The Definition of Crime

W.H. Hitchler

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation

Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol38/iss4/1

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.
THE DEFINITION OF CRIME

*W. H. HITCHLER

"The word crime," says a Pennsylvania court¹ "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."²

Judicial definitions of the term are extremely scanty and not very informative.³ "Well knowing the idiosyncrasies, often in the nature of historical survivals, of our unkempt criminal law, our judges have hesitated to essay anything like a watertight definition of crime."⁴ Perhaps this is due to the fact that there is "rarely need for courts to define crime."⁵

Legislatures have usually been no more successful than the courts in defining crime.⁶ Their definitions are not such as would be likely to be adopted if the law were "restated" or codified.⁷

It has been stated that "nobody indeed will ever be able to attempt it (the definition of crime)—except a codifier who has a charter to fashion the whole existing system into something resembling shape and consistency;"⁸ but the inability of the text writers, who create what has been called aptly

¹B.L., University of Virginia Law School. 1905; D.C.L., Dickinson College. 1932; LL.D., St. Francis College. 1932: Professor Dickinson School of Law. 1906—: Dean of Dickinson School of Law. 1930—.


³Compare the statement of the New Jersey court: "I am not aware that any jurist, in any age of the common law, has ever doubted as to the meaning of the word crime." Matter of Voorhees, 32 N. J. L. 141, per Beasley. C. J. Balzac, in the "Magic Skin," makes Raphael say. "Crime, there's a word which has all the height of the gallows and all the depth of the Seine."

⁵Winfield, The Law of Tort, p. 230,
"the literary law," has not been due to lack of effort, but to the intractability of the subject matter.

Definitions of the term crime by those who have expounded the criminal law are indeed numerous and unsatisfactory. Perhaps they are numerous because they are unsatisfactory. The following definitions are quoted without distinction in a recent case:10

"A crime is an act committed or omitted in violation of a public law forbidding or commanding it."11

"An act which subjects the doer to legal punishment."12

"The commission or omission of an act which the law forbids or commands on the ground of public policy, under the pain of punishment to be imposed by the state in its own name."13

"A wrong which the government notices as injurious to the public and punishes in what is called a criminal proceeding in its own name."14

These definitions, respectively, seem to regard the distinctive attribute of crime to be its prohibition by law, its punishment, its prosecution by the state, its injurious effect upon the public. It will be sufficiently in accord with these definitions, and convenient for our present purposes, to define a crime as an act which is prohibited by law because injurious to the public and for which the actor may be prosecuted and punished in the name of the state. 15 The merits, or defects, of this definition will become apparent as the discussion progresses. It presents for consideration the following topics:

1. An act.
2. Prohibition by Law.
3. Punishment.
4. Prosecution.
5. Injury to Public.18

AN ACT

Every crime includes a physical element which is called the criminal act. A mere mental operation, such as hoping, expecting or intending is

---

11Blackstone, Commentaries, vol. 4, p. 5.
12Standard Dictionary.
13Clark, Criminal Law, p. 1.
14Bishop, Criminal Law, sec. 32.
15For somewhat similar definitions, see 16 C. J. p. 51 and Robinson, Elementary Law, 2nd Ed., sec. 460. The Wickersham report defines a crime as "a violation of the will of the State which commands that designated human acts shall not take place and threatens the application of a particular stated reaction, the penalty, if the prohibition is ignored." No. 13, p. 5.
never criminal. The law, it is said, cannot regulate the thoughts and intents of the "heart." The best it can do, because of the evidential difficulties involved, is to punish acts, and it would be unreasonable to require the law "to detect and punish criminal intent." Furthermore the aim of the law is not to punish sins but to prevent certain external results.

The required act may be positive or negative—an act of commission or an act of omission. The perpetration of some crimes requires an act of commission; the perpetration of others requires an act of omission; and some crimes may be perpetrated by either an act of commission or by an act of omission. The great majority of crimes involve acts of commission. "Omissions, no matter how reprehensible, are usually not regarded as criminal."

PROHIBITION BY LAW

An act to be a crime must, it is said, be prohibited by law. No matter how morally reprehensible or economically injurious an act is, it is not a crime unless it is prohibited by law. "Technically, from the legal standpoint, the enactment forbidding the act causes the act forbidden to become a crime at that moment. As a corollary of this, therefore, no act is a crime which is not legally forbidden." The question whether an act is a crime is therefore not "a question of fact to be solved by an analysis of acts, but a question of law to be settled by reference to legal definitions and distinctions."

The fact that the actor thought that the act which he did was prohibited by law is not sufficient if the act in reality was not so prohibited. This is true whether the mistake of the actor was one of:

(1) fact, as where an American soldier joined American troops thinking that they were British troops.

---

17 Interesting and instructive discussions of the meaning of the term crime may be found in Kenny's Criminal Law, 14th ed., p. 3. Winfield's Law of Tort p. 190 and Allen's Legal Duties, p. 230.
20 Train, The Prisoner at the Bar, p. 10. The physical element of crime has been discussed in a previous number of this Review, vol. 26, p. 117. It will be discussed again in a forthcoming volume of this Review.
21 16 C. J. p. 64; May v. Pennell, 101 Me. 516, 64 Atl. 885, 7 L. R. A. (N. S.) 286; Ware v. Circuit Judge, 75 Mich. 488.
23 Parsons, Crime and the Criminal, p. 151; Clark, Criminal Law. 3rd. ed. p. 3.
(2) law, as where a man took wild bees mistakenly believing that according to law they belonged to his neighbor. 26

In the first case the actor thought that he was doing an act which was prohibited by law and constituted treason. In the second case he thought that he was doing an act which was prohibited by law and constituted larceny. In both cases it was held that he was not guilty.

