99] *Carye* (1676), 84 E.R. 1027.

[100] See *supra*. Further finds await those willing to read the opinions of the Law Officers of the Crown: *cf.* the report dated 9th January 1854, printed in McNair, International Law Opinions, Vol. I, p. 15, at p. 16, where it is that that for a British subject to assume the position of sovereign of a foreign country "might be treated as an offence at Common Law". See also *ibid.*, p. 126 (Report of 15th February 1861 on the "Kossuth Bank Notes").

Blackstone, Hawkins, East and Russell. The results of the confused state of the sources of the criminal law are unjust and anarchic. Thus, for example, a number of eminent opinions[101] support the view that the defamation of a foreign sovereign is a common law offence and some dusty precedents[102] are cited. Lord McNair's *International Law Opinions*[103] contains a series of Law Officers' opinions on this subject the latest of which is dated 21st March 1857[104] and relates to a note from the Prussian Minister in England "requesting to be informed whether there exists in England any law analogous to that established in Prussia for the punishment of Press offences against the Sovereign or Chief of a Foreign State . . .". The Officers reported that there was no provision of English law analogous to that of Prussia, and, further:

> A Libel published in England of or concerning a Foreign Sovereign or the Chief of a Foreign State, would not be treated and punished by the English law differently from one published of or concerning any private person.

Moreover, in *Antonelli and Barberi*[105] Phillimore J., as he then was, said:

> Seditious libels are such as tend to disturb the government of this country, and in my opinion a document published here, which was calculated to disturb the government of some foreign country, is not a seditious libel, not punishable as libel at all. . . . To hold otherwise . . . would make our great statesmen guilty of seditious libel, and those persons who espoused the cause of Italian liberty.

Perhaps, like blasphemy, the offence has been redefined to suit new conditions[106] but it is obvious that considerable uncertainty exists as to the present state of the law.[107]

VII. *Nulla Poena Sine Lege.*

"It has always been thought", said Lord Reid in *Shaw*, "to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what

[101] Stephen, Digest of the Criminal Law (8th ed., 1947), Art. 120; Oppenheim, International Law (8th ed., 1955), Vol. 1, p. 283, note; Dickinson, (1928), 22 Am. J. Int. L. 840, at pp. 842-843.

[102] *D'Eon* (1764), 1 W.Bl. 510, 96 E.R. 295; *Lord George Gordon* (1787), 22 St. Tr. 213; *Vint* (1799), 27 St. Tr. 627; *Peltier* (1803), 28 St. Tr. 589.

[103] Vol I., pp. 10-13.

[104] *Ibid.*, p. 12. *Cf.* (1949), 26 Br. Y.B. Int. L. 27.

[105] (1905), 70 J.P. 4.

[106] See *infra.*

[107] See the works cited in footnote 101, *supra;* and *cf.* Lauterpacht (1928), 22 Am. J. Int. L. 105, at pp. 114-115; Russell, *op. cit.*, footnote 68, pp. 1806-1807 (*semble*, criminality lies in the probability of provoking disputes and war between this country and a foreign sovereign: see *Antonelli and Barberi, supra*, footnote 104).

conduct is and what is not criminal, particularly when heavy penalties are involved".[108] In a judgment concerning a statutory offence Mr. Justice Holmes once said in the Supreme Court of the United States: "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."[109]

Throughout the common-law world the desirability of certainty in the definition of both statutory and non-statutory crimes has frequently been asserted by judges and academic writers during the last hundred years.[110] Indeed, Dicey sought to raise to the level of a constitutional precept the rule that no man should be punished except for a distinct breach of the law.[111] It is, at the same time, recognized that the criminal law cannot be spelt out with exhaustive precision.[112] Even were the entire criminal law of England to be reduced to statutory form, the very process of statutory interpretation would itself defeat any absolute predictability in the administration of criminal justice.[113] But it is pertinent to inquire how far, if at all, it is desirable that there should rest with the courts, through the medium of conspiracy and substantive crimes such as "public mischief" and "corruption of public morals", "a residual power, where no statute has yet intervened to supersede

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[108] *Supra*, footnote 1, at p. 281 (A.C.).

[109] *McBoyle* v. *United States* (1930), 283 U.S. 25, at p. 27.

[110] *E.g. Price* (1884), 12 Q.B.D. 247, at pp. 255-256; *L'Association St. Jean-Baptiste* v. *Brault* (1900), 30 S.C.R. 598, at pp. 614-615; *Connally* v. *General Construction Co.* (1925), 269 U.S. 385, at p. 391; *Lanzetta* v. *New Jersey* (1938), 306 U.S. 451, at p. 453; *H.M. Advocate* v. *Semple*, [1937] J.C. 41, at pp. 45-46; Jerome Hall, *op. cit.*, footnote 74, ch. 2; Glanville Williams, *op. cit.*, footnote 69, ch. 12; Amasa M. Eaton, Conspiracy to Commit Acts Not Criminal Per Se (1906), 6 Col. L. Rev. 215, at p. 219; Arthur M. Allen, Criminal Conspiracies in Restraint of Trade at Common Law (1910), 23 Harv. L. Rev. 531, at p. 548; Francis B. Sayre, Criminal Conspiracy (1922), 35 Harv. L. Rev. 393, at pp. 412-413; W.T.S. Stallybrass, Public Mischief (1933), 49 L.Q.Rev. 183; R. M. Jackson, *loc. cit.*, footnote 74, at p. 201; Ralph W. Aigler, Legislation in Vague or General Terms (1923), 21 Mich. L. Rev. 831.

[111] Introduction to the Study of the Law of the Constitution (10th ed., by E.C.S. Wade (ed.), 1959), Part 2.

[112] "Language cannot be used to describe human conduct with the precision that is available to a physicist or chemist dealing with inanimate data" — Jerome Hall, *op. cit.*, footnote 174, at p. 45.

[113] An interesting example of alleged judicial legislation through the process of statutory interpretation is afforded by *Kylsant*, [1932] 1 K.B. 442. In a Note in (1932) Annual Survey of English Law 270, at p. 273, the statutory interpretation in *Kylsant* is described as "uncommonly like a bold piece of judicial legislation to meet the relaxed commercial morality of some members of the business world in the present depression".

the common law, to superintend those offences which are prejudicial to the public welfare".

The "inherent power of the criminal common law to extend its bounds to meet unusual circumstances and changing social conditions has often been asserted"[114] and the significance of the judgments of the majority of the House of Lords in *Shaw* is that a judicial faith in the resilience and flexibility of the criminal common law remains unabated. Yet, as we have seen, there was in the nineteenth century a strong body of opinion in favour of a complete codification of our criminal law, and such codification has been achieved in several common-law jurisdictions: this is true, for instance, of New Zealand and of many of the states of the United States.[115]

The Supreme Court of Canada has, in *Frey* v. *Fedoruk*,[116] shown its preference for confining the criminal law to statutory or other defined bounds. In particular, it disapproved of attempts to charge people under wide generic crimes such as "breaches of the King's Peace". The case involved an action for malicious prosecution and false imprisonment by a man whose activities as a "peeping tom" had led to his arrest and trial for acting in a manner likely to cause a breach of the peace. Mr. Justice Cartwright said in the Supreme Court:

> I think it safer to hold that no one shall be convicted of a crime unless the offence with which he is charged is recognized as such in the provisions of the *Criminal Code*, or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the courts.[117]

There was no express provision requiring the Canadian judges to

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[114] Note, (1940), 53 Harv. L. Rev. 1047, at p. 1048. See: *Ramsay and Foote* (1883), 15 Cox C.C. 231, 235.

[115] See Note, Common Law Crimes in the United States (1947), 47 Col. L. Rev. 1332; R. M. Jackson, *op. cit.*, footnote 7, at p. 193.

[116] [1950] S.C.R. 517. See Note, (1950), 28 Can. Bar Rev. 1023.

[117] *Ibid.*, at p. 530. See: Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes (1962), 75 Harv. L. Rev. 904, where the author writes (at p. 904): "The principle of *nulla poena sine lege* imposes formidable restraints upon the definition of criminal conduct. Standards of conduct must meet stringent tests of specificity and clarity, may act only prospectively, and must be strictly construed in favor of the accused. Further, the definition of criminal conduct has largely come to be regarded as a legislative function, thereby precluding the judiciary from devising new crimes. The public mischief doctrine and the sometimes overgeneralized "ends" of criminal conspiracy are usually regarded as anomalous departures from the main stream." In *Shaw*, *supra*, footnote 1, Lord Reid said (at p. 275 (A.C.)): "Where Parliament fears to tread it is not for the courts to rush in."

adopt such a view. It was a matter of deliberate choice. Some English judges have made the same choice, notably, of course, Mr. Justice Stephen. In *Price*[118] he declined to classify the burning of the dead body of a child as a misdemeanour at common law. "I must be satisfied", he declared, "not only that some people, or even that many people, object to the practice, but that it is, on plain, undeniable grounds, highly mischievous or grossly scandalous".[119] Incest, seduction and adultery could all, he added, be deemed highly mischievous or grossly scandalous, and yet they were not common law misdemeanours. He went on to stress the great principle of criminal law that nothing is a crime unless plainly forbidden by law and that exceptions to the principle should be admitted only with the utmost reluctance.

