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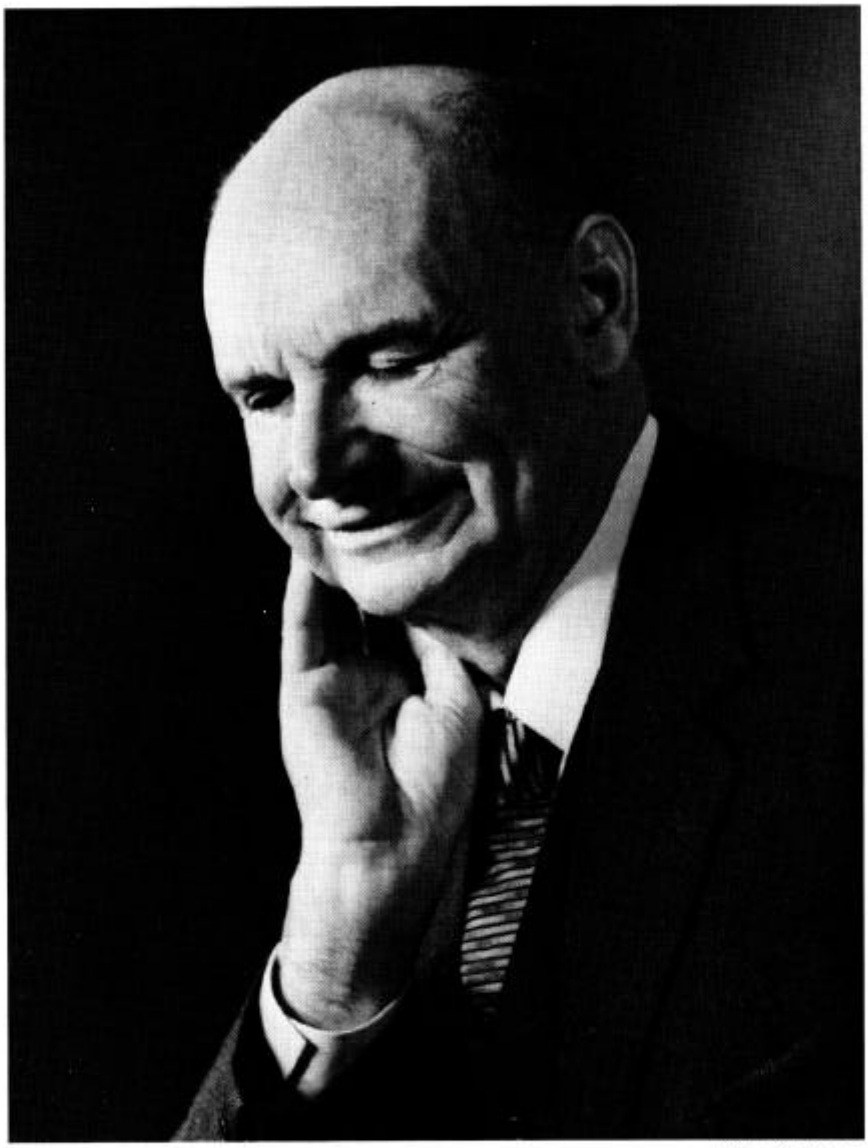

Ramsey & Muspratt

RUPERT CROSS

ARTHUR RUPERT NEALE CROSS

1912–1980

I

RUPERT CROSS was born with cancer of the eyes. After an operation at the age of one, he became totally blind and not the least of the splendid achievements of his life was his triumph over blindness. He developed extraordinary powers of work, self-discipline, and concentration and became an immensely productive scholar in many different fields of law, and was the author of one of the most renowned legal text books of the century. He was much admired as a lecturer, and teacher, lucid, thorough, challenging, and entertaining. He played a full part as a member and, in his turn, as Chairman of the Oxford Law Board, as an examiner and as a member of the Governing Body of his Oxford colleges. He contributed much to the work of the sub-committee of the Law Reform Committee, and of the Criminal Law Revision Committee. He delighted in the company of a wide circle of friends of both sexes, including many of those he had taught, and he added much to the gaiety of their lives. He was a generous and attentive host and a most rewarding guest. He enjoyed travel and lecturing abroad, chess, country walks, food and drink, and indeed he lived life to the full. Though he was in many ways the most English of persons, I think the Italian words *gusto* and *brio* are needed in the description of his energetic mind and buoyant character.