Since a crime is an act prohibited by law, it follows that an act which the law commands or authorizes is not a crime. "It is of course a legal solecism to call that a crime which is maintained by authority of law." 27 In order that this principle may apply the act must have been authorized:

(1) by the law as distinguished from officers of the law. 28
(2) by the law of the proper state or country. 29

The definition of a crime as an act prohibited by law has been criticized from both a sociological 30 and a legal standpoint. It has been contended that this definition, though adequate in those states in which there is no common law, is inaccurate in states in which the common law exists. The common law, it is said, determines "from the reason of the thing" whether an act is a crime and therefore the definition under discussion is a petitio principii, it being equivalent to saying that an act is a crime because it is forbidden by law and that it is forbidden by law because it is a crime. 31

In reply to this criticism it has been said: "The common law does prohibit. To say otherwise would be to say that the common law makes an act punishable which was not against the law when it was committed, and no civilized nation would punish such acts. . . . . There are acts it is true, which may never have been committed (and which are not prohibited by statute), but, which, when they are committed, may be punished. They will not be punished, however, unless they violate the general principles of the common law, and unless they are mala in se or wrong in themselves." 32

Aversion to retroactive law should not be beguiled by a resort to fiction. The law in general should operate only on future conduct, or as lawyers state it, prospectively and not retroactively. This requirement is fully recognized in the case of statutory law. 33 Courts, however, have the power to make new rules of the common law even in criminal cases, and all new rules of law

26 Wallis v. Mease, 3 Binney (Pa.) 546.
27 Danville Co. v. C., 73 Pa. 29.
29 Reg. v. Leslie, 8 Cox 371; 16 C. J. p. 73; 16 C. J. p. 149.
30 Parsons, Crime and the Criminal, p. 151. See infra.
31 Wharton, Criminal Law, 12th ed., p. 18.
33 Kinnane, Anglo-American Law, p. 97.
made by the courts operate retroactively, for judicial decisions are rendered with reference to past conduct.34

This fact does not produce great injustice, and no serious effort has been made to abolish the retroactivity of court made laws. All decisions do not operate retroactively but only those in which new law is made, and such decisions, in criminal cases, are comparatively rare.35 Furthermore, in reality, in most cases the application of the law for the laity, is all ex post facto. A man who enters into a partnership, or buys a piece of land, or engages in any other transaction usually has the vaguest possible idea of the law governing the situation, and law of which a man has no knowledge is the same to him as if it did not exist.36

CHARACTER OF PROHIBITION

An act may be prohibited and made criminal by (1) the law of the state, in which case it is a crime against the state, and the perpetrator is prosecuted in the state courts and punished by the state; or (2) the federal law, in which case it is a crime against the nation, and the perpetrator is prosecuted in the federal courts and punished by the federal government.37

The same act may be made criminal by both state and federal law, and for the commission of such an act the perpetrator may be prosecuted and punished both by the state and the federal governments.38 "An act denounced as a crime by both national and state sovereignties is an offense against both and may be punished by each."39 This doctrine is based upon the assumption that the breaking of both national and state criminal law gives rise to two distinct crimes rather than to concurrent jurisdiction over the same criminal act. In the leading case the Supreme Court of the United States said: "Here the same act was an offense against the State of Washington, because a violation of its law and also an offense against the United States under the National Prohibition Act. The defendant thus committed two different crimes by the same act and a conviction by a court of Washington of an offense against that state is not a conviction of the different offense against the United States and so is not double jeopardy."40 This doctrine has been criticized as being historically, analytically and functionally unsound.41

34Gray, Nature and Sources of the Law, p. 96.
36Gray, Nature and Sources of the Law, p. 100.
37U. S. v. Worrall, 2 Dall. (U. S.) 384.
40U. S. v. Lanza, supra; Dobie, Federal Procedure, p. 51.
STATE CRIMES

Acts are made crimes against the state either by (1) legislation or (2) judicial decision. The legislative law of a state includes (1) its constitution, (2) the statutes enacted by its legislature, and (3) the ordinances enacted by its municipalities. There are no acts which are made criminal by the Constitution of Pennsylvania.

The law of crimes in Pennsylvania, it is said, "is nearly all statutory." This statement, subject to important qualifications, is true of Pennsylvania and the other states. "The American criminal law in general has proceeded to a point where it puts most of its emphasis on statutes."

The law which is made by the courts is called the common law, and acts made criminal by judicial decisions are called common law crimes. Notwithstanding the alleged comprehensiveness of the present statutory law as to crimes, common law crimes still exist in Pennsylvania. The so-called Criminal Code of Pennsylvania provides: "Every felony, misdemeanor, or offense whatever not specially provided for by this act, may and shall be punished as heretofore," and that: "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by an act or acts of assembly of this Commonwealth the directions of the said acts shall be strictly pursued; and no penalty shall be inflicted or anything done agreeable to the provisions of the common law in such cases, further than shall be necessary for carrying such acts into effect." The effect of these provisions is to leave the common law of crimes in operation, except where it has been supplied by the statutory law. "But for the most part," it has been said, "it has been so supplied and the scope left for the operation of the common law is very limited."