A judicial reluctance to break new ground in the criminal law, as exhibited in *Frey* v. *Fedoruk* and *Price*, can be contrasted with a readiness in other cases to punish what is held to be highly undesirable conduct. The older case-law in England abounds with examples. In *Wellard* Baron Huddleston said: "It seems to be established that, speaking generally, whatever openly outrages decency and is injurious to public morals is a misdemeanour at common law."[120] And in what is believed to be the last Scottish case where such a view was expressed, Lord Justice-Clerk Boyle said that the opening and keeping of a common gaming house "is so great an invasion of the rights of public morality, and threatens such evil to the public at large and to the particular community among whom it is sought to be introduced, as to be clearly cognisable by the court".[121]

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[118] *Supra*, footnote 110.

[119] *Ibid.*, at p. 255. In *Curll* (1727), 17 St. Tr. 153, at p. 157, Mr. Justice Fortescue said: "I own this is a great offence; but I know of no law by which we can punish it. Common law is common usage, and where there is no law there can be no transgression."

[120] (1884), 14 Q.B.D. 63, at p. 67. In *Crunden* (1809), 2 Camp. 89, 170 E.R. 1091, the defendant, who had undressed on Brighton beach for the purpose of bathing, was convicted of indecently exposing his naked body. "Whatever his intention might be", said McDonald C.B. (at pp. 90, 1091), "the necessary tendency of his conduct was to outrage public decency, and to corrupt public morals".

[121] *H.M. Advocate* v. *Greenhuff* (1838), 2 Swin. 236, at p. 258. See W. A. Elliott, *op. cit.*, footnote 89, where the author objects to claims "to resuscitate an obsolescent law-making function of our courts which, under modern conditions, they are hardly suited to fulfil". Professor T. B. Smith refers to the power of the High Court of Judiciary to declare new crimes but submits that this declaratory power should not be invoked at the present day to declare new offences *sui generis:* Scotland: The Development of its Laws and Constitution (1962), pp. 121-122, 124-131. See the recent development of the crime of "breach of the peace" in *Raffaelli* v. *Heatly* 1949 S.L.T. 284 and *Young* v. *Heatly* 1959 S.L.T. 250; the Judicial

Two recent decisions in state courts of the United States reveal that a belief in the capacity of the common law to expand to cover "new phases of crime" is certainly not confined to the United Kingdom. In *Bradbury* a defendant who had burned his sister's body in a cellar furnace was convicted in that he ". . . indecently and unlawfully . . . did dispose of and destroy the said body . . . by burning the same in said furnace, to the great indecency of Christian burial, in evil example to all others in like case offending . . .".[122] No statute applied, but it was held on appeal—and this may be compared directly with the tenor of Mr. Justice Stephen's judgment in *Price*—that since the act was highly indecent and *contra bonos mores* it was punishable at common law. In *Mochan*[123] the Superior Court of Pennsylvania affirmed a conviction for "immoral practices and conduct"; the defendant had over a long period persistently telephoned a married woman and had, in suggesting sexual intercourse and sodomy to her, used language that was described as obscene, lewd and filthy. Judge Hirt, speaking for the majority of the court, said that it was not necessary to find any precise precedents, that the test was whether the defendant's conduct could have been punished at common law, and that it certainly could be punished since the courts in Pennsylvania had power derived from common law to act against "whatever openly outrages decency and is injurious to public morals".[124] He agreed that merely to attempt to seduce a married woman was not an offence but emphasized that the circumstances were exceptional and that, in view of the fact that the words were spoken on a party line, there was a clear threat to public morality. In a strong and concise dissent, Judge Woodside objected to the assertion that the defendant's conduct amounted to a crime as "an unwarranted invasion of the legislative field".[125]

Professor Seaborne Davies, in his Presidential Address to the Society of Public Teachers of Law in 1961, has strongly attacked the implicit assertion in *Shaw* that, through the medium of conspiracy and generic crimes, "the criminal law is an indefinitely

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approach in those cases may be contrasted with the approach of the Canadian judges in *Frey* v. *Fedoruk*, *supra*, footnote 116.

[122] (1939), 9 A. 2d 657; see: Note, (1940), 53 Harv. L. Rev. 1047.

[123] (1955), 110 Atl. 2d 788; see: Note, (1956), 54 Mich. L. Rev. 418; Jim Thompson, Common Law Crimes Against Public Morals (1958), 49 J. Crim. L, Crim. Pol. Sci. 350. In the latter article, the author points out (at p. 355) that the indictment could have been differently and more satisfactorily drafted in view of the solicitations to commit sodomy — for sodomy is a statutory felony in Pennsylvania.

[124] *Ibid.*, at p. 790.

[125] *Ibid.*, at p. 791.

expansible creature of the judges"[126]. It is not intended here to retrace the ground which he has covered in such an entertaining way. Suffice it to say that there is powerful support throughout the common law world for the view that new departures in the criminal law should be entrusted solely to the legislature.[127] And it is appreciated even by exponents of a flexible criminal law that the "*ex post facto* flavour" of convictions secured by a judicial extension of the law demands that such extensions should be effected only with the greatest caution and circumspection.[128] In practice the point of divergence between the two schools of thought is often slight since all laws, like constitutions, have to be adapted to new circumstances: therein lies the paradox of the *nulla poena* principle.[129] Many judges have adapted and incidentally expanded the criminal law without even adverting to the possibility that their decision could be interpreted as retrospective law-making; it is only when the issue is squarely faced as in *Shaw* that the articulation of reasons by the judges raises the question of the degree of flexibility that is desirable in the criminal law at the present day.

VIII. *Negative Judicial Legislation.*

A significant and often over-looked feature of judicial legislation is that the English judges mould the law in a negative as well as in a positive direction: that is, they "repeal" as well as "enact". Yet this feature must be taken into account in any attempt to examine the degree of flexibility that is desirable in the criminal law. "If recent English experience is anything to go by", it has

[126] D. Seaborne Davies, The House of Lords and the Criminal Law (1961), 6 J.S.P.T.L. 104.

[127] *E.g.* Roscoe Pound, Common Law and Legislation (1908), 21 Harv. L. Rev. 383; Harlan F. Stone, The Common Law in the United States (1936), 50 Harv. L. Rev. 4, at p. 9; W. A. Elliott, *op. cit.*, footnote 89, Boston (1923), 33 Comm. L. Rep. 386, at p. 408.

[128] In *Commonwealth* v. *Kentucky* (1933), 63 S.W. (2d) 3, the Court of Appeals of Kentucky upheld a conviction for a common law conspiracy involving usury, but Clay J. in his dissent said: "However indefensible the exaction of usury may be, it is a matter that should be regulated by the Legislature and not by the courts . . . . When a court on the theory of conspiracy declares an act to be a crime at the time it was done, its decision savors strongly of an *ex post facto law*." Jerome Hall, *op. cit.*, footnore 74, p. 59, says that "there has probably been no more widely held value-judgment in the entire history of human thought than the condemnation of retroactive penal law". See: Rupert Cross, Precedent in English Law (1961), p. 26.

[129] See: *Willis* v. *Baddeley*, [1892] 2 Q.B. 324, at p. 326, per Lord Esher: "There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."

been said, "it is very difficult to unmake a criminal law—to declare by Act of Parliament that conduct which formerly constituted a crime shall no longer be criminal".[130] It is true that suicide has, by enactment, ceased to be a crime, and that occasionally Parliament is prepared—as in the case of homicide or obscenity—to introduce substantial modifications of a criminal law; but—in general—the reluctance of the legislature to unmake a criminal law contrasts vividly with its readiness to add to the criminal law.

Nonetheless there are several old common law offences which, despite the inaction of Parliament, have been skilfully narrowed down from precedent to precedent, often to the point of virtual extinction. In theory a doctrine of desuetude is not overtly recognized in English law[131] but in practice, it is submitted, such a doctrine clearly does operate.

In *Shaw*, Viscount Simonds, in asserting that the law "must be related to the changing standards of life", referred specifically to blasphemy as an example of an offence that has been narrowed by judicial action.[132] From the seventeenth to the nineteenth centuries it was stressed by the judges that Christianity was part of the law of England and accordingly deserving of its protection through the sanctions of the misdemeanour of blasphemy. Some qualified the premise by holding that it was the established Church alone that merited the protection of the courts. By the end of the nineteenth century, however, it was abundantly clear that the crime of blasphemy had largely outlived its day, and in *Bowman* v. *Secular Society*[133] the House of Lords recognized this in no uncertain terms. The older cases were duly considered and interpreted, and any direct reversal or overruling of the entire law of blasphemy was avoided by the reminder that it could still be invoked where a breach of the peace was caused or threatened. Lord Dunedin was aware that the pronouncements (albeit described as *dicta*) of great judges were being overruled,[134] and Lord Sumner dismissed

[130] Rupert Cross, Unmaking Criminal Laws (1962), 3 Melb. Univ. L. Rev. 415. See also: Sir Patrick Devlin, The Enforcement of Morals (Maccabaean Lecture in Jurisprudence of the British Academy, 1959), p. 19, where it is said: "I return to the simple and observable fact that in matters of morals the limits of tolerance shift. Laws, especially those which are based on morals, are less easily moved." See: Lord Devlin, Law, Democracy and Morality (1962), 110 U. of Pa. L. Rev. 635, at p. 648.