Cross was born on 15 June 1912 and was the younger of two sons of Arthur George Cross and his wife Mary Elizabeth, née Dalton. Arthur George Cross was the son of an architect in Hastings, and after leaving school worked in Australia and qualified as a quantity surveyor. He returned to England in his early thirties, settled in London and eventually rose to the top of his profession with a very successful private practice. His wife, whom he married after his return to England, was the daughter of a distinguished civil servant, who after working in what was then the Local Government Board became Comptroller of Patents and was knighted.

Though there was no academic or legal tradition in their family, apart from the fact that their maternal grandfather after

leaving Cambridge was called to the Bar before joining the Civil Service, both Rupert and his brother Geoffrey became lawyers, though of different kinds, and were academically distinguished, though in different ways. For Geoffrey Cross, now Lord Cross of Chelsea, was a Prize Fellow in classics at Trinity College, Cambridge, before practising at the Chancery Bar and becoming successively a Judge of the Chancery Division, a Lord Justice of Appeal, and a Lord Appeal in Ordinary. During most of Cross's early years the family home was in various flats in Chelsea. The family was a very happy one: the two brothers were close to each other, and both parents, well educated and well read, were very easygoing. They were fond of entertaining and travel, often spending family holidays abroad, and with their sons would dine out at restaurants and drink wine when neither practice was as common as it is now. Both parents were extremely fond and proud of Rupert and managed the situation created by his blindness remarkably well. They encouraged his independence, treating him as a perfectly normal person with a slight disability and expected him to fend for himself which he did with extraordinary vigour and success.

Cross went away to school at the Worcester College for the Blind and under its headmaster George Clifford Brown, a remarkable and original figure, he was encouraged to think of blindness not as a handicap in competition with the sighted, but as a mere nuisance. The high-spirited and strenuous atmosphere of the school suited Cross's vigorous temperament and he took part with enjoyment and success in school life. He learnt easily, rowed, appearing once at Henley, and early developed a talent for chess, which later enabled him to captain Oxford and come fourth in the British Chess Championship.

He came up to Oxford in 1930 to Worcester College. Here he first read modern history, but eager to enjoy the pleasures of undergraduate life did not work hard enough to secure a First; yet as his later forays into legal history showed, he acquired a historian's combination of respect for accuracy and literal truth with a sympathetic understanding of the thought of earlier generations.

To compensate for his initial failure to secure a First he decided to read law as a second school, which would help to qualify him for a career as solicitor. This was a wise and most fortunate choice for he early developed a passionate interest in the law which remained with him to the end of his life. He was fortunate enough to find in Theo Tylor, Fellow and Tutor in Law at Balliol, who

was himself very nearly blind, an excellent and demanding teacher, who insisted on rigorous argument and clarity and Cross owed him much. Stimulated by Tylor, Cross obtained in 1935 a First in the Honour School of Jurisprudence and had he not been overstanding for honours he would have obtained a First in BCL, which he took in 1937. By then Cross had been in articles to a London firm of solicitors, where a fellow chess enthusiast and friend, G. S. A. Wheatcroft, was a partner.

Just after taking the BCL Cross married Aline Heather Chadwick, the daughter of a Leeds solicitor, who was herself in articles and had come to London to work with her father's London agents. She was as forthright and as energetic as Cross himself and, as Professor Honoré has aptly said, 'Her steady and loving companionship was the condition of all Cross's future success which was to be in a real sense their joint success.' She had a detailed knowledge and understanding of his work, assisted in its progress, and when necessary supplemented his wonderful reading of braille, reading to him and locating what he required in libraries.