The courts, moreover, still have the power, in absence of precedent or statute, to make acts criminal by judicial decision, but the occasions when

42Kinnane, Anglo-American Law, p. 50.
43The United States Constitution defines treason against the United States.
44Report, Crimes Survey Commission, p. 36.
45The nature of these qualifications will be discussed later.
4618 Cornell Law Quarterly, p. 524.
51C. v. Railing, 113 Pa. 110.
53Id.
the power can properly be exercised are rare, and in the main the Legislature
must now be relied upon for the proper development of the criminal law.\textsuperscript{64}
The statutory law leaves "very few crimes unprovided for."\textsuperscript{65}

MUNICIPAL ORDINANCES

A municipal corporation has no inherent power to pass police regulations.\textsuperscript{66} The legislature may, however, empower the authorities of a municipality to make such rules and regulations as they shall deem necessary for the good order of the community, and to prescribe penalties for the violations of such rules and regulations, provided they do not contravene the laws or constitution of the state or of the United States. The ordinances enacted by the municipality must be a reasonable exercise of the power conferred by the legislature.\textsuperscript{67}

Ordinances enacted by a municipality within the scope of its delegated power are just as much laws of the State as are statutes.\textsuperscript{68} But violations of municipal ordinances are not generally crimes.\textsuperscript{69} The penalty prescribed for the violation of an ordinance is enforced in a civil action.\textsuperscript{70} The statute authorizing a municipal ordinance may, however, expressly provide that a violation of an ordinance shall be a crime.\textsuperscript{71}

Municipalities may be empowered, expressly or by necessary implication, to prohibit and punish acts which are made crimes by the statutory or common law of the state.\textsuperscript{61a} In such cases, as the violation of the ordinance does not constitute a crime, the violator may be punished for both violating the ordinance and for committing the crime, without violating constitutional provisions against double jeopardy or the common law principle of autre fois convict.\textsuperscript{82}

EXECUTIVE REGULATIONS

A violation of the rules and regulations prescribed by a government officer or department is not per se a crime.\textsuperscript{63} Such officers cannot, unless authorized by statute, make that a crime which was not a crime by common law

\textsuperscript{54}Report, Crimes Survey Commission p. 22.
\textsuperscript{55}Id. p. 36.
\textsuperscript{66}In Re P. R. R. Co., 213 Pa. 373; 43 C. J. p. 205; 3 L. R. A. (N. S.) 140.
\textsuperscript{68}Burton v. Erie County, 206 Pa. 570.
\textsuperscript{69}Trickett, Boroughs, p. 142; Sadler, Criminal Procedure p. 539; Mahanoy City v. Wadlinger, 142 Pa. 308; 43 C. J. 446.
\textsuperscript{61}Id.
\textsuperscript{61a}43 C. J. p. 222; Morgan v., 30 P. L. J. 14.
\textsuperscript{82}43 C. J. p. 222; Clark & Marshall, Crimes, 3rd. ed. p. 2.
or statute. Moreover, Congress or the legislature cannot confer upon executive officers or departments the power to define crimes or classify offenders or prescribe penalties for the violation of executive regulations. But Congress or the legislature may delegate to officers or departments the power to determine the facts or things upon which the operation of the law depends. Congress or the legislature may confer upon the executive officers or departments the power to make rules and regulations and may prescribe that violations of such rules and regulations shall constitute crimes.

Statutes conferring upon private organizations the power to make rules and regulations and prescribing that violations thereof shall constitute crimes have usually been held to be unconstitutional. But such a statute was held to be constitutional in *Gima v. Hudson Coal Co.* The statute provided that those firing high explosives should comply with the rules prescribed by the manufacturer and made a violation of such rules a misdemeanor. The case was one involving public safety and perhaps greater latitude in the delegation of its power should be accorded to the legislature in such cases. The delegated power would probably be held to authorize only reasonable regulations; but confusion is very likely to result from lack of uniformity in the rules prescribed by different manufacturers for similar products. The legislature may need relief from the burden of setting up detailed regulations, but the delegation to private individuals of the power to define crimes seems to be unfortunate.

**DUAL CRIMES**

An act may be prohibited and made criminal by more than one law of the state. "There are many instances, in the statutes, of offenses for which the perpetrator may be indicted under more than one act of assembly, leaving the choice to the district attorney as to which one he shall use."

**FEDERAL CRIMES**

Acts are made crimes against the United States only by the statutory law. There are no crimes against the United States save those acts which are made criminal by act of Congress. Unless, therefore, an act is made criminal by a federal statute, that act, however vicious or offensive its char-
acter, is not a crime against the United States. There are therefore no
common law crimes against the United States. In making acts criminal
Congress frequently employs the terminology of the common law, and in
such cases recourse must be had to the common law for interpreting the con-
gressional language. But in such cases Congress creates the offense.

The doctrine that there are no common law crimes against the United
States is said to be due to the fact that the United States is a government
of delegated powers. It has no powers except those expressly or impliedly
given to it by the United States Constitution.

The Constitution contains a few express grants of power to punish
crime; and the United States has the implied power to make criminal the
violation of any law which it has the constitutional power to pass.

The field of federal crimes is therefore potentially coextensive with the
scope of federal institutions; but the great majority of crimes committed
within the geographical limits of the United States are state crimes.

Many of the statutes defining crimes against the United States were
codified by Congress in a code which became effective on January 1st, 1910.
The steady expansion of the activities of the federal government, the modern
passion for controlling personal conduct by legislation, the World War, the
Eighteenth Amendment, and the depression, together with many other fac-
tors, have led, since the adoption of this code, to the enactment of other
criminal laws "as numerous as, and many much less useful than, the storied
leaves that were supposed to strew the brooks of Vallambrosa."

**TIME OF PROHIBITION**

In order that an act may be punished as a crime, it must be prohibited
by law both at the time it is committed and at the time of the final judgment
against the criminal. If, therefore, a law making an act a crime is repealed

---

U. S. 677; Manchester v. Massachusetts, 139 U. S. 240.

22This section 275 of the Penal Code (18 U. S. C. A. sec. 457) declares "rape" to be a
crime when committed in certain places subject to federal jurisdiction. The common law
must be used to supply the definition of "rape". Matter of Lane, 135 U. S. 443. See Wil-
liams, Federal Procedure, p. 300.