[131] See: T. B. Smith, The Doctrine of Judicial Precedent in Scots Law (1952), pp. 98-102. Professor Smith writes (p. 99) that "the English doctrine of precedent does not differentiate openly between old and modern authority, and would embrace obsolete decisions unless they could be explained away by sophistries or overruled".

[132] *Supra*, footnote 1, at p. 268 (A.C.).

[133] *Supra*, footnote 50.

[134] *Ibid.*, at pp. 432-433.

as mere "rhetoric" any claim that Christianity was part of the law of England.[135] And the effect of the decision of the House of Lords has been that a Lord Chief Justice has felt able to refer to "the somewhat obsolete offence of blasphemy"[136] and that a member of the present House of Lords could, in an extra-judicial utterance, confidently state that blasphemy had fallen "into desuetude".[137]

The crime of maintenance has also been narrowed by judicial decision. In *Neville* v. *London 'Express' Newspaper*, Lord Shaw of Dunfermline said that a search in Hawkins' *Pleas of the Crown* "would yield a rich reward to those who inquired as to the extraordinary length to which in certain ages, and by certain authors, the doctrine of maintenance was carried. . . . It was as if law courts were a plague-ridden or infected area, to help one another into which was an injury and a crime. Needless to say, these things, once claimed as being part of the common law of England, have long since disappeared. They are repugnant to sensible and modern ideas".[138] Lord Denning M.R., has recently expressed the hope that the scope of the crime of maintenance should continue to be severely limited,[139] and in the High Court of Australia it has been said: "It was at one time a crime of great importance, but the reasons for its importance disappeared centuries ago. . . . It may be necessary some day to consider whether maintenance as a crime at common law ought not to be regarded as obsolete."[140]

In the sphere of criminal contempt of court the judges have on occasion displayed a readiness to declare that certain species of

[135] *Ibid.*, at p. 464. In the Court of Appeal, the Master of the Rolls suggested that much of the older law as to what is blasphemous is now obsolete. "It is really a question of public policy", he said, "which varies from time to time" (*In re Bowman; Secular Society* v. *Bowman*, [1915] 2 Ch. 447, at p. 462). The words of defence counsel in a trial for blasphemy in the early nineteenth century had accurately predicted the decline and fall of the offence: "He, therefore, did not deny the existence or the propriety of the law upon which the information was filed: but all human laws were founded upon circumstances, and changed with the efflux of time, and the character and manners of a people. If they were not wholly abrogated, they either ceased to be enforced at all, or were enforced with less severity." (*Eaton* (1812), 31 St. Tr. 927, at p. 953). For a brief account of the progressive narrowing of blasphemy in accordance with changing concepts of public policy, see: Percy H. Winfield, Public Policy in the English Common Law (1928), 42 Harv. L. Rev. 76, at pp. 94-95. See also: *Doodeward* v. *Spence* (1908), 6 C.L.R. 406, at p. 413.

[136] *Morris*, [1951] 1 K.B. 394, at p. 397 (C.C.A., per Goddard L.C.J.).

[137] Lord Radcliffe, Censors (The Rede Lecture, 1961), p. 12. Lord Radcliffe also said (p. 12): "Time and the consolidation of our society have eroded the offence of criminal libel either for seditious or for heretical or seditious libel."

[138] [1919] A.C. 368, at p. 414 (H.L.). See: Percy H. Winfield, *Neville* v. *London Express Newspaper Ltd.* (1919), 35 L.Q. Rev. 233.

[139] *Re Trepca Mines Ltd. (No. 3)*, [1963] 1 Ch. 199, at p. 219 (C.A.).

[140] *Clyne* v. *N.S.W. Bar Assn.* (1960), 104 C.L.R. 186, at pp. 202-203.

contempt are now obsolete. Lord Morris, speaking on behalf of the Judicial Committee of the Privy Council in 1899, said: "Committals for contempt of court by scandalizing the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."[141] And in 1931 a "supposed rule" of criminal contempt, which was based upon a decision of 1738, was dismissed by one judge as "nowadays entirely obsolete".[142]

The history of English law, however, provides not infrequent examples of the revival of criminal offences that, for one reason or another, have lain dormant for long periods.[143] The old common law crimes of forestalling, regrating and engrossing, which had been in abeyance for about two centuries up to 1772, were accorded a new lease of life in the late eighteenth and early nineteenth centuries before prosecutions were finally forbidden by statute in 1844.[144] This was the more startling in view of the inference that might have been drawn from Parliament's repeal in 1772 of all statutory provisions against forestalling, regrating and engrossing, namely that these practices were no longer deemed undesirable. Addressing a jury in a regrating case of 1800, Lord Kenyon said: "The law has not been disputed; for though in an evil hour all the statutes which had been existing above a century were at one blow repealed, yet, thank God, the provisions of the common law were not destroyed."[145] In a later case Lord Kenyon

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[141] *McLeod* v. *St. Aubyn*, [1899] A.C. 549, at p. 561. This *dictum*, however, has not been followed by the English courts in subsequent cases; see: *Gray*, [1900] 2 Q.B. 36 (D.C.).

[142] *R.* v. *Jones, ex p. McVittie*, [1931] 1 K.B. 664, at p. 671, per MacKinnon J. (D.C.).

[143] In respect of summary offences prosecutors have also shown remarkable ingenuity in adapting dated statutory crimes to meet new demands. "Conduct may be governed by statutes passed in the reign of Queen Victoria or earlier, some of which are now out of print, or by local Acts . . ." (Glanville Williams, *op. cit.*, footnote 69, p. 585). Three years ago, a Brighton police officer is reported to have said that those who play radios on beaches or in public places could be charged with making "a loud and continuous outcry" under an ancient ruling designed to control the noise of hawkers' bells and rattles (The Times, June 12th, 1962, p. 7); and a taxi-driver in Plymouth was acquitted on a charge of leaving a hackney carriage in the street without "someone proper to take care of it", contrary to the Town Police Clauses Act, 1847—a policeman conceded that his taxi was unlikely to shy at passing traffic or to bite pedestrians (The Times, June 14th, 1962, p. 7).

[144] See: Myron W. Watkins, The Change in Trust Policy (1922), 35 Harv. L. Rev. 815, at p. 828 *et seq.*; Wendell Herbruck, Forestalling, Regrating and Engrossing (1929), 27 Mich. L. Rev. 365.

[145] *Rusby* (1800), Peake Add. Cas. 189, at p. 192, 170 E.R. 241, at p. 242. Lord Kenyon added that the common law "is coeval with civilized society itself, and was formed from time to time by the wisdom of man". As to suggestions that the judiciary might be out of touch with contem-

said of ingrossing that it "is a most heinous offence against religion and morality, and against the established law of the country".[146]

In the last decade the crimes of affray and misprision of felony have been revived in English law. Charges of making an affray are now regularly brought by prosecutors throughout the country: yet the crime had lain dormant for so long, it seems, that it is not even discussed by Hale, East or Foster.[147] "It is remarkable", said Lord Chief Justice Goddard in 1957, "what a lack of authority there is with regard to this offence. There seems to be no reported case which deals with it".[148] As for misprision of felony, a writer in the *Harvard Law Review*, in commenting on a Michigan decision of just over twenty years ago, said: "The scarcity of judicial opinion is attributable, in large measure, to the belief that misprision of felony, as a common-law offence, is practically obsolete in both the United States and England."[149] In the nineteenth century Lord Westbury said that the term "misprision of felony" has "now somewhat passed into desuetude",[150] and much more recently Lord Devlin has in a lecture described the offence of misprision as "practically obsolete".[151] But the House of Lords, in *Sykes* v. *D.P.P.*,[152] has unequivocally asserted the continued existence of the crime. "If Staunford, Coke, Hale and Blackstone all say there is such an offence as misprision of felony", said Lord Denning, "are we to say the contrary?"[153]

In the magistrates' courts of this country conduct which was once criminal, and indeed conduct which has never expressly been accepted as criminal, is often nowadays prohibited in effect by

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porary events he declared: "We are not monks and recluses, as was said in another place, but come from a class of society that I hope and believe gives us opportunities of seeing as much of the world, and that has as much virtue amongst its members, as any other, however elevated."

[146] *Waddington* (1807), 1 East 143, at p. 155, 102 E.R. 56, at p. 61.

[147] *Sharp and Johnson*, [1957] 1 Q.B. 552, at p. 556 (argument of counsel).

[148] *Ibid.*, at pp. 558-559. The Court of Criminal Appeal faced a similar difficulty of definition, as to the crime of keeping a disorderly house, in *Quinn*, [1962] 2 Q.B. 245 (C.C.A.).

[149] Note, (1941), 54 Harv. L. Rev. 506.

[150] *Williams* v. *Bayley* (1866), L.R. 1 H.L. 200, at p. 220.

[151] The Criminal Prosecution in England (1960), p. 26.

[152] *Supra*, footnote 11.

