James Fitzjames Stephen, A General View of the Criminal Law of England (1863)

A GENERAL VIEW

OF THE

CRIMINAL LAW OF ENGLAND.

CHAPTER I.

THE PROVINCE OF CRIMINAL LAW.

THE object of this chapter is to show what is the subject-matter to which criminal law relates, and what are the component parts of which by the nature of the case it must consist. First, then, what is a law, and what is a crime?

A law is a command enjoining a course of conduct. A command is an intimation from a stronger to a weaker rational being, that if the weaker does or forbears to do some specified thing the stronger will injure or hurt him.* A crime is an act of disobedience to a law forbidden under pain of punishment. It follows from these definitions that all laws are in one sense criminal, for by the definitions they must be commands, and any command may be disobeyed.

This consequence may appear paradoxical, but it is true. To common apprehension, the laws of inheritance are absolutely unrelated to the criminal law, yet, in fact, they repose upon it. Thus the law is that the eldest son is heir-at-law to his father. This means that all persons, except the eldest son of the dead man—if he has one—are commanded by the sovereign power not to exercise proprietary rights over the land which belonged to him, unless they can show a title to do so. If

* Austin's Prov. of Jurisprudence, Lect. I.

CHAP. I. they should exercise such rights and should fail to show such a title, the sovereign would command the sheriff to give possession of the land to the heir-at-law, and to make the intruder pay the costs of the suit; and if the sheriff should fail to execute that command, he would be liable to punishment (amongst other things) by an indictment for not obeying the lawful commands of the sovereign, and to fine and imprisonment on conviction under that indictment. Thus, the ultimate meaning of the phrase, "By law the eldest son is heir to the father," is, that the sovereign commands all persons to act upon that rule, and will, if necessary, force them by the terror of legal punishment to do so. Legal maxims may appear to stand even further from the criminal law than the law of inheritance. It may be said the maxim that the king never dies is part of the law of England, but how can this be resolved into a command? The answer is, that this and other maxims of the same kind are to a great extent subject to the will of courts of justice, which are entrusted by the tacit consent of the sovereign power with a certain discretion in their interpretation, and are to that extent legislators. To the extent of that discretion these maxims are certainly not laws at all, but beyond that discretion they are laws and might be penally enforced. If, for example, a judge, being called upon to apply to a given case the maxim that the king never dies, were expressly to refuse to do so, that refusal might be evidence of judicial misconduct for which he might be made answerable by impeachment or by a criminal information. The extreme improbability of the case has nothing to do with the justice of the principle. The general doctrine well established in English law, that it is a misdemeanor to disobey the lawful commands of the king or the provisions of a public act of parliament, is in exact accordance with it.

Much has been said of late years on the importance of codifying the law, especially the criminal law; and, in answer to the obvious arguments in favour of such a measure, it has generally been urged that the codification of the statute law is either effected, or nearly effected, by consolidation acts; and that the codification of the common law would be undesirable, because it would deprive it of a quality which its admirers call "elasticity," by which they probably mean that degree of vagueness which gives the judge or jury, as the case may be, the power of moulding it to suit circumstances as they arise. The general subject of judicial legislation I shall discuss elsewhere;* but the foregoing illustrations will enable the reader to judge of the merits of this controversy, as far as relates to the definition of crimes. I agree with the opponents of codification in the opinion that the six acts passed in the summer of 1861 form a criminal code complete enough, as far as their extent goes, for most practical purposes. It would be simply impossible to collect the whole of the criminal law into a compact form, because, in a sense already assigned, the whole law is criminal. Every command issued by the legislator, upon every subject whatever, is guaranteed by a punishment in case of disobedience. Even if we take the more restricted sense of crime—an act subjected by law to definite punishment—the same consequence follows. Almost every act of parliament adds to the criminal law. For instance, the Merchant Shipping Act and the Bankruptcy Act create numerous special offences.

If by criminal law we mean, as is generally the case in popular language, that part of the criminal law which is in every-day use, and applies to the common run of offences,

which are at once repugnant to all law and to all morals, the six acts of 1861 correspond very nearly to this sense of the phrase. The gist of the whole may be summed up in four commandments.

Thou shalt honour and obey the king.

Thou shalt not kill nor hurt.

Thou shalt not steal, especially by forged instruments or bad money.

Thou shalt not maliciously injure property.

A criminal code in the popular sense of the word, means no more than a reduction of these generalities to a form sufficiently definite for legal purposes. I think that the crimes

Criminal Code Bill Commission, Report (1879)

In the first place, it must be observed that codification merely means the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects which the experience of its administration has disclosed. The process must be gradual. Not only must particular branches of the law