24Counterfeiting, piracy, felonies on the high seas, offenses against the law of nations,
and treason.

25Williams, Federal Procedure, p. 299.

26Act of March 4, 1909. Title 18, United States Code Annotated.

27A list of general penal provisions not contained in the Code follows section 536 of
title 18, United States Code Annotated, pages 407-429.

after the act is committed, the actor cannot be punished for it.\textsuperscript{70}

This is true even though when the repeal occurs a prosecution is pending, or after a conviction, and before sentence, or after sentence pending an appeal to a higher court.\textsuperscript{80} A repeal after a final judgment will, however, neither vacate the judgment nor arrest the execution of the sentence.\textsuperscript{81}

The rule is subject to real or apparent exceptions:

(1) Where there is a saving clause in the repealing law authorizing prosecution after repeal for acts committed previous to the repeal.\textsuperscript{82}

(2) Where there is a general statute or constitutional provision, applying to all laws which repeal former laws either expressly or by implication, and providing that the repeal of a statute shall not affect the right to prosecute for acts committed while the statute was in force.\textsuperscript{82}

(3) Where a statute is repealed, even expressly, and all, or some, of its provisions are at the same time literally or substantially reenacted, the provisions of the repealed act which are thus reenacted continue in force without interruption so as to permit prosecutions for acts committed prior to the repeal.\textsuperscript{84}

(4) Where a statute indicates very clearly that its provisions are to apply only to offenses thereafter committed, the effect is the same as that of a saving clause in the repealing act or of a general statute providing that repeal shall not affect prosecutions for offenses committed while the statute was in force.\textsuperscript{85}

The mere fact than an act is prohibited by law does not make it a crime. There is something more in the notion of crime than a mere breach of a legal rule. An act which is prohibited by law may be only a civil injury, e. g., a tort, or a breach of contract, or a quasi contractual or equitable obligation. It is, therefore, inaccurate to define a crime simply as an act prohibited by law, and this inaccuracy is not relieved by substituting as Blackstone does, the term “public law” for “law,” for the term public law is itself incapable of precise definition.\textsuperscript{86}

\textsuperscript{80}C. v. Duane, 1 Binney (Pa.) 601.
\textsuperscript{81}In Re Kline, 77 Oh. St. 25, 70 N. E. 511, 1 Ann. Cas. 219.
\textsuperscript{83}Id.
\textsuperscript{84}Id.
\textsuperscript{85}C. v. Beattie, Sed quere.
\textsuperscript{86}Kenny, Criminal Law, 14th ed. p. 3; In Re Clifford (1921) 2 A. C. 570.
PUNISHMENT

An act, in order to be a crime, in addition to being prohibited by law, must subject the actor to liability to punishment and not merely to a legal duty of reparation or restitution. The definitions of crime, however they may differ in other respects, nearly all contain this element. "A crime always involves punishment." Applying this rule it has been held that suicide is not a crime. "As there is no punishment, there is no crime."3

The idea of punishment as an essential element of crime has been so emphasized that it has been said that, "the only tolerably certain test of crime is; Does the conduct complained of render the offender liable to punishment?"4 and that "the distinction between a civil and criminal proceeding is whether the real end or object of the proceeding is punishment or reparation."5

It is doubtless true that a distinguishing mark, par excellence, of a crime is that it involves liability to punishment. But it is no more than a distinguishing mark. It does not explain the thing itself.6 Although punitiveness or nonpunitiveness is a simple and obvious test by which to determine in many cases whether an act is a crime, it is not an absolute test.7 There are acts which are not crimes which are nevertheless punishable. Three classes of such acts are:

(1) Acts for which punitive damages may be recovered in a civil action.

(2) Acts for which a penalty may be recovered in a civil action.

(3) Acts which violate injunctions.

PUNITIVE DAMAGES

There exists a large class of ordinary civil cases in which punitive damages may be recovered. Punitive damages are damages imposed for the purpose of punishing the defendant. They are given in addition to the damages which are given for the purpose of compensating the plaintiff, which

---

90Jernigan v. C. 104 Va. 850, 52 S. E. 361.
91Allen, Legal Duties, p. 233.
The practice of awarding punitive damages in certain civil cases is centuries old and is now followed in all but a few states. The doctrine, however, has been denounced as an anomaly and criticized on the ground that punishment is not a proper object of the civil law. Among the states in which the doctrine of punitive damages is recognized, there is a conflict of opinion as to whether punitive damages may be recovered in a civil case for an act which is also a crime. The majority of jurisdictions, including Pennsylvania, hold that the fact that the act for which punitive damages are sought in a civil action is also a crime does not preclude a recovery of such damages. There may be a recovery of punitive damages although the defendant has been convicted in a criminal prosecution for the same act; and the fact that in a civil action a person has been compelled to pay punitive damages is not a bar to a criminal prosecution for the same act. In jurisdictions in which this doctrine prevails there is need for a reciprocal adjustment of the penalties of the criminal and civil courts. If the defendant has been convicted in the criminal courts before the civil action takes place, it is held that the record showing his conviction and sentence may be offered in evidence and considered by the jury in mitigation of damages. The actual effect of the introduction of such evidence is doubtful. The jury instead of using the information to adjust downward the penalty which the defendant should pay, may be persuaded by it that the defendant is guilty and deserving of heavier punitive damages. If the civil trial comes first, the jury does not know for certain that a criminal prosecution will be brought, nor does it know that the defendant will be convicted if prosecuted. In such cases the jury should assess the damages without regard to the possibility of punishment in a criminal court, and if a criminal prosecution is subsequently brought the adjustment should be made there. The judge of the criminal court can make such adjustment easily by imposing a minimum sentence or by suspending sentence if the evidence warrants it.