[153] *Ibid.*, at p. 559. Lord Denning went on to say that "it is plain that there is and always has been an offence of misprision of felony and that it is not obsolete. It is true that until recently it has been rarely invoked, but that is no ground for denying its existence" (at p. 560). See also the words of Lord Goddard (at pp. 567-568). In *Aberg*, [1948] 1 All E.R. 601, at p. 602 (C.C.A.), Lord Goddard admitted that misprision "is generally regarded nowadays as having become obsolete or as having fallen into desuetude".

binding over orders.[154] Eavesdroppers—or, in the words of Blackstone, "such as listen under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales"[155]—apparently are guilty of no crime, either indictable or summary,[156] though they may find themselves bound over to be of good behaviour. But in some American jurisdictions eavesdroppers have been convicted as common nuisances, and only seventy or so years ago it was held in New Jersey that a common scold was indictable as a common nuisance.[157] Persistent common scolds were once prosecuted in England,[158] but, as a commentator upon the New Jersey decision said, the offence "is really a relic of a time when woman was a slave or servant, when witches and gypsies were hung, noses were cut off, and tongues were cut out for false rumours".[159]

Despite the absence of any accepted doctrine of desuetude in English law, and despite the admitted resilience of some of the "unravished remnants" of the common law, it is reasonable to suppose that there are relatively few crimes of a specific nature that could now be called up from the past. This is certainly the case where a trial on indictment is envisaged.[160] The further back we go the more uncertain are the authorities, and the very fact that a crime has lain dormant for a long period should lead to the presumption that its very justification in the eyes of society has gone. In *Jones* v. *Randall* in 1774, Lord Mansfield said: "The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing,

[154] See: Glanville Williams, *op. cit.*, footnote 69, ch. 12 ("Preventive Justice and the Rule of Law"). "It is extraordinary", writes Dr. Williams (at para. 228, p. 719), "that the humblest judicial functionaries should thus be able to indulge their fancy by formulating their own standards of behaviour for those who come before them". In Scotland recently a skilift manager, who deliberately kept a skier suspended in his chair for a hundred minutes, was successfully prosecuted summarily for assault by depriving the skier of his liberty and causing him discomfort and inconvenience; the defendant's advocate is reported to have said that he had "been unable to find any authority more recent than the eighteenth century to support a charge of this kind" (The Times, June 26th, 1962, p. 7).

[155] *Op. cit.*, footnote 47, Vol. IV, p. 168.

[156] *R.* v. *County of London Q.S.*, [1948] 1 K.B. 670 (D.C.). The question was, however, specifically left open by the Supreme Court of Victoria: *Haisman* v. *Smelcher*, [1953] V.L.R. 625. See: A. W. Le P. Darvall and D. McL. Emmerson, Eavesdropping: Four Legal Aspects (1962), 3 Melb. Univ. L. Rev. 364.

[157] *Baker* v. *State* (1890), 20 Atl. Rep. 858.

[158] *E.g. Foxby* (1703), 6 Mod. 12, 178, 213, 239.

[159] Note, (1891), 5 Harv. L. Rev. 91.

[160] Even in *Rusby*, *supra*, footnote 145, the court was divided as to whether the offence of regrating was triable on indictment, and in the event no judgment was ever passed on the defendant: see—Blackstone, *op. cit.*, footnote 47, Vol. IV (ed. Chitty, 1826), p. 158.

we must go back to the time of Richard I to find a case, and see what is law."[161] In the late nineteenth century Lord Halsbury answered as follows the arguments in support of the proposition that a husband is entitled virtually to imprison his wife in order to enforce restitution of conjugal rights:

> I confess that some of the propositions which have been referred to during the argument are such as I would be reluctant to suppose ever to have been the law of England. More than a century ago it was boldly contended that slavery existed in England; but, if any one were to set up such a contention now, it would be regarded as ridiculous. In the same way, such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country.[162]

Many old common law offences, which equally depend in several instances upon "quaint and absurd dicta" and which would be "ridiculous" in the present-day context, can properly be described as "obsolete". " 'Obsolete' ", said a New Zealand judge, "does not mean merely suspended or reserved for special aggravated cases, but means wholly and entirely out of date, unsuited to existing conditions, existing in theory but inapplicable in practice. It is not only obsolescent (growing out of use), but obsolete (disused)".[163]

There is, it is submitted, something highly unsatisfactory about a system of law that allows for the revival of obsolete offences. Professor Winfield once wrote that "it is a mark of the organic nature of our Common Law that parts which fall into desuetude in one age are resuscitated in the next, sometimes with new functional developments far beyond the ken of their creators",[164] but such a view ill accords with the principle of *nulla poena sine lege*. In a book published in 1921 Professor Winfield wrote: "Maintenance, champerty, livery, embracery, barratry and conspiracy (in its original sense) were commonest at times when the law was constantly set at naught, the government was weak, and the kingdom was very near anarchy. That the law now rarely has any need to use its weapons against these offences is satisfactory, but that

[161] *Supra*, footnote 60, at pp. 707 (E.R.), 385 (Lofft).

[162] *R.* v. *Jackson*, [1891] 1 Q.B. 671, at pp. 678-679 (C.A.) See also *Neville* v. *London 'Express' Newspaper Ltd.*, *supra*, footnote 138, at p. 414; *Winchester* v. *Fleming*, [1958] 1 Q.B. 259, at p. 264.

[163] *Att.-Gen.* v. *Blomfield*, [1914] N.Z.L.R. 545, at p. 568, per Denniston J. (in reference to contempt by scandalizing the court).

[164] Percy H. Winfield, *op. cit.*, footnote 138. See also, Chapman J. in *Att.-Gen.* v. *Blomfield*, *ibid.*, at p. 581: "An obsolete process or jurisdiction is one which is no longer used, not necessarily one that is no longer capable of being used."

it would be unwise to abandon them altogether no one can doubt. Even now, it is easily possible to imagine parts of the United Kingdom where legal procedure might be warped by corruption or overwhelmed by violence".[165] On the contrary, it could be argued, the revival of those crimes in their old form should be a matter solely for the legislature.

The irony is that offences such as blasphemy which have been progressively narrowed in scope could not be revived in their old form, because of the doctrine of precedent, whereas offences such as misprision of felony which simply lapsed are capable of being revived in full. And decisions such as that of *Shaw* would seem to put a premium upon astute reading of the old reports and authorities wherein lies the evidence of the "unravished remnants" of our common law. The remedy surely would seem to lie in a clear judicial recognition of a doctrine of desuetude in respect of case-law, a doctrine that should operate to prevent the revival of long-dormant offences or of offences that have come to be recognized generally as obsolete. It has been suggested that there should be formed "a society for the abolition in the sphere of criminal law of the 'unravished remnants' of the common law mentioned by Viscount Simonds";[166] but the formation of such a society would not be needed if the judges were to take a more realistic view of the process of negative judicial legislation through the centuries. In summary trials and in trials on indictment, and in the exercise of either punitive or preventive powers, it is submitted that the law should show a clear "tendency to test the reliability of a precedent by its relevance to contemporary social life"[167] and a greater readiness to let sleeping precedents lie.

IX. *Generic Crimes: The Problem of Definition.*

Whatever the future attitude of the English courts to the revival of obsolete offences, the fact is that *Shaw* has expressly recognized the category of conduct injurious to public morals, whether as a species of conspiracy or as a substantive crime, and has incidentally re-affirmed the continued existence of the possibly wider category of public mischief.[168] The law as to public mischief and public morals, in the light of the various judgments in *Shaw*, may tentatively be stated in the following manner:

[165] Percy H. Winfield, The History of Conspiracy and Abuse of Legal Procedure (1921), pp. 161-162.

[166] Rupert Cross, *op. cit.*, footnote 130, at p. 431.

[167] The phrase is that of T. B. Smith in *op. cit.*, footnote 131, at p. 99.

[168] See: A. L. Goodhart, The Shaw Case: The Law and Public Morals (1961), 77 L.Q. Rev. 560, at pp. 566-567.

(1) The existence of the common law misdemeanour of public mischief was affirmed by the Court of Criminal Appeal in *Manley*.[169] "What the Court of Criminal Appeal did", it has been said recently, "was to apply *dicta* in old cases to a situation which had not been contemplated by the judges responsible for them and, by so doing, they declared in 1933 that acts performed in 1932 were criminal although, in 1932, many lawyers would have said that such acts were merely anti-social".[170] The decision, in fact, gave some respectability to those instances in previous centuries where the judges had extended the criminal law "when the facts of the case before them seemed to be such that it would be proper for them to give rein to their personal feelings of indignation".[171] *Manley* has been frequently and soundly criticized by legal writers[172] and doubts have been cast upon it even by the Court of Criminal Appeal;[173] nowhere, perhaps, have the weaknesses of the decision been more effectively exposed than in the Supreme Court of South Australia in the case of *Todd*.[174] Yet the judgment of Viscount Simonds in *Shaw* would seem to suggest that public mischief has life in it still.[175]

(2) There is a recognized crime of conspiring to effect a public mischief. "It is much too late", said Lord Goddard in *Newland*, "to object that a conspiracy to effect a public mischief is an offence unknown to the law".[176] Dr. Glanville Williams has argued, however, that this offence should, on the basis of decided authority, be confined to agreements to commit a crime or to defraud.[177] And in his dissenting judgment in *Shaw*, Lord Reid said: "Public mischief is the criminal counterpart of public policy, and the criminal

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[169] [1933] 1 K.B. 529. See: W.T.S. Stallybrass, *op. cit.*, footnote 110.

