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## Literature and the Criminal Law

**A Narration of Cases in Which Points of Law Have Entered Into the Composition of Books**

The literature of a nation is the best expression of its best thought reduced to writing, but it is more. It is the expression of the life and character of the nation's people. It therefore has power to instruct you, which is as effective as it is subtle, and which no research or systematic study can ever rival. It quickens your thought, and fills your imagination with the images which have illuminated the choicer minds of the race, bringing you into the presence of men of the greatest charm and force.

But it does more than that. It acquaints your mind by direct contact with the forces which really have governed the world from generation to generation. More of a nation's politics may be learned from its poetry than from books about its constitution or public affairs. Operas are better mirrors of manners than chronicles. Dramas sometimes let you into the secrets of statutes; orations, stirred by a deep energy of emotion or resolution, and passionate pamphlets, contain more history than legislative journals.

The law of a nation presents a contemporaneous panorama of its life; and the history of a nation's jurisprudence is the story of the progress or decadence of its civilization. The law deals with human relations in all of their aspects. The whole confusing, shifting drama of life parades before it and in it finds a permanent reflection. "Lawyers know life practically," said Samuel Johnson, "a bookish man should always have them to converse with".

Law books are not things remote from life. They have played and continue to play an important part in the enduring things of life. In them you will find recorded life in its brilliant aspects and life with the gloss rubbed off; tragedy, comedy, manners, customs, superstitions and traditions, truly pictured by contemporary evidence. Back of every argument or decision or statute there is a story of human interest.

Of all the branches of the law there is none which stirs men's imaginations and sympathies so readily and so deeply as the criminal law. Its study is rendered attractive to all thoughtful men by its direct bearing on the most urgent social difficulties and the deepest ethical problems of all times; and almost all men, thoughtful or thoughtless, are fascinated by its dramatic character—the vivid and violent character of the events which the criminal courts notice and repress as well as those by which they effect the repression. It is not surprising that writers have found in it a constant source of plot and inspiration. Between literature and the criminal law there is therefore an immediate and inveterate connection, which justifies the title of this article.

But the title is a flexible formula. Under its protection one might discuss criminals, who, like Bunyan, became great writers; or great writers, who, like Byron, became criminals; or writers, who, like Scott, were successful criminal lawyers; or criminal lawyers, like Arthur Train, who were popular writers; or novels, like *Lorna Doone* or *The Heart of Midlothian*, or *Kidnapped*, in which a criminal trial is described; or books like *Micah Clarke* or *For Faith and Freedom*, in which the activities of a famous criminal judge are depicted; or books like *The Vicar of Wakefield* or *The Orange Girl* in which the underlying theories of the criminal law are condemned.

But because of the exigencies of time and occasion, I have decided to present to you simply a potpourri of narration of miscellaneous cases in which some point of law has entered into the composition of a book which, properly

or improperly, has been called a piece of literature. "The time has come the walrus said to speak of many things, of shoes and ships and sealing wax, of cabbages and kings".

### Definition of Crime

"I am not aware", said the greatest of New Jersey judges, "that any jurist in any age of the common law has ever doubted as to the meaning of the word crime". The judge had the authority of Lord Mansfield for his statement, but he was wrong. "The word crime", says the Pennsylvania court, "is a generic word of wide significance, and there has been no universal adoption of a precise, definite and exclusive meaning to be attached to it".

I appeal to Balzac for a vindication of the Fatherland. He was a lawyer who had made a careful study of criminal law. Furthermore, he admitted on various occasions that he knew everything and was always right. "Crime", says his character Raphael in the *Wild Ass's Skin*, "there's a word as high as the gallows and deeper than the River Seine". Modern authority has confirmed Balzac and Pennsylvania, and today it is everywhere admitted that the question, "What is crime?" is impossible of solution.

### The Criminal Act

Though the definition of crime is still doubtful, from an early date it has been uniformly held that a physical element—a criminal act—is an essential factor in every crime. A mere mental operation, hoping, expecting, desiring is never criminal. "The thought of man is not to be tried" said one of the greatest medieval judges, "for the devil himself knoweth not the thought of man".

In requiring a physical act as a condition of responsibility, the criminal law differs from the Divine Law. The Decalogue commands: "Thou shall not covet" as well as "Thou shall not steal"; and in the most famous of all sermons we are informed, "Whosoever looketh on a woman

to lust after her hath committed adultery with her already in his heart”.