**PENAL ACTIONS**

A penal action is an action to recover a penalty provided by statute. There are many such statutes in Pennsylvania. The purpose of such actions

---

9817 C. J. 719.
94For an excellent discussion, see 44 Harvard Law Review, p. 1173.
9517 C. J. 981.
96Wirsing v. Smith, 222 Pa. 15.
97Id.
98Foster v. C., 8 W. & S. 77.
11 C. J. 932.
is punishment. The law imposes the penalties from precisely the same motives which lead it to send thieves to jail or murderers to the electric chair. But the litigation by which such penalties are enforced is not regarded as criminal, and the acts which are so punished are not regarded as crimes, even though such acts are prohibited and penalized solely because of their tendency to injure the public.

It has been said that "penal actions are in form civil but in substance criminal" because they are intended to produce punishment and not reparation. Certainly their anomalous character complicates very artificially the distinction between the criminal and the civil law—between acts which are crimes and acts which are merely civil injuries. They have been stigmatized as "freaks," "hybrids" and "anomalies", which frustrate attempts to distinguish crimes from civil injuries.

The origin of these actions was due to historical causes. The present advantage of such a form of procedure is that it may be used by the legislature to penalize a minor offense in a summary civil proceeding before a magistrate even though the offense may have been indictable prior to the adoption of the state constitution and therefore, not punishable in a summary criminal proceeding. The disadvantages are that the legislature cannot provide for the imprisonment of the guilty person, except on civil process to enforce the payment of the pecuniary judgment, and that the convicted defendant has the unqualified right to appeal upon the payment of costs, instead of the right qualified by the necessity of obtaining the allowance of the appeal by the appellate court, as in a summary criminal proceeding, and also that there is no adequate method of enforcing the judgment against an insolvent defendant.

Penal actions are of various kinds: (1) Those which are brought in the name of the person who was injured by the act for which the penalty was imposed. In these cases it is not necessary that the penalty be confined or proportioned to the loss or damage caused to the plaintiff, as it is imposed for the purpose of punishment and not for the purpose of redressing a private injury. (2) Those which are brought in the name of any person who chooses to sue for the penalty. Statutes providing for such actions have been in existence in this country ever since the founding of our government.

Those which are brought in the name of the Commonwealth.\textsuperscript{10} Actions of this class are said to be governed by many of the principles applicable to summary convictions for crime.\textsuperscript{11} The latter two classes of penal actions differ from actions in which punitive damages may be recovered by the fact that the latter may be brought only by the injured party.\textsuperscript{12}

The legislature may provide that a penal action and a prosecution may be brought for the same act. \textsuperscript{13}Many statutes have been enacted by our legislature which provide that a person violating their provisions shall be liable to a penalty to be recovered in a civil action . . . . . and shall also be guilty of a misdemeanor and upon conviction be fined or imprisoned. We know of no Pennsylvania decision in which it is held that such legislation offends against any provision of our constitution. This is not punishing the same offense twice. The penalty recovered in the civil action and fine and imprisonment imposed in the criminal prosecution are but parts of one punishment.\textsuperscript{14} Sometimes the legislature provides that a penal action and a prosecution shall be alternative remedies.\textsuperscript{15} The fact that the law provides that the injured person may recover a penalty in a civil action does not necessarily preclude him from also recovering damages for the injury which he suffered.\textsuperscript{16}

VIOLATIONS OF INJUNCTIONS

Civil courts, sitting as courts of equity, in certain cases issue decrees, called injunctions, ordering the defendant to do or to refrain from doing certain acts. A violation of such a decree is called a contempt of court, and one guilty thereof may be fined or imprisoned by the court. Contempt involves not only an infringement of the private rights of the plaintiff in the injunction suit but also a flouting of the court's authority. Proceedings for contempt may, therefore, seek indemnity for disobedience or a vindication of the court. This dual aspect of contempt has led to a classification of contempt as (1) civil and (2) criminal.

The distinction \textsuperscript{"rests in shadow,"} and has led to much opaque discussion, but it is recognized in Pennsylvania. In \textit{Patterson v. Wyoming Council},\textsuperscript{17} the court said: \"From the earliest days of our legal history contempts of court and proceedings to ascertain them have been divided into two broad

\textsuperscript{12}Hibbert, Jurisprudence, p. 174.
\textsuperscript{14}See act of July 2, 1839, P. L. 519.
\textsuperscript{15}Hibbert, Jurisprudence, p. 174.
\textsuperscript{16}Root v. McDonald, 260 Mass. 358.
\textsuperscript{17}31 Pa. Super. Ct. 112.
and easily distinguishable classes. Where the alleged contemptuous act is aimed directly at the power or dignity of the court, or subversive of the administration of public law; and where the responsive act of the court is purely punitive in character, to vindicate the rights of the people at large vested in their properly constituted legal tribunals, such contempts, and the proceedings to ascertain and punish them, have always been regarded as essentially criminal—as distinguished from civil—in their character. But where the act complained of consists merely in the refusal to do or refrain from doing some act commanded or prohibited for the benefit, primarily at least, of a party litigant, proceedings to ascertain such contempts and enforce obedience to the order or decree, have ever been deemed akin to execution process and civil, rather than criminal in their nature."