[170] Rupert Cross, *op. cit.*, footnote 128, p. 25.

[171] W. A. Elliott, *op. cit.*, footnote 89, at p. 42. See also: R. M. Jackson, *op. cit.*, footnote 74, at p. 198; Francis B. Sayre, *op. cit.*, footnote 110, at pp. 406, 413; *Ex p. Andrew Jackson* (1885), 45 Ark. 158 (see, Annotation on Vagueness in Statutes (1938), 83 Law. Ed. of Sup. Ct. Reports of U.S.A. 893, at p. 898); *Boston* (1923), 33 C.L.R. 386, at p. 408.

[172] See: Stallybrass, *op. cit.*, footnote 110; Jackson, *op.cit.*, *ibid.*; R. M. Jackson, The Machinery of Justice in England (4th ed., 1964), pp. 128-129.

[173] *Newland*, [1954] 1 Q.B. 158, at pp. 165, 167-168.

[174] *Supra*, footnote 86. The defendant was charged with effecting a public mischief in that he falsely represented that he had been drowned, thereby causing the police to devote their time to searching for him or his body. After a careful consideration of the case-law on public mischief and of the major works on criminal law, especially those of the nineteenth century, the Supreme Court concluded that there was no offence known to the law of South Australia which should be described in an information as "effecting a public mischief" *simpliciter*.

[175] See Goodhart, *op. cit.*, footnote 168, at pp. 566-567.

[176] *Supra*, footnote 173, at p. 165.

[177] *Op. cit.*, footnote 69, pp. 596-600.

law ought to be even more hesitant than the civil law in founding on it in some new aspect."[178]

(3) The existence of a common law misdemeanour of corrupting public morals seems to be asserted by the Court of Criminal Appeal in *Shaw* and by three of the majority judgments in the House of Lords. After considering various authorities from the seventeenth century, Mr. Justice Ashworth in the Court of Criminal Appeal felt able to assert that "it is an established principle of common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable misdemeanour".[179] Viscount Simonds and Lord Morris fairly clearly are in agreement with that statement,[180] and Lord Hodson probably so.[181] The attempt in *Newland* to confine public mischief to cases of conspiracy contrasts with this readiness in *Shaw* to accept a substantive offence of corrupting public morals—even though such acceptance was unnecessary for the final decision on the conspiracy count. If, as is likely, the corruption of public morals is but one species of public mischief, then the judgments in *Shaw* would appear to have partially restored *Manley* to a position of respectability in the criminal law.

(4) "In my opinion", said the trial judge in *Shaw*, "a conspiracy to debauch and corrupt public morals is a common law misdemeanour and is indictable at common law".[182] The charge, of course, was one of conspiracy, and Lord Tucker, one of the majority judges in the House of Lords, directed his attention solely to the issue of conspiracy, and was not concerned with whether the corruption of public morals amounted in itself to a substantive offence. "It has for long been accepted", he said, "that there are some conspiracies which are criminal although the acts agreed to

[178] *Supra*, footnote 1, at p. 276 (A.C.). In *Newland, supra*, footnote 173, at p. 165, Lord Goddard said "that the court should approach the subject [of public mischief] at least with the same degree of caution as must be exercised when considering a plea in a civil action that something has been done contrary to public policy".

[179] *Ibid.*, at p. 233 (A.C.).

[180] The judgment of Viscount Simonds (*ibid.*, at pp. 266-268 (A.C.)) does not specifically advert to the substantive offence, but the general tenor of his words leaves little doubt that he accepts the approach of the Court of Criminal Appeal. Lord Morris of Borth-y-Gest said (at p. 292): "There are certain manifestations of conduct which are an affront to and an attack upon recognized public standards of morals and decency, and which all well-disposed persons would stigmatise and condemn as deserving of punishment. The cases afford examples of the conduct of individuals which has been punished because it outraged public decency or because its tendency was to corrupt the public morals."

[181] Lord Hodson (*ibid.*, at p. 292 (A.C.)) expressed "full agreement" with the speeches of both Viscount Simonds and Lord Tucker.

[182] Quoted in the argument of counsel at p. 235 (A.C.), *ibid.*

be done are not per se criminal or tortious if done by individuals".[183] Whatever the ultimate view that is held as to the existence of the substantive offence, it is clear that, as a result of the decision in *Shaw*, there is a recognized crime of conspiring to corrupt public morals—either as a sub-category of conspiring to effect a public mischief or as a separate category of its own.

(5) The willingness of the court to punish the corruption of public morals stems from the court's re-asserted role as the *custos morum* of the people.[184]

The fundamental objection to generic categories of crime such as public mischief and the corruption of public morals is the difficulty of defining what sort of conduct should be included within them. In *Kataja*, a state decision in Victoria, Chief Justice Mann said:

> As has been frequently pointed out, such phrases as "public mischief", "tending to the prejudice of the community", or "contrary to public policy", are in their very nature phrases which have to be applied by the Judges and interpreted by the Judges with the very greatest caution and with the greatest regard to precedent; because they are of such a nature that there is a very grave danger of either a Judge or a jury so applying them as unwittingly to create new offences not known to the common law and without the authority of Parliament.[185]

But Professor Goodhart has, in an analysis of *Shaw*, argued that in respect of many crimes—such as manslaughter, sedition, criminal libel and public nuisance—it may be impossible to foretell whether a particular act is forbidden.[186] "Certainty", he writes, "is a question of degree, and all that can be required is that the crime should be sufficiently defined so that a reasonable man could recognize that it is concerned with a particular and recognizable type of wrongful act".[187] It could, however, fairly be argued that manslaughter, criminal libel, sedition and public nuisance, or certainly the first two, are less sweeping in their area of potential coverage than the proscription of public mischief or of conduct offensive to public morals; and, in any event, even if there are well-

[183] *Ibid.*, at p. 283 (A.C.). Lord Morris (at p. 291) said "that the law is not impotent to convict those who conspire to corrupt public morals", and Lord Tucker (at p. 292) declared: "I am wholly satisfied that there is a common law misdemeanour of conspiracy to corrupt public morals." Of the count of "Conspiracy to corrupt public morals", Viscount Simonds said (at p. 266) that he was "concerned only to assert what was vigorously denied by counsel for the appellant, that such an offence is known to the common law . . ." Lord Tucker, in laying his whole stress upon the angle of conspiracy, added (at p. 290) that he was not rejecting the view that there is a substantive offence of corrupting public morals.

[184] See *supra*.

[185] (1943) V.L.R. 145, at p. 146.

[186] *Op. cit.*, footnote 168, at pp. 564-565.

[187] *Ibid.*, at p. 565.

established generic crimes in English criminal law, it is questionable whether it is for the courts at the present day to add to their number.

More specifically, the following objections could be taken to the attitude of the majority judges in *Shaw* to the corruption of public morals.

(1) None of the judges expressly spoke of any limitations upon the term "public morals". It has been suggested by one writer that "public morals" at common law is relevant *only to questions* of sexual morality,[188] and it is true that all the hypothetical examples of corrupting public morals that were judicially suggested in *Shaw* concerned sexual morality.[189] Lord Tucker, for instance, envisaged the conspiracy to corrupt public morals as a weapon against the encouragement of adult homosexual practices, should the law be changed as recommended by the *Wolfenden Report*, or as a weapon against the encouragement of lesbianism at the present time, or as a weapon that could have been used against the encouragement of incestuous sexual intercourse up to 1907.[190] Yet, so long as the term "public morals" is retained, it is open to lawyers to speculate as to its possible application to racial and religious discrimination, drunkenness, tax evasion, unfair advertising, tobacco consumption, improper business practices, gambling, and, indeed, the propagation of controversial views on topics such as sterilization or birth control.[191] These examples cannot be dismissed simply as mere academic speculation. The precedents in English law, such as they are, afford instances of the courts acting against conduct deemed to be *contra bonos mores*, even though that con-

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[188] Case and Comment, [1961] Crim. L. Rev. 468, at p. 473. But see: *Musser* v. *Utah* (1947), 333 U.S. 95, at pp. 96-97; *Jordan* v. *De George* (1950), 341 U.S. 223 (especially the dissent of Jackson J.). In *Anderson* v. *Commonwealth* (1826), 5 Rand. (26 Va.) 627, at p. 631 (quoted in Michael and Wechsler, Criminal Law and its Administration (1940), p. 1074), it is said: "A case of slander may display as much baseness and malignity of purpose, as much falsehood in its perpetration, or ruinous effect in its consequences, and as pernicious an example in its dissemination, as this case of seduction."

[189] "It is interesting to observe that all the examples cited by their lordships are sexual in nature . . . but this is probably merely because such instances of immoral acts come more readily to mind" — Alan W. Mewett, Morality and the Criminal Law (1962), 14 U.T.L. J. 213, at pp. 222-223.

[190] *Supra*, footnote 1, at p. 285 (A.C.). See also, Viscount Simonds, at p. 268.