It also differs from the principles of the ecclesiastics and the moral philosophers, according to which the will is taken for the deed. They have not been able to understand it. Hence Boswell tells that when Garrick declared that whenever he acted the part of Richard, III he felt like a murderer, Samuel Johnson, as a moral philosopher, sharply retorted, “Then you ought to be hanged whenever you act it”.

But as Holmes as sententiously declared “the aim of the law is not to punish sins but to prevent certain external results” and so the doctrine of the ecclesiastics has never found an abiding place in our law. Perhaps this is fortunate, for Montaigne in his *Essays on Vanity* says, “There is no man so good who were he to submit all his thoughts to the law would not deserve hanging ten times in his life”.

Shakespeare, who knew so much law that his plays must have been written by Bacon, or knew so little law that he could not possibly have studied law at all,—the answer depending entirely on which book you read,—was familiar with the principle of which Johnson<sup>1</sup> was ignorant.

In *Measure for Measure*, distinguishing the guilt of Claudio from that of Angelo he has Isabella say,

“My brother had but justice,  
In that he did the thing for which he died:  
For Angelo,  
His act did not overtake his bad intent,  
And must be buried as an intent,  
That perished by the way; thoughts are no subjects,  
Intent but merely thoughts.”

In a recent North Carolina case, the court holding that a person who goes to a distillery merely to buy whiskey is not guilty of aiding and abetting its unlawful manufacture, said, “In the language of the great dramatist, it may be said of the defendant;

‘His act did not overtake his bad intent’.”

The fact that Shakespeare knew the rule of law of which Johnson was ignorant, and that his language has been cited with approval by a court, might furnish great comfort to the Baconians were it not for the fact that in applying the rule to the facts of the case before him he entirely overlooked the rule of the criminal law that where a person intends to commit one criminal act and by mistake commits another he is criminally responsible for the act which he did commit.

### **Criminal Attempts**

A criminal act is an essential element of criminal responsibility but it is not necessary that a criminal should have accomplished fully the criminal act which he intended. An attempt to commit a criminal act is itself criminal. But in the application of this principle we are confronted with the question: Is a man criminally responsible for attempting to commit a crime the commission of which was physically impossible?

Conan Doyle even with the aid of his spiritualistic advisors seems to have been baffled by this problem. In the Return of Sherlock Holmes we are told of an attempt to murder Sherlock Holmes under the following circumstances: Holmes expected that an attempt to kill him would be made by Colonel Moran. He therefore prepared a wax effigy of himself and put it in a life-like position in an arm-chair in his room. The window shade was pulled down and a light placed so as to throw the silhouette of the wax figure on the shade. Deceived by these preparations, the Colonel shot and the bullet struck the effigy in the forehead. The Colonel was arrested and the police proposed to prosecute him for attempting to murder "Sherlock Holmes".

Was he guilty? A very able writer and a very learned court would say that Moran was guilty, but that he would not have been guilty if the window shade had been up, and the figure itself instead of its shadow had been visible to the

Colonel. But this is a fantastic distinction scarcely worthy of serious consideration.

Other authorities would decide that the Colonel was guilty if his belief that the effigy was Holmes was a reasonable belief. Others would decide that the Colonel was guilty if Holmes, or, perhaps, some one else, was so near as to be frightened or endangered by the shooting. And still others would hold that the Colonel was guilty if his act was considered to contravene the policy intended to be advanced by the legal prohibition of murder.

Unfortunately the creator of Sherlock Holmes, who solved all other problems with great facility, seems to have been unable to answer this one, and so he brings it about that the Colonel is prosecuted for the previous murder of another person, and is never brought to trial for attempting to murder Holmes. After all, as Galsworthy says in his *Platitudes Concerning Drama*, it is a writer's duty to propound the problem, not to find the solution.

### **The Criminal Intent**

The moral philosophers and the ecclesiastics were not able to impose upon the common law the doctrine that the will should be taken for the deed. But they were not entirely unsuccessful. They induced the common law courts to adopt the principle that every crime involved a mental as well as a physical element, and so for nearly 800 years the maxim that there cannot be a guilty act without a guilty mind has been familiar to English lawyers as a fundamental principle of the criminal law.

Among the difficult problems to which this maxim gives rise are those presented by so-called dual personalities. Little is known about such personalities. There are not more than fifty cases known to science, but the famous case in fiction of Dr. Jekyll and Mr. Hyde is known to every one.