It has been truly said that the granting of an injunction "is in some respects analogous to the publication of a criminal statute. It is notice to a party that certain things must be done or not done under a penalty fixed by the court." and the sentence of the court looks very much like punishment. It has, however, been naively stated; "It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant." On the other hand, though it is held that in the so-called criminal contempts "the sentence is punitive," it is nevertheless true that proceedings for such contempts "are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime." The truth seems to be that contempt proceedings of either class are sui generis and are not truly criminal proceedings and contempts of either character are not crimes in the ordinary sense of the term.

Although a court of equity will not enjoin an act simply because it is a crime, it is well settled that where an injunction is otherwise warranted by the principles of equity to protect the rights of another, the mere fact that a criminal act must be enjoined to affect such protection will not deprive the court of its jurisdiction. The criminality of the act sought to be enjoined neither gives nor divests jurisdiction. The advantage of securing from

---

18See also Westmoreland Co. v. United Mine Workers, 1 West. (Pa.) 3.
22In Re Grossman, 267 U. S. 87.
23See Harris, Criminal Law, 15th ed. p. 3.
equity injunctions against crime were formerly very great. The prohibitions of the criminal law are general and each man is left to apply it to himself. The prohibition of an injunction is addressed directly to an individual. The punishments for crime are generally fixed by law. The punishment for disobedience to an injunction was in the discretion of the court. For a violation of the criminal law, punishment is imposed only after plenary proceedings. The charge of violating an injunction was disposed of in a summary proceeding. By the device of having a court determine the particular acts which constitute the offense, and having the person likely to commit the offense enjoined, the charge of subsequent guilt could be disposed of summarily, without preliminary hearing, indictment by grand jury, or trial by jury. These advantages led to a gradual but persistent and continual enlargement of the power of the courts of equity to grant injunctions and to a movement to extend this most effective of the preventive remedies developed in the past on the civil side of the law.

It has been held that the fact that a person has been punished for contempt for violating an injunction by doing an act which is also a crime is not a bar to a subsequent criminal prosecution for the same act. It, therefore, appears that many acts which have been penalized by one organ of the government, the legislature, may be penalized again by another organ of it, the courts. A little ingenuity in the formation of governmental contrivances might make it possible for a man to be punished three or four times for the same act, because three or four public functionaries have concurred in forbidding it. In justification it has been said that an injunction prevents and this differs from the criminal law which punishes. An injunction prevents simply by creating a desire on the part of the defendant to do or not to do. the act commanded or forbidden by it. It creates this desire by a threat of evil consequences to him who disobeys. An injunction prevents, then, only as the criminal law prevents, because punishment will follow disobedience.

PROSECUTION

In order that an act may be a crime it must not only be prohibited and made punishable by law but it must subject the actor to liability to prosecution. "The distinction (between crimes and civil injuries) is between wrongs

---

26These advantages have been to some extent abolished. See act of June 23, 1931, P. L. 925; and act of June 23, 1931, P. L. 926.
27In Re Debs, 165 U. S. 564; Walsh, Equity, p. 207; Foster v. C., 8 W. & S. 77.
28In Pennsylvania there are statutes conferring this so-called preventive procedure upon other courts in certain cases. C. v. Andrews, 211 Pa. 110. An effort has been made to reconcile the apparent exceptions, which have just been discussed, with the statement that the only safe test of crime is the fact that it renders the offender liable to punishment by giving a particular definition to the term punishment. Winfield, The Law of Tort, p. 199.
to be redressed by private suit and those the perpetrator of which may be proceeded against by prosecution." 29 A prosecution is a judicial proceeding in the name of the state, but every judicial proceeding in the name of the state is not a prosecution. The fact that an act renders the actor liable to be proceeded against in the name of the state is therefore not decisive of its criminal character. "The distinction between criminal and civil proceedings is not whether the crown is a party for it is so in mandamus and quo warranto." 30 This is true, as the previous discussion of penal actions demonstrates, even though the act is prohibited and made punishable by law solely upon the ground that it injures the public and the penalty is recovered in an action in the name of the State. 31

An act to be a crime must render the actor liable to be proceeded against in a certain kind of proceeding in the name of the state, to wit, a prosecution. 32 The kinds of prosecution in use in Pennsylvania are: (1) prosecutions by information and (2) prosecutions by indictment. 33

It has been said that the best test whether an act is a crime is whether it renders one subject to a prosecution. 34 This is not, however, an absolute test. By statute in some states prosecutions by indictment or information may be maintained to redress certain civil injuries and not for the purpose of imposing punishment. 35 But these cases are exceptional and few in number, and, in general, it may be said that "where an act is interdicted and made punishable by law, the test by which to determine whether an act is a crime is whether the punishment is in an action or a prosecution. If in the latter it is criminal. If in the former the act is not criminal." 36

It must be remembered, however, that although a prosecution is a judicial proceeding in the name of the state any person has a right to institute it. 37 "Even where a state officer or bureau has been specifically charged with the enforcement of a statute, we have frequently held that such direction did not deprive any citizen of the right to institute prosecutions for its violation." 38 In these cases the private prosecutor is simply a complainant or informant, and altho the state may permit him to start the machinery of the

30Jernigan v. C., 104 Va. 858.
34Clark, Criminal Law, p. 17.
3517 Cyc. 1254.
36Bishop, Criminal Law, sec. 32. "A crime is an act which may be the subject of criminal proceedings instituted for the punishment of the offender." Harris, Criminal Law, 15th ed., p. 1.
3716 C. J. 289.
criminal law, it retains control of the machinery. The private prosecutor has no right to demand the punishment of the offender and the state may in various ways stop the machinery.\(^{30}\) In the case of civil injuries, on the contrary, in general, it may be said to be true that there is no power which can prevent a plaintiff from suing when he has a reasonable claim.\(^{40}\)