[191] The Attorney General in *Curll*, *supra*, footnote 119, said, in argument: "I do not insist that every immoral act is indictable, such as telling a lie, or the like. But if it is destructive of morality in general, if it does, or may, affect all the king's subjects, if there is an offence of a *public nature*. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal Courts, and bawdy houses are."

duct was not related to sexual morality. In *Lynn* in 1788 the court affirmed the conviction of a man who stole a dead body from a graveyard and took it away for the purposes of dissection: in reply to counsel's contention that this constituted no crime at common law the court stressed that the action of the defendant was "highly indecent and *contra bonos mores*".[192] In *Davies* in 1905 the court justified an admitted extension of the law of contempt of court by recourse to the role of the King's Bench as the *custos morum* of all the subjects of the realm.[193]

The ambivalence of such a phrase as "public morals" was in issue in a case in Utah. Thirty-three people had been convicted of the statutory offence of conspiracy "to commit acts injurious to public morals" in that they counselled, advised and practised polygamy. After appeals against conviction had been denied by the Supreme Court of Utah a further appeal was taken to the federal Supreme Court which sent the case back for further consideration as to whether the statute was so indefinite as to offend the constitution; ultimately the state Supreme Court did rule that the statute was unconstitutional.[194] While the case was before the federal Supreme Court, Mr. Justice Jackson commented upon the wide discretion that the provision left to the courts and said: "In some States the phrase 'injurious to public morals' would be likely to punish acts which it would not punish in others because of the various policies on such matters as to the use of cigarettes or liquor and the permissibility of gambling."[195]

If the corruption of public morals is but a sub-division of public mischief, the courts could conveniently confine cases of sexual immorality to the former category and deal with other forms of immorality under the broader category. Yet, as we have seen, Lord Goddard was at pains in *Newland* to doubt the practice of using public mischief as a substantive crime, while in *Shaw* there were several *obiter* remarks asserting the existence of a substantive crime of corrupting public morals. Are we to assume that the present judicial policy is to confine public mischief to cases of conspiracy except where there is an issue of public morals? If so, it is surely the duty of the courts to provide some indication of the

[192] *Supra*, footnote 61. See also: *Hathaway* (1702), 14 St. Tr. 639, 12 Mod. 556, 88 E.R. 1515.

[193] [1906] 1 K.B. 32 (D.C.). In *Shaw*, *supra*, footnote 1, (at p. 268), Viscount Simonds links the status of the Court of King's Bench as *custos morum* to the superintendency by that court of conduct *contra bonos mores*.

[194] *State* v. *Musser* (1946), 175 P. 2d 724; *Musser* v. *State of Utah*, *supra*, footnote 188; *State* v. *Musser* (1950), 223 P. 2d 193.

[195] *Ibid.*, at pp. 96-97 (U.S.).

scope of public morals in the criminal law. As Professor Seaborne Davies has pointed out, the real objection to what he terms "drag-net law" is "the most distinct possibility of abuse at some moment of deep crisis". "Junius", he added, "hit the nail on the head when he said that in law you must not trust to what men will do but guard against what they may do".[196]

(2) The application in law of a concept such as "public morals" may vary considerably from one judge to another. In *Jordan* v. *De George* in the Supreme Court of the United States, Mr. Justice Jackson referred to attempts in lower courts to define the phrase "moral turpitude". "Irrationality", he said, "is inherent in the task of translating the religious and ethical connotations of the phrase into legal decision. The lower court cases seem to rest . . . upon the moral reactions of particular judges to particular offences".[197] It is true that, even in the operation of generic offences, due regard is paid to precedents, but, so long as the English judges decline to recognize a doctrine of desuetude, this is only a small consolation. Professor Harlan F. Stone has written:

> If we search the precedents so intent upon the past that we have no eye for what is going on in the world about us, it is easy to find analogies and resemblances which will serve as a superficial justification for the extension of a precedent to sets of facts whose social implications may be quite different from any which the precedents have considered.[198]

In any event, both Viscount Simonds and Lord Tucker in *Shaw* were satisfied that the absence of exact precedents was no bar to a

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[196] *Op. cit.*, footnote 126, at p. 110.

[197] *Supra*, footnote 188, at p. 239. Jackson J., along with two other judges, dissented from the view that a conspiracy to defraud the United States of taxes on distilled spirits constituted a "crime involving moral turpitude" within a statute which made two convictions for offences involving moral turpitude a ground for deportation. If, he asked, moral turpitude embraces these who commit fraud, does it also embrace those who are a little niggardly on a customs declaration or those who fail to keep their accounts square with a parking meter? "We should not forget," he added, "that criminality is one thing—a matter of law—and that morality, ethics and religious teachings are another. Their relations have puzzled the best of men." (at p. 241). See also: Note, (1929), 43 Harv. L. Rev. 117 on "Crimes Involving Moral Turpitude"; in the interpretation of the phrase "moral turpitude" the author would prefer a uniform standard laid down by the legislature rather than "the apocalyptic criteria of individual judges" (at p. 121). See: the dissent of Jackson J. in *Lutwak* v. *U.S.A.* (1952), 344 U.S. 604, at p. 620. A distrust of individual interpretations of morality doubtless inspired the United States government in starting proceedings last year to challenge the white supremacy voting laws in Mississippi, and, in particular, the requirement of "good moral character" as a criterion for voting eligibility (The Times, August 29th, 1962, p. 6).

[198] *Op. cit.*, footnote 127. See also: Arthur M. Allen, *op. cit.*, footnote 110, at p. 548; Francis B. Sayre, *op. cit.*, footnote 110, at pp. 412-413; *Todd, supra*, footnote 86 at p. 319.

conviction for conspiring to corrupt public morals.[199] The position would seem to be that it is open to a trial judge, in prosecutions concerning public morals and certainly in prosecutions concerning public mischief, to direct the jury that they are entitled to convict in a wide sphere of anti-social behaviour.

(3) The application in law of a concept such as "public morals" may equally vary considerably from one jury to another.[200] Several of the judges in *Shaw* appear to have considerable faith in the capacity of juries successfully to interpret the prevailing standards of public morality.[201] Lord Hodson declared that "the function of *custos morum* is in criminal cases ultimately performed by the jury" and added: "In the field of public morals it will thus be the morality of the man in the jury-box that will determine the fate of the accused, but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law."[202]

In the area of public mischief generally it would seem that the jury is not entrusted with the same power that is to be allowed to it in respect of the corruption of public morals.[203] In manslaughter and in obscenity, however, the jury is, as in cases of public morals, left to decide not only the facts alleged by the prosecution but also the issue of whether, upon those facts, the conduct of the defendant is deserving of punishment. And it has been suggested by one writer that, had their lordships in *Shaw* considered criminal negligence, "they might have been less complacent about the role of

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[199] *Supra*, footnote 1 at pp. 267-289 (A.C.)..

[200] See *Todd, supra*, footnote 86, at p. 321.

[201] *Supra*, footnote 1. Viscount Simonds (at p. 269 (A.C.)) felt that the matters raised in the case "must ultimately depend on the opinion of a jury." "Only juries", said Lord Tucker (at p. 289) "can adequately reflect the changing public view on such matters through the centuries". Lord Morris said (at p. 292): "Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved."

[202] *Ibid.*, at p. 294 (A.C.).

[203] See the words of the Recorder in *Manley, supra*, footnote 169, at p. 530: "It is my clear view that this act is one which may tend to a public mischief. It would be intolerable that our police force . . . should have their services deflected in order to follow up charges which are entirely bogus to the knowledge of those making them." According to the Report (at p. 530): "The jury found on the evidence that the appellant had done the acts which she was alleged to have done and that she was guilty of the offence with which she was charged." Had the case been one of corrupting public morals, it seems that the jury would have been left to decide whether the act was in fact one which might tend to corrupt public morals. See also: *Joshua* v. *Reginam*, [1955] 1 All E.R. 22; *Boston, supra*, footnote 171, at p. 392; R. M. Jackson, *op. cit.*, footnote 74, at p. 198. For a different view see *Todd, supra*, footnote 86, at pp. 320-321; *Bailey*, [1956] N.I. 16 (and see also J.LL.J. Edwards, [1956] Crim. L.R. 151, at pp. 161-163).

the jury in the sphere of public morals".[204] As for obscenity, Lord Reid in his dissent in *Shaw* admitted that in cases of obscene libel the jury has great latitude, "but", he added, "I think it would be an understatement to say that this has not been found wholly satisfactory".[205] The function of the jury in obscenity cases is perhaps the closest of all to the function entrusted to it in cases of public morals, for in each the jury is being asked to interpret "the common conscience of the community by present-day standards".[206]

Though it would be disingenuous to suggest that the judge, in his summing-up, would have no influence upon a jury in its interpretation of the common conscience of the community, a great measure of the law on obscenity and as to public morals must depend on the vicissitudes of juries' decisions. Standards will differ, not only from one age to another and from one society to another, but also within one country at the same time. It would be theoretically possible for two juries to reach two completely divergent decisions on the same day. The judges in *Shaw* clearly felt that they themselves should not act as the interpreters of public morality, but it is scarcely satisfactory that juries are now expressly to be recognized as makers of the criminal law.[207] "Is there not a danger", asks Cross, "that a jury composed of men and women whose taste is very properly disgusted by the salubrious, will be all too ready to convict someone of conduct tending to corrupt public morals merely because he shocks them"?[208] The danger must be infinitely greater than in the law of obscenity, which in its scope is a much narrower crime and which has, since the legislation of 1959, been subject to certain legislative safeguards. Even if public morals is to be confined in practice to sexual morals, how can it convincingly be argued that twelve jurymen, deliberating in the secrecy of a juryroom, are competent to assess what

[204] Rupert Cross, *op. cit.*, footnote 130, at p. 430.