Was Dr. Jekyll legally responsible for the crimes of Mr. Hyde? An English Judge has answered the question

by saying, "Dr. Jekyll would have been hanged for the murder that Mr. Hyde committed if it were proved that Mr. Hyde knew what he was doing". The judge added, "They were dangerous things, these double personalities; people going about stealing and murdering and telling lies about it".

### **Marital Coercion**

The rule that every crime involves a mental element—a guilty mind—is interpreted as requiring not only that there must be some degree of intentionality but also that the mind must be free from certain forms of coercion.

A rather anomalous application of this principle was the rule that a married woman was not responsible for crimes which she committed in the presence of her husband and under his coercion; and that she was presumed to act under his coercion when she acted in his presence.

The origin and reasons for this defense are matters of conjecture and mystery. Blackstone said that the defense had been recognized in England for at least a thousand years. It has been severely criticized by the most eminent legal writers and has been constantly the subject of adverse criticism by the courts because of its manifest absurdity.

Dickens, who served as an attorney's clerk and court reporter, and therefore had almost all the direct experience with the law in action which a lawyer's life and training gives, criticized the rule almost 100 years ago.

In *Oliver Twist*, Mrs. Bumble had unlawfully possessed herself of a gold ring, taken from Oliver's mother as she lay dying in the workhouse. When charged with the crime, Mr. Bumble endeavored to shift the responsibility. "It was all Mrs. Bumble, she would do it", urged Bumble, first looking around to ascertain that his partner had left the room. "That is no excuse", replied Mr. Brownlow, "you were present, and indeed, are the more guilty of the two in the eyes of the law; for the law supposes that your wife acts under your direction".



"If the law supposes that", said Mr. Bumble, "the law is an ass—the law's a bachelor, and the worst I wish the law is that his eye may be opened by experience".

The Court of Kings Bench, in a decision not yet reported, has declared that during the last fifty years the position of married women has changed in an extraordinary manner, both by decision and statute. "The married woman", said the learned court, "can choose her own part and decide her own future". It is significant that the opinion in this case was written by Justice McCardie, who is known throughout England as the bachelor judge, and who has been severely criticised by reason of his unorthodox sayings relative to women, birth control, abortion and kindred matters.

An American Court has also declared that as a wife is no longer a marionette moved at will by her husband, she should assume the responsibilities of life. But in Pennsylvania, it seems that the law is still an ass, a bachelor, who has not profited by experience, and so the old rule prevails, adding to the already great difficulties in restraining the criminal activities of the female race.

### Homicide

Homicide has been variously defined as the killing of a human being; the killing of a human being by a human being; and the killing of a human being by another human being. And the decision of cases has been made to depend upon these distinctions. But there seems to be no legal definition of a human being. Blackstone with what Bentham would have called his customary vagueness, attempts a definition by saying that it would not be homicide to kill a monster, thus substituting one inquiry for another.

The question ordinarily would present little difficulty, but in his book<sup>1</sup> entitled *On the Trail of Bad Men*, Arthur Train suggests that if the Wild Man of Borneo were killed by the Missing Link, a difficult question would be presented, and it would be easy to imagine a trial lasting months

or even years where all the greatest physiologists, zoologists, and biologists should testify to what really made a man a man rather than a monkey. You doubtless recall that H. G. Wells in his book the *Island of Dr. Moreau* portrays human beings manufactured out of parts of different animals.

### **Justifiable Homicide**

Homicide is of two kinds, criminal and non-criminal. The line of distinction between the two kinds has not had a permanent location, and some species of homicide which are now regarded as excusable, such as homicide by misadventure or homicide in self-defense, were at one time regarded as crimes. But from an early day to the present time it has been lawful to kill a robber.

This rule has not escaped criticism. Even in days when the legal punishment for robbery was death, Samuel Johnson could find no better justification for it than that it was better to kill a robber when he was robbing than to swear against him when he was on trial for his life for robbery. "I am surer I am right in the one case than the other", said Johnson, "I may be mistaken as to the man when I swear. I cannot be mistaken if I shoot him in the act". Johnson then admitted that he might be sorry afterward if he killed a robber, but he promptly added that he might also be sorry if he did not.