Definitions are always difficult and should as far as practicable be avoided. Perhaps the worst form of unscientific definition is one which states the results to which the thing which is being defined gives rise instead of stating the intrinsic nature of the thing and the elements which compose it.\(^{41}\) The orthodox definitions of crime are of this character. They define a crime by stating what the legal consequences of committing one are. They are purely technical and amount merely to a distinction between civil and criminal procedure and say "a crime is an act which gives rise to that kind of procedure which is styled criminal." The legal definitions of crime give no indication why particular acts are designated crimes; why two such dissimilar acts as parking 35 minutes, when a statute makes 30 minutes the limit, and a brutal murder are both crimes; why it is necessary to make criminal certain types of conduct; while other acts are only civil injuries.\(^{42}\)

Some authorities have attempted to discover distinctive peculiarities in the intrinsic nature of crime by which they may be distinguished from other acts. Two such peculiarities have been suggested; (1) crimes injure the public; (2) crimes are immoral acts. But, as will presently appear, it is now quite universally admitted that there is no essential intrinsic difference between acts which are crimes and those which are not.\(^{43}\)

It is, therefore, necessary, in defining a crime, to resort to an extrinsic test and to adopt the unscientific method of defining it by stating the legal consequences which follow its commission.

---

\(^{30}\) Allen, Legal Duties, p. 227.

\(^{40}\) As to injunction against civil and criminal proceedings, see 32 C. J. p. 84. 279. As to the destruction or impairment of rights of action by legislature, see 12 C. J. 972; Austin, Jurisprudence. Lecture XXVII.

\(^{41}\) "The consequences charged upon an act by law and not the nature of the act itself is the specific difference by which crimes are distinguished." Stephen, General View, p. 2.

\(^{42}\) Wickersham Report, No. 13, p. 5; Allen, Legal Duties, p. 221, 233.

\(^{43}\) Austin, Jurisprudence. Lecture XXVII. "There are no certain and universal qualities which at once stamp an act with the character of a crime." Harris, Criminal Law, p. 2. "Nothing in the character of an act enables us to determine whether it is a criminal offense. The only test is the nature of the liability it entails. In particular, neither the moral character of an act nor the amount of public mischief it may cause can distinguish it from a civil injury or make it a criminal offense." Harris, Criminal Law, p. 4. "Any description of crime which centres either in procedure or in the fact of punishment amounts only to a formal, not to a material definition." Allen, Legal Duties, p. 233.
The books are full of statements to the effect that crimes injure the public, and in order that an act may be a crime it must be "a public wrong" or be "injurious to the public." In ascertaining the correctness of these statements, common law crimes must be distinguished from statutory crimes.

The theory of the common law was that a crime was a "wrong committed against the public." It is quite true that before the definitions of common law crimes had become crystalized, injury to the public was the test usually, or at least frequently, applied in determining whether an act was a crime; and this test is frequently applied in determining whether certain acts fall within certain common law definitions, e. g., nuisance and conspiracy. But it is conceded, that even at common law, the act might affect the public either directly, as in case of nuisance, or indirectly, as in case of murder. And the correct doctrine undoubtedly is that, even at common law, it was not true that every crime caused injury to the public in any real sense of the word and that the presence or absence of injury to the public did not constitute an infallible test by which to distinguish crimes from other unlawful acts. This is proved by the following facts:

Some common law crimes are purely private wrongs to individuals alone. Thus nothing could be more purely a private wrong than a simple larceny where there is no breach of the peace, no loss of property since it simply changes hands, no open immorality corrupting the minds of the young, no person injured but him who takes and him who loses.

Some acts which injure the public are not common law crimes. A person without committing a common law crime may bring about a public calamity incomparably more widespread and severe than that produced by many common law crimes, as e. g., by the negligent management of a bank.

An act may be criminal at common law even though instead of being injurious to the public it is, on the whole, beneficial, as where a defendant was held guilty of a nuisance for erecting a causeway which to some extent obstructed navigation though by reason of facilitating the handling of goods and passengers it produced advantages which were considered by the jury to more than counterbalance the harm done.

---

44See C. v. Randolph, 146 Pa. 24; C. v. Hutchinson, 6 Pa. Super. Ct. 405. This, it is said, is the "simple common sense of matter and the accepted view of the English law." Allen, Legal Duties, p. 284. "This is the traditional view of the English law and is justified by the early history of the criminal law." Keeton, Jurisprudence, p. 192.
The legislature in determining whether an act should be made criminal has not been compelled to follow and has not even pretended to follow the principle that in order that an act may be a crime it must injure the public. Apart from constitutional restrictions, it is bound by no precedents and governed by no principles. It may make and has made criminal, acts which possess none of the alleged qualities of common law crime and which the public has never regarded as criminal or wrong. It has made many acts criminal though the injury resulting therefrom was solely to an individual and even trifling and insignificant. It has been held, however, that where a statute prohibits any matter of public grievance or commands a matter of public convenience, although a violation of the statute is not expressly declared to be a crime and no penalty is provided for it, a violation of the statute constitutes a crime. It appears, therefore, that "we cannot say, with anything like that unvarying precision which a definition requires that a legal wrong is a crime if it tends to cause evil to the community," and injury to the public is "too nebulous" a test "to be incorporated into a definition of crime." To speak of crimes as those forms of legal wrong which are regarded by the law as being especially injurious to the public at large, may be an instructive general description of them, but is not an accurate definition. A recent writer has stated that crime "is no longer an injury directed primarily against the security of the State, but any undesirable act which the State finds it most convenient to correct by the institution of proceedings for the infliction of a penalty instead of leaving the remedy to the discretion of some injured person." In reality crimes are of two kinds: (1) Those which primarily injure rights of specific persons, and secondarily injure the public; (2) Those which directly injure the public interest represented by various factors of the social organization, and do not injure specific individuals at all, except in the very remote and indeterminate sense that ultimately every individual is a joint beneficiary in the public interest.