[205] *Supra*, footnote 1, at p. 282 (A.C.).

[206] *Roth* v. *United States* (1957), 354 U.S. 476, at p. 490 (quoting the words of a trial judge). This was an obscenity case. Douglas J. in a dissent said: "Any test which turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment." (at p. 512).

[207] See Generally: Mark DeWolfe Howe, Juries as Judges of Criminal Law (1939), 52 Harv. L. Rev. 582.

[208] Rupert Cross, *op. cit.*, footnote 130, at p. 431. Judges have frequently shown a surprising assurance in leaving moral judgments to juries; in *Redd* v. *State* (1910), 67 S.E. 709, the defendants were convicted in Georgia of a "notorious act of public indecency, tending to debauch the morals", and in the Court of Appeals it was said: "What is decent and what is indecent is largely a matter of general public opinion, and, hard as it is to define the words 'public indecency', most of us who have ordinary sensibilities know what it means." (at p. 711).

particular conduct is calculated to corrupt public morals? The fact is, surely, that this is pre-eminently a legislative function and should be entrusted to the legislature. Lord Devlin has said:

> The novelty in the dicta in *Shaw's* case is that they formally confer on the jury a positive function in law enforcement. It cannot be intended that the jury's only duty is to draw the line between public morality and immorality. If, for example, a man and a woman were charged with conspiracy to corrupt public morals by openly living in sin, a jury today might be expected to acquit. If homosexuality were to cease to be per se criminal and two men were to be similarly charged with flaunting their relationship in public, a jury today might be expected . . . to convict. The distinction can be made only on the basis that one sort of immorality ought to be condemned and punished and the other not. That is a matter on which many people besides lawyers are qualified to speak and would desire to be heard before a decision is reached. When a minister submits the issue to Parliament, they can be heard; when a judge submits it to a jury, they cannot. The main burden of Lord Reid's trenchant criticism of the majority opinion is that it allows and requires the jury to perform the function of the legislator.[209]

Furthermore, a reliance upon juries' decisions upon the law will serve to enhance the unpredictability of the criminal law. Precedent will tell us nothing save that there is a criminal category of corrupting public morals, and the judges, as we have seen, have omitted to suggest even a broad definition of what is to be understood by public morality. Juries admittedly have a formative role to play in all areas of the criminal law, but in this sphere of public morals, it is submitted, they have been given a wider role than in respect of any other offence. This role might be restricted by entrusting to the judges, as in other cases of public mischief, the function of directing the jury as to whether the conduct alleged in the particular case could amount to a corruption of public morals, but it is also submitted that this would be satisfactory only in the event of the scope of public morals being more precisely defined. Indeed, it is fairly clear that much of the criticism of *Shaw* has stemmed from a very real distrust of either the judge or the juror acting as an interpreter of prevailing standards of morality. In Arkansas in 1885, a court said in respect of a charge of committing an act "injurious to the public morals":

> We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the

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[209] *Op. cit.*, footnote 130, at p. 648. See also Harlan F. Stone, *op. cit.*, footnote 127, at p. 9 — "When the evil is defined and generally recognized, legislatures have not been slow to effect reforms which courts have been unwilling or have not felt free to make." *Cf. Todd, supra*, footnote 86, at pp. 320-321.

> moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or no, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed.[210]

(4) The existence of a generic category of crime such as "the corruption of public morals" leaves too much initiative in the hands of a prosecutor. There are doubtless many spheres of crime where prosecutors have a considerable discretion—for example, the law of public order. Many commonplace summary crimes are both uncertain and erratic in their operation.[211] But it is submitted that, in any mature system of law, there should be a constant striving to limit the number and scope of "last resort" offences which may be invoked.[212] It may be that "the corruption of public morals" will be invoked but infrequently and yet therein lies its greatest threat to a realistic concept of *nulla poena sine lege*. In effect, there could be charges of corrupting public morals at a point in time when the authorities deem it expedient to intervene. Prosecutions in such circumstances could be oppressive, and, as

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[210] *Ex p. Andrew Jackson, supra*, footnote 171 (quoted in Ralph W. Aigler, *op. cit.*, footnote 110, at pp. 848-849). Older examples of how moral indignation can enter into judicial action are provided by the summings-up of Lord Kenyon in *Thomas Williams* (1797), 26 St. Tr. 653 and in *Rusby* (1800), Peake Add. Cas. 189, 170 E.R. 241, and the words of the Pennsylvania court in *Updegraph* v. *Commonwealth* (1824), 11 S. and R. 394 (quoted in Jim Thompson, *op. cit.*, footnote 123).

[211] "Many concedely vague crimes at the lower end of the criminal law spectrum — vagrancy, disorderly conduct and loitering, for example — have on occasion been rationalized as essential catch-all devices enabling police and prosecutor to operate in a twilight zone — both by cloaking with legality otherwise illegal arrests on suspicion, and by reaching anti-social conduct which cannot be fitted into existing criminal categories. A similar rationale for vagueness is sometimes announced for both conspiracy and fraud" — Abraham S. Goldstein, Conspiracy to Defraud the United States (1959), 68 Yale L.J. 405, at p. 443. See also: Arthur H. Sherry, Vagrants, Rogues and Vagabonds — Old Concepts in Need of Revision (1960), 48 Calif. L. Rev. 557; Joseph Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice (1960), 69 Yale L.J. 543. In British Justice: The Scottish Contribution (1961), p. 99, Professor T. B. Smith writes: "It is in respect of less heinous anti-social behaviour that pressure is brought to bear on the courts to extend the criminal law — in particular where sexual morality and the administration of justice is concerned."

[212] In *Quinn, supra*, footnote 148, which concerned a charge of keeping a disorderly house, counsel for one of the defendants said: "This is the first case of its kind. It is an attempt to warm up an out-of-date offence dormant for some 30 years, presumably because no other was suitable." (at p. 251). The convictions were upheld, in part by reliance on the reasoning of the majority judges in *Shaw, supra*, footnote 1.

Lord Kenyon said in the course of argument in *Thomas Williams* in 1797, "if people with the very best intentions carry on prosecutions that are oppressive, the end may not always perhaps sanctify the means".[213]

X. *Conspiracy and Public Morals.*

The *ratio* of the decision of the House of Lords in *Shaw* clearly is that there is a common law misdemeanour of conspiring to corrupt public morals. With certain of the implications of their Lordships' decision—particularly as to the significance in relation to the law of obscene publications—we shall not be concerned in this article.[214] It is submitted, however, that, whether or not the criminal category of corrupting public morals is to be decently wrapped in the blanket-charge of conspiracy, it is still to be deplored in view of its inherent uncertainty.

Some of the most profound examples of judicial legislation in all common law countries have taken place under cover of conspiracy. Not surprisingly, conspiracy has been described as the "darling of the modern prosecutor's nursery".[215] During the prolonged dispute between the government and the medical profession of Saskatchewan in 1962, the Attorney General of the province warned doctors that they could be prosecuted on charges of criminal conspiracy in the event of their refusing to treat patients after the proposed health insurance scheme came into force.[216] In the same year, some fifty leaders of the Sons of Freedom of the Doukhobor sect in British Columbia were charged with conspiring to intimidate the Parliament of Canada and the legislature of the province; such a charge had apparently never been brought before in Canada.[217] Again in the same year, a British barrister was sentenced to nine months' imprisonment in Jamaica upon a conviction of inciting another person to effect a public mischief; the alleged public mischief consisted of making false statements to the Gov-

[213] *Supra*, footnote 210, at p. 704.

[214] See especially the Commentary upon *Shaw* in [1961] Crim. L. Rev. 468, at pp. 470-475, for a valuable concise exposition of the issues raised in *Shaw*.

[215] *Harrison* v. *United States* (1925), 7 F.2d 259, at p. 263, per Learned Hand J. (2nd Cir.).

[216] See The Times, June 6th, 1962, p. 12. The Attorney General explained that a doctors' strike would be considered as a breach of their "implied contract" with patients contrary to the Medical Professions Act, and that a conspiracy to break their contract could lead to up to five years' imprisonment. He declared, according to the report, that "the criminal code existed to protect the public from an irresponsible minority, and the public would be protected to the full limit of the law".