Cross was admitted as a solicitor in 1939 and practised throughout the War mainly in family law, but he had early felt drawn to academic work, and in 1945 he became a full-time lecturer at the Law Society's School of Law, now the College of Law. Here he at once showed himself to be an excellent lecturer, simultaneously entertaining and instructing his audience, usually concentrating attention in each lecture on a few seminal points always chosen with extraordinary skill and care. But he had long sought a university post and after some initial rebuffs was able in 1946 to begin his return to Oxford. In 1948 after two years divided between lecturing at the School of Law in London and tutorial teaching in Oxford as a weekender at Magdalen he was elected to a Fellowship at that college. Here he joined forces with John Morris, a distinguished legal scholar and most impressive teacher, who had early perceived Cross's quality and had fostered his return to Oxford. Together Morris and Cross formed an outstandingly successful team, demanding and obtaining much from those whom they taught, and their former pupils include three present holders of the six chairs of law at Oxford, two who became law commissioners, and a number of English and Australian judges and many eminent barristers, among them the Warden of All Souls College, Patrick Neill.

In 1956 Cross was made University Lecturer in the Law of Evidence which was to be the subject of his most famous work and in the same year he published his first article on the subject, 'The

Scope of the Rule against Hearsay'. In 1964 after John Morris had decided not to accept the offer of the Chair, Cross became the twelfth Vinerian Professor of English Law, and moved to All Souls College. From then to his retirement in 1979 he lectured and held classes and seminars, usually jointly with other teachers, on the whole range of subjects in which he was interested: the law of evidence; criminal law; the principles of criminal responsibility; sentencing and the theory of punishment; precedent and statutory interpretation. He went as Visiting Professor to the University of Adelaide in 1962 and to the University of Sydney in 1968 and he lectured in Ghana in 1972. He gave in 1979 a lecture at Williamsburg, Virginia, on 'The First Two Vinerian Professors: Blackstone and Chambers' to commemorate the bicentennial of the foundation there of what was the second chair of Common Law in the English-speaking world. In 1971 he gave the twenty-third series of Hamlyn Lectures, 'Punishment, Prison and the Public', and in 1973 the nineteenth Lionel Cohen Lecture at the Hebrew University in Jerusalem on 'An Attempt to Update the Law of Evidence'.

He served in 1959 on the Archbishop of Canterbury's Committee on Suicide, which recommended that suicide and attempted suicide should no longer be crimes, and from 1963–4 he served on the Committee on Jury Service chaired by Lord Morris of Borth-y-Gest, and in 1972 on the Diplock Committee on Legal Procedure to deal with terrorism in Northern Ireland. But his chief and very considerable public service was done from 1965 onwards on the sub-committee of the Law Reform Committee and on the Criminal Law Revision Committee. He signed the 11th, 12th, 13th, and 14th Reports of the Criminal Law Revision Committee and he contributed greatly as a co-opted adviser to the work of the sub-committee of the Law Reform Committee which prepared its 15th, 16th, and 17th Reports. The details and the vicissitudes of these reports to which Cross had given so much of his time and energy are recounted below.

Many honours came to him. He was awarded the degree of DCL at Oxford in 1958 and in 1967 was elected Fellow of the British Academy. In 1969 he became President of the Society of the Public Teachers of Law. Worcester College made him an Honorary Fellow in 1972 as did Magdalen in 1975. Edinburgh University awarded him an Honorary LLD in 1973 and the University of Leeds did so in 1975. In 1972 the Middle Temple made him an Honorary Bencher, a rare honour for a solicitor, and he was knighted in 1973. He died on 12 September 1980 of cancer from which he had begun to suffer in 1973.

II

In 1958 Cross published his main work, *Evidence*, and with it opened a new epoch in the exposition and critical study of the English law of evidence. For his work presented for the first time a fully comprehensive, lucid, and precise analytical account of the law. It rapidly became in Britain and in several Commonwealth countries the standard work of the subject for practitioners and students and for those concerned with the reform of the law. As Cross's successor in the Vinerian Chair at Oxford wrote, 'It provided an equally rich source of material for a university seminar and for an argument before the House of Lords.' Indeed the authority of the book was such that many English judges kept it on their desks in Court, and Cross became one of the exceedingly small number of English academic lawyers whose works were frequently cited in their lifetime by judges and whose opinion judges sought. To the successive editions of this renowned work, Cross devoted much thought and care, in effect reworking the subject each time he returned to it and often providing fresh evaluations even of the oldest and most obscure cases. He reviewed his own expressed opinions with singular critical detachment and felt no embarrassment in changing his mind when he thought his opinions were wrong.