### **Causation**

The liberties which Spencer took with the English language in order to improve the rhyme and rhythm of his poetry are well known. It is not so well known that he took similar liberties with the law in order to make his poetry more interesting. His technique in the two cases was not the same. He archaized his language so that his poetry spoke in the language of the past. He modernized his law so that his poetry spoke the language of prophecy and vision.

He described a trial of a maiden for murdering her lover by breaking his heart. At that time, and for many years thereafter, and, perhaps in many jurisdictions even now, the law was clear that homicide could not be committed simply by causing grief or terror or nervous irritation or shock.

"Working upon the fancy of another" says East in his Pleas of the Crown, "or treating him harshly or unkindly by which he dies from grief or fear is not such a killing as the law takes notice of". Hale in his book on Criminal Law said, "Though as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet in a human forum, it cannot come under the judgment of felony, because no external act of violence was offered and secret things belong to God".

There is something grotesque in the notion of God's recognizing the distinction between murder and manslaughter, and Stephen suggests that fear of prosecution for murder by witchcraft was the real reason for the rule.

Save in certain parts of Pennsylvania, people no longer believe in witchcraft, and the great improvements in medical science has led to a gradual attrition of the former rule. It was first held to be inapplicable when death was caused by fear resulting from a battery. Later it was held to be inapplicable where the fear was produced by an assault. Finally it has been held that a prosecution for homicide may be sustained where death was caused by fright or fear alone, even though no hostile demonstration or overt act was directed against the deceased. "Many examples might be mentioned", says a learned court, "where it would be possible for the death of a person to be so caused". Thus after about three centuries the law of the poet Spencer has become the law of the courts.

### **Suicide**

At common law suicide was murder. The punishment for it was forfeiture of goods and burial at cross-roads

with a stake driven through the body. The purpose of the stake was to apprise the profane in passing that the corpse of the self-killer was below them. This method of dealing with suicide was doubtless prompted by the reflection that a poor wretch to whom life had lost its attractiveness would be seriously deterred from self-murder by the anticipation of the contumely with which his dead body would be treated by the ignorant crowd, instigated by the officers of the government. It was much easier to desecrate a dead body than to lend succor to it living when needy, or hope to its despairing possessor, and in this way lessen the motive for death.

Accordingly, in the Old Curiosity Shop, the coroner's jury having returned a verdict that Quilp had committed suicide "he was left to be buried with a stake through his heart in the center of four lonely roads".

The writer of the story, however, states that as Quilp left no will his wife inherited his property and thus became rich, overlooking the fact that at that time the property of a suicide was forfeited to the Crown. Even if Quilp's death had not been a suicide, his wife would have inherited only one-half of his property.

Dicken's mistake was probably due to the fact that he was not a lawyer and was not much concerned with technical rules of law. He was more concerned with the machinery by which the law was enforced, the men who enforced it, the conditions in which these men lived, and the actual effect of the rules of law upon the men and women of his day. He mentions comparatively few technical rules of law but from his works we may reconstruct the legal atmosphere of the period of which he wrote.

### **Dying Declarations**

Originally dying declarations were admissible in civil as well as criminal cases. The later restriction of their admissibility to prosecutions for homicide has been declared by a very able writer to be one of the most humiliat-

ing examples of the "inconceivable narrowness of our judges\*\*\*in the whole disgusting series of judicial bigotry".

The attitude back of the restriction—that a crime is more worthy of the attention of the courts than a civil wrong—is probably a traditional relic of days when civil justice was administered as a purchased favor and criminal prosecutions in the king's name were zealously encouraged because of the fines which they added to the royal revenues. Certainly it is as much of consequence to the cause of justice that robbery and rape be punished as that murder be detected.

In *Hard Cash*, which has been declared to be the "most thrilling" of his romances and the "best of all legal novels," Charles Reade permits a dying declaration to be admitted in evidence in a civil suit for false imprisonment.

Reade was a lawyer, but whether he was ignorant of the rule of law which he allowed to be violated or wrote, as was his custom, in the spirit of a knight errant burned with a desire to redress wrong, does not clearly appear. It does appear that the declaration was admitted over the objection of the opposing counsel, who objected "on the law of evidence", saying "a court of justice is not the place for new law".

### **Battery**

The common law right of a parent to control and discipline his minor children included the right to inflict corporal punishment without criminal liability. For an abuse of this right the parent was criminally liable for assault, or, if the child died, for murder or manslaughter, depending on the circumstances of the case.