[217] See The Times, March 26th, 1962, p. 9.

ernor so as to secure the reprieve of a man awaiting sentence of death for murder. The barrister's conviction was subsequently quashed by the Caribbean Court of Appeal.[218] These are just a few recent examples of the infinite flexibility of the charge of conspiracy. Mr. Justice Jackson has, in the Supreme Court of the United States, described it as "so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from the many independent offences on which it may be over-laid".[219] An Irish judge of the nineteenth century said that conspiracy was "necessary to redress classes of injuries which at times would be intolerable, and but for it would go unpunished".[220] Once more in the words of Mr. Justice Jackson, this "elastic, sprawling and pervasive offence" presents a "strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers".[221]

In some common-law jurisdictions efforts have been made to reduce conspiracy to a statutory and relatively confined compass. "A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy", wrote Professor Sayre, "lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought".[222] In a well-known article published in 1922, Professor Sayre examined the nature of the crime, from the historical and analytical points of view, and concluded by pressing for an abandonment of the idea "that mere combination in itself can add criminality or illegality to acts otherwise free from them".[223] That idea, in his view, stems from a mis-

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[218] See: *Jamaican Conspiracy Trial* (*The Peter Evans Case*) (1962), 5 The Lawyer 41. It is pointed out in the note that the Court of Appeal "explicitly exonerated Peter Evans of any motive to do more than his professional duty required of him".

[219] *Krulewitch* v. *United States* (1948), 336 U.S. 440, at pp. 446-447. In *op. cit.*, footnote 69, at para. 226, pp. 710-713, Dr. Glanville Williams criticizes the "wide ambit and elasticity" of the offence. See also, Kenelm E. Digby, The Law of Criminal Conspiracy in England and Ireland (1890), 6 L. Q. Rev. 129, at p. 134: "No branch of the law of England is more uncertain and ill-defined than the law of Criminal Conspiracy." "The history of the law of conspiracy appears to show that from time to time, especially when social questions become prominent, there is a tendency to extend the area of criminal conspiracy." See generally: *Weaver* (1931), 45 Comm. L. Rep. 321 (the judgment of Evatt J.); S. Goldstein, *op. cit.*, footnote 211, at pp. 415-416.

[220] *Parnell* (1884), 14 Cox C.C. 508, at p. 516, per Fitzgerald J.

[221] *Krulewitch* v. *United States*, *supra*, footnote 219, at pp. 445, 457. See also: *Parnell*, *ibid.*, at p. 519; *Warburton* (1870), L.R. 1 C.C.R. 274, at p. 276; Note, (1915), 15 Col. L. Rev. 337, at p. 338; *Todd*, *supra*, footnote 86, at p. 321.

[222] Francis B. Sayre, *op. cit.*, footnote 110, at p. 393.

[223] *Ibid.*, at p. 427. In *Krulewitch* v. *United States*, *supra*, footnote 219, at p. 450, Jackson J. said: "Attribution of criminality to a confederation

reading of Hawkins' *Pleas of the Crown*[224] but has survived because the judges have found it an extremely convenient instrument for enforcing their own notions of justice. Above all, it has relieved judges "from the embarrassing necessity of having to spell out the crime".[225] Conspiracy all too often serves to provide a specious respectability for extensions of the criminal law, and the decision of the House of Lords in *Shaw* has led to a renewed call from some quarters for a more satisfactory delimitation of the scope of the crime.[226] Lord Reid stressed in his dissenting judgment that the House of Lords was clearly creating "a new unlawful act" for the purposes of conspiracy. "It appears to me", he commented, "that the objections to that are just as powerful as the objections to creating a new offence".[227]

XI. *Concluding Remarks.*

Critics of the outcome of *Shaw* must be cautious lest they be accused of advocating the reduction of the role of the judges to that of automatons. It is conceded that the judges cannot "apply the law" in any mechanical sense: technique is important. Technique and judicial intuition can achieve good results in fields in which the legislature is unlikely to take any action by way of negative legislation: thus judicial application of a doctrine of obsolescence has been successful in the sphere of blasphemy.[228] Extension of the criminal law by judicial action, the marking of the boundaries of

which contemplates no act which would be criminal if carried out by any one of the conspirators is a practice peculiar to Anglo-American law."

[224] (1922), 35 Harv. L. Rev. 393, at p. 406. Professor Seaborne Davies has described Hawkins as "a somewhat second-rate institutional writer" (*op. cit.*, footnote 126, at p. 110), a view which might be compared with that expressed by Lord Goddard when he said that Hawkins' Pleas of the Crown is "a work of the highest authority which has been cited in the Courts for many years" (*Hudson*, [1956] 2 Q.B. 252, at p. 259 (C.C.A.)).

[225] *Ibid.*, at p. 406. In *Shaw*, Lord Tucker said (*supra*, footnote 1, at p. 282 (A.C.)): "It has for long been accepted that there are some conspiracies which are criminal although the acts agreed to be done are not per se criminal or tortious if done by individuals. Such conspiracies form a third class in addition to the well-known and more clearly defined conspiracies to do acts which are unlawful, in the sense of criminal or tortious, or to do lawful acts by unlawful means."

[226] *E.g.* D. Seaborne Davies, *op. cit.*, footnote 126. Professor Davies writes: "In the course of our legal history, it has been a device used for much dirty work. It is still too frequently the last resort of desperate prosecutors. If it has to be kept, and I am ready to admit the possibility that it may very occasionally be useful, it should be under strict restrictions and not with this amplitude or arbitrariness now sanctified by the judicial custodians of our morals." (at p. 111).

[227] *Supra*, footnote 1, at p. 276 (A.C.). Lord Reid also said (at p. 275): "Every argument against creating new offences by an individual appears to me to be equally valid against creating new offences by a combination of individuals."

[228] *Supra.*

generic crime, is also a legitimate and necessary use of judicial power. However, in *Shaw* the power to create new crimes *sui generis* is asserted. The decision cannot be regarded as a further example of the technique of gently moulding the law by means of new definitions of a well-established crime or a new application of recognized principles of the law of murder, larceny, forgery and the like. The House of Lords and our other leading courts of criminal jurisdiction are declared to have the right to enforce their opinions as to public morals by criminal sanctions.

The problems of constitutional theory, and the questions of policy summarised by the maxim *nulla poena sine lege*, have been examined above. The unhappy association of the categories of conspiracy and public mischief with the propositions to be found in *Shaw* has been considered. However, these questions do not exhaust the sources of anomaly provided by the House of Lords. Thus the readiness of the courts to extend the concept of public morals to meet new demands is in striking contrast to a judicial reluctance to create new heads of public policy. In a recent decision of the Court of Appeal, *Faramus* v. *Film Artistes' Association*,[229] the majority of the court declined to create a new head of public policy so as to render void a trade union rule which one of the majority judges agreed was "cruel and arbitrary".[230] Lord Justice Diplock said: "A contract may be unenforceable as contrary to public policy because it is unreasonable in respects relevant to particular grounds of public policy as, for instance, in being in unreasonable restraint of trade or unreasonable restraint of marriage. But unreasonableness per se or unreasonableness in respects not relevant to any of the now well-settled grounds of public policy has, as I understand the law, never constituted a separate ground of public policy entitling the court to treat a contract or a term of a contract as void."[231] Yet Lord Goddard himself, in an extra-judicial utterance, declared that public mischief, like public policy, is an unruly horse,[232] and there is certainly no assurance that public mischief, or public morals, is any the less an unruly horse for being shrouded in criminal conspiracy.

Moreover, if it is permissible to create new offences as a matter of policy, *a fortiori* it would be defensible to create offences by

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[229] [1963] 2 W.L.R. 504, at p. 523. See now the decision of the Lords: [1964] 2 W.L.R. 126. [230] *Ibid.*, at p. 523. [231] *Ibid.*, at p. 524.

[232] The working of the Court of Criminal Appeal (1952), 2 J.S.P.T.L. (n.s.) 1, at p. 8. For some of the judicial dicta concerning the unruly nature of public policy, see: R. E. Megarry, Miscellany at Law (1955), p. 270.

analogy with statutes[233] and indeed this is less arbitrary than the "rabbit out of the hat" approach. No doubt the judges and others would deplore such a suggestion, and with justification. The readiness to innovate exhibited in *Shaw* contrasts with the solicitude of the courts for the liberty of the subject evident from *Taylor*[234] and the policy of interpreting criminal statutes strictly in accordance with the intention of Parliament.[235] Extensive interpretation of statutes affecting the liberty of the subject has been resorted to only in wartime.[236] Doubtless the judges believe that the power they have will not be abused and that trust can be placed safely in the courts. However, times change and experience has shown that self-confidence on the part of those administering the law is not ultimately a guarantee of the rule of law.

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[233] *Cf. Fairclough* v. *Whipp*, [1951] 2 All E.R. 834 (D.C.); and the Indecency with Children Act, 1960, 8 & 9 Eliz. 2, c. 33.

[234] [1950] 2 K.B. 368.

[235] Admittedly this policy is not adhered to in all respects today: see references in [1961] Crim. L.R. 156, at pp. 22-23. It remains sound policy, however, and it is certainly not suggested by writers or judges that a *general* principle of "effective" construction should replace the older rules. The present principle seems to be that the intention of parliament should be discovered and that the same principles of construction apply to all classes of statutes. See Craies on Statute Law (5th ed., 1952), p. 503.

[236] *R.* v. *Halliday, ex parte Zadig*, [1917] A.C. 260; *Liversidge* v. *Anderson*, [1942] A.C. 206.