To understand the impact made by Cross's book and the scale of his achievement it is necessary to recall both the general state of the English law of evidence and previous attempts to explain it. Both of these in 1958 were profoundly unsatisfactory and the law of evidence in criminal proceedings remains so still. In the language of the present Lord Chancellor uttered as long ago as 1973, it is 'an extremely complicated, obsolete and unintelligible field of the law, urgently in need of rationalisation and reform.'[1] For in spite of a number of legislative interventions the law of criminal evidence still consists largely of a mass of case law 'disfigured' as Cross wrote 'by distinctions without a difference', by arbitrary rules with arbitrary exceptions and conflicting provisions often provoking costly and time-wasting litigation.

The systematic, critical, and analytical survey of the mass of case law and legislation in this branch of the law, and the extraction from it wherever possible of clear, general rules with their ordered qualifications and exceptions, was a task which had never been seriously attempted by Cross's predecessors. The literature on the subject in general current use in 1958 consisted of

[1] HL Deb. 14 Feb. 1973, col. 1596.

practitioners' manuals which had had their origins in the last century, such as Archbold's *Pleading Evidence and Practice in Criminal Cases*, first published in 1822, and Phipson's *Evidence*, first published in 1892. These had been updated by successive editors to incorporate decisions made since the last edition, most of them without any analytical or critical comment or attempt to explain the rationale of the increasingly technical, complex, and fragmentary rules which the Courts' decisions were taken, with the aid of many refined and elusive distinctions, to support. The result was a jumble of statutes, decisions, and doctrinal statements which led many to think that the law of evidence was not fit for rigorous academic study. Cross's achievement was to demonstrate that this view of the subject was wrong.

His book is not a work of grand theory; it is neither like Bentham's work intended to reconstruct from first principles the established framework of English law, nor was it like the work of the great American writers, Thayer and Wigmore, concerned to exhibit the fundamental principles of testimony, probability, rational inference, and proof which should guide judicial findings of fact. Cross's work, even at its most critical, was closely aligned to the main established practices of the English Courts, and both his exposition and the constructive criticism which it offered had their foundations in that practice.

Cross brought to bear on this most unpromising area of the law many gifts. He had a complete mastery of the case law and statute, stored in a phenomenal memory with instant recall, great powers of lucid and orderly exposition of tangled and complex issues, and a rare ability to detect both what was empty or meaningless in long accepted formulations of the law, and any latent content of good sense which could be extracted from them. He combined an extraordinary grasp of detail with a firm and balanced understanding of the interdependence of different parts of the subject and indeed of the subject as a whole. This enabled the reader, whether student, practitioner or judge, to find his way through the labyrinth of rules and exception to rules and conflicting reasons for decisions which had been created by the piecemeal development and partial reforms of the law. He had an instinctive understanding, sharpened by practical experience as a solicitor, of what lawyers would find difficult and in need of explanation and what arguments would be acceptable to the Courts. Throughout, his main purpose was to formulate and explain clear rules, where the law as it stood was sufficiently settled to permit this, and to point out inconsistencies and to suggest acceptable principles for

their resolution. But much else was achieved by this book; for woven into its texture are many illuminating comparisons of English law, sometimes to its disadvantage, with the law of the United States and Commonwealth countries, and especially in the later editions there is much critical but constructive comment presented, not as deductions from a general abstract theory, but as the deliverances of a pragmatic common sense. Cross in fact dedicated much of his time and energy to the reform of the law of evidence and even before 1965 when he joined the deliberations of the sub-committee of the Law Reform Committee and the Criminal Law Revision Committee, concerned respectively with evidence in civil and criminal trials, he had urged in some powerful articles a number of specific reforms, and always looked forward to the simplification and ultimate codification of the whole law of evidence. He threw himself into the work of the two Committees with great enthusiasm, contributing much both to their reports and to the drafting of legislation designed to give effect to their recommendations. When, as was the case with the massive 11th Report of the Criminal Law Revision Committee on Evidence in Criminal Trials, these were attacked, he defended them with outspoken vigour, and when replying to criticisms which appeared to him to ignore the realities of practice, he permitted himself a much more polemical style ('mildly vituperative'[1] he called it) than in his book.

To his great satisfaction the proposals made by the reports, to which he contributed much, of the Law Reform Committee for changes in the law relating to civil proceedings were accepted and passed into law by the Civil Evidence Acts of 1968 and 1972. Chief among these changes was the virtual abolition of the rule against hearsay, which had long been a target for Cross's sustained criticism and had, as he urged, made English law look ridiculous when compared with the law of the United States and of a number of Commonwealth countries. Instead of a general rule against hearsay with complex interlocking exceptions, depending on numerous elusive distinctions, the new law in effect prescribed clearly and simply the conditions under which statements of parties who are not witnesses and the prior statement of witnesses may be received in evidence. Other changes for which Cross had argued relating to privilege, expert evidence and evidence of opinion and also proof of criminal conviction in civil proceedings were duly made when the new legislation was passed.

The 14th Report of the Criminal Law of Revision Committee

[1] *Criminal Law Review* (1973), p. 329.

on Evidence in Criminal Proceedings, published in 1972 after seven years gestation, met to Cross's great disappointment with a different fate. He had invested much thought and effort in it and in the preparation of the draft Bill attached to the Report. He had expected that the Bill would, as he said, go 'merrily through Parliament' and he claimed that if it became law, English law would have the best rules of evidence in criminal cases in the common law world.[1] In fact the publication of the Report provoked a storm of opposition from many different quarters, including Law Lords, Professors of Law, the Criminal Bar Association, and the National Council of Civil Liberties. The main focus of criticism was the modification of the so-called right to silence, which the report proposed. This took two forms, the first and most severely castigated was the provision that failure by an accused, on being interrogated or on being charged with an offence, to mention any facts on which he subsequently relies in his defence and which he could reasonably be expected to have mentioned, might be the basis of such inference as might appear to be proper to be drawn by the Court or jury in determining whether there is a case for the accused to answer or whether he is guilty of the offence. The second modification was the proposal that if the accused at his trial refused to give evidence or to answer any questions, a Court or jury might in determining whether he was guilty draw such inferences from such refusal as might appear proper. As a corollary of these provisions the existing restrictive rules, prohibiting the Prosecution from commenting on the accused's silence and generally limiting the judge's observations to comment stopping short of suggesting that the accused's silence might in the circumstances lead to an inference of guilt, would disappear. So too, the Report recommended the replacement of the present caution mentioned in the Judges' Rules by a provision requiring the police when charging a suspect or informing him that he might be charged to hand him a written notice explaining the new provisions with regard to his silence.

The attack on both these two proposals took many different forms. Many critics urged that the pressure to speak, and so to render himself liable to cross-examination, put on the accused by exposure to the risk of adverse inferences being drawn from his silence, was a drastic inroad on fundamental principles of liberty enshrined in the presumption of innocence and the privilege against self-incrimination long sanctioned in English law. Other

[1] *An Attempt to Update the Law of Evidence* (Lionel Cohen Lecture, Jerusalem, 1973), p. 1.

critics stressed the increased opportunities which the proposals would give to the police to trick into damaging admissions suspects held in custody, who might often be confused or inarticulate or immigrants or other persons terrified of formal authority. Others pointed to the power which the prosecution would have to 'trim' their evidence to meet the defence and to the difficulty that suspects would have in identifying, before the details of the case against them were known, the matters on which they would have to rely later in their defence and so must mention to the police.

Cross had anticipated before the publication of the Report some of these