A teacher stands toward a pupil at least in some respects *in loco parentis*, and at common law had similar powers of control and discipline. In absence of statute forbidding it, he has therefore the right to inflict corporal punishment upon a pupil being criminally liable, like the parent for an abuse of the right.

The demoralization and disintegration of the home which has taken place in recent years has caused a relaxation of domestic discipline almost to the point of extinction, and in many communities a sickly sentimentality has led to the enactment of laws forbidding teachers to administer corporal punishment. Corporal punishment of children or pupils is therefore comparatively rare.

Dr. Johnson would not have approved this state of affairs. Upon all occasions he expressed his approbation of enforcing instruction by means of the rod. "I would rather", said he, "have the rod to be the general terror to all, to make them learn, than tell a child, if you do thus or thus, you will be more esteemed than your brothers or sisters. The rod produces an effect which terminates in itself. A child is afraid of being whipped and gets his task, and there is an end on it; whereas by exciting emulation and comparisons of superiority, you lay the foundations for lasting mischief; you make brothers and sisters hate each other."

On another occasion Johnson said, "Children, not being reasonable can be governed only by fear. To impress this fear is therefore one of the first duties of those who have the care of children. It is the duty of the master who is in his highest exaltation when he is loco parentis. The discipline of a school is military. The master who punishes, not only consults the future happiness of him who is the immediate subject of correction, but he propagates obedience through the whole school and establishes regularity by exemplary justice".

### **Embezzlement**

The present day fame of Swift is based principally on the fact that he wrote a book the allegory which is so perfect that though the book was designed for the instruction of adults it has come to be used for the entertainment of children.

Gulliver's Travels is a book which every boy enjoys, but

it is loaded with vitriol and is a devastating satire on the human race. The law does not escape Swift's rapier thrusts. Gulliver tells us that he interceded with the Emperor of the Lilliputians in behalf of a servant who had embezzled money which he had received for his master, telling the Emperor that it was merely a breach of trust and not a crime. The Emperor replied that it was monstrous to offer as a defense the greatest aggravation of the crime. And Gulliver adds, "I had little to say in return except that different nations had different customs, for I confess that I was heartily ashamed".

At the time Swift wrote the servant would not have been guilty of a crime in England. Because of technical rules as to possession, he was not guilty of larceny, and embezzlement was not made a crime until 75 years later. Swift showed the way.

### **Finger Prints**

The first appellate decision declaring finger prints admissible as evidence of identity was made in 1911. Such evidence had been admitted in prior lower court cases. Perhaps the most famous of such cases is *Comm. v. Chambers*, reported by Mark Twain in *Puddinhead Wilson* as having occurred in 1893.

Readers familiar with the writings of Twain may be inclined to question the accuracy of his report. Twain himself stated that "a person who is ignorant of legal matters is always liable to make mistakes when he tries to describe a court scene with his pen." But he declared that he "was not willing to let the law chapters in this book go to press without subjecting them to rigid and exhaustive revision and criticism by a trained barrister, if that is what they are called", and that the chapters "were right in every detail for they were twice rewritten under the immediate eye of William Hicks who studied law part of a while in southwest Missouri thirty-four years ago and then came over to Florence for his health and is still help-

ing for exercise and his board in Macaroni Vermicelli's horsefeed shed which is up the back alley".

### Conclusion

I have endeavored to show you that the connection between law and literature is so frequent and close that the jurist who does not love the classics of all ages is like a post mortem doctor operating at a birth; a maker of manikins prescribing for a disease of the blood, a student of masks posing as a connoisseur of smiles and kisses. And the literati who write unaided by the gladsome light of jurisprudence will fail to see into the nooks and crannies where lurk some of the starkest tragedies and from which emerge some of the most sprightly romances of life. For in all times and places the law has been an intimate part of life and an essential basis of the structure of society. Examine this structure seeking the foundations upon which its philosophy, economics, religion, and sociology are built and you come to the law which is both the product and cause of human experience.

The law contains the story of men's relations with each other, but you cannot tell the story nor conceive the law, till you know something about the men you speak of. I know of no way of learning this but by reading the stories they have told of themselves, the songs they have sung, and the adventures they have applauded. You must see things with their eyes before you can understand their law books. Their jural relations are not independent of their ways of living, and their way of thinking is the mirror of their way of living.

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