---

50 Kenny, Criminal Law, p. 6.  
52 Kenny, Criminal Law, p. 8. "While the tendency of a wrong to injure the public is a factor by no means to be ignored in considering the criminality of such wrong, it is too vague to rest the whole weight of the definition of crime upon it." Winfield, The Law of Tort, p. 197.  
53 Keeton, Jurisprudence, p. 193.  
54 Robinson, Elementary Law, p. 522; Allen, Legal Duties, p. 249; Holland, Jurisprudence, 9th ed., p. 361; Mercier, Crime and Insanity, p. 90. "In modern times the latter greatly outnumber the former." Allen, Legal Duties, p. 90.
It is sometimes asserted that crimes are limited to acts which offend our moral sentiments. In popular speech this is true, but in a legal sense it is incorrect. Crime and immorality are not convertible terms, and there is a marked difference of opinion as to the degree of correspondence between them. On the one hand it has been said that "the moral nature of an act is an element of no value in determining whether it is criminal or not" and that "numerically considered only a minority of crimes have any ethical significance whatever." On the other hand, it has been asserted that "in general the prohibitions of the criminal law correspond with the moral sense of the community, and, with few exceptions, crimes are acts from which every man knows he ought to refrain."

It is certainly true that an act may be immoral but not a crime. "A very great number of the most despicable, wicked, and harmful deeds that can be committed are not crimes at all." This was particularly true of the common law. Morality in England was encouraged and vindicated by the ecclesiastical courts, and the common law courts ordinarily left offenses against morality for consideration and punishment by them. In the United States, though there were no ecclesiastical courts, and the reason for the common law doctrine did not exist, the doctrine has nevertheless been generally followed.

It is also true that an act may be criminal but not immoral. Indeed, "it is conceivable that the only really morally right thing to do under certain circumstances would be to commit an act designated by law as a crime." Notwithstanding these facts it may perhaps be truthfully said that, "it is, in the last analysis, underlying ethical concepts which shape and give direction to the growth of the criminal law," and that "criminality always has been and always will be inseparably connected with and dependent upon ethical concepts." It has been stated that the divergence between morality and the criminal law tends to increase. The divergence which does exist is partly intentional and partly the result of historical development.

55Train, The Prisoner at the Bar, p. 3.
56Geldart, Elements of English Law, p. 239; Allen, Legal Duties, p. 237; Stephen, General View, p. 1.
57Train, The Prisoner at the Bar, p. 4.
59C. v. Kilwell, 1 Pitts. L. J. (Pa.) 255.
60Train, The Prisoner at the Bar, p. 2.
6145 Harvard Law Review, p. 1017. Holmes, Common Law, pp. 41, 44. This was especially true in the early days of the common law. Potter, English Law, p. 295.
62Keeton, Jurisprudence, p. 195.
63Salmond, Jurisprudence, p. 235.
MENTAL ELEMENT

The definition of crime which we have adopted as the basis of our discussion, in common with many other definitions, is also defective in that it omits all reference to the fact that a mental element is an essential factor of every crime.64 Statutes in some states attempt to correct this defect by defining a crime as a violation of public law in the commission of which there must be a union or joint operation of act and intention or criminal negligence.65

CONCLUSION

It is impossible to draw an exact line between acts which are criminal and acts which are not. The general opinion of society, finding expression in this country through the common law or statutes, makes an act criminal or not according to the view which it takes of the proper means of preserving order and promoting justice. The reasons which influence a country to treat acts as crimes vary with the country and age. What therefore is criminal in one jurisdiction may not be criminal in another and what may be criminal at one period may not have been criminal at another.66

Students of the criminal law, confused by the varying acts designated crimes in different stages of development of a particular country, or in different countries, have sought to establish some intrinsic test of criminality, and to discover some acts which have been designated as crimes at all times and in all places. It seems to be generally admitted, however, that an intrinsic test of legal crime cannot be determined by an investigation of the specific acts that have been considered crimes in different countries at different times. An examination of present day countries yields evidence of great disagreement as to what acts shall be made crimes. Differing levels of culture, different economic systems, differing degrees of identification of religion and State have had their effect upon what these countries will designate crime.67

Even in Pennsylvania at the present time, an examination of the acts which are designated as crimes reveals no intrinsic characteristic which may be adopted as an essential and universal characteristic of criminal acts.

656 C. J. 53.
66Terry, Anglo-American Law, sec. 524.
67Parsons, Crime and the Criminal, p. 129; Wickersham Report No. 13, p. 12. "New conceptions of social interest cause changes in what acts are called crimes. Each country determines for itself what interests are most vital to the development and security of its people and uses the criminal law as an instrument in their furtherance and protection." Wickersham Report No. 13, p. 11.
The number of crimes is constantly increasing. The courts have been restrained by the common law principle that an act to be a crime must have a tendency to injure the public; and have not run wild. But legislatures have. The result has been the creation of so many minor crimes that it has been suggested that a person must be a careful student of the criminal law in order to avoid being a criminal. But this is an exaggeration. It is still possible for a careful man to exist for a considerable period of time without paying a fine or going to jail.

It is to be regretted, however, that the opinion seems to prevail that the law can be made an effective instrument in maintaining the social order only by making violations of it crimes. It is to be deprecated that our law can devise no means of regulating our existence save by threatening us with the shaved head and the striped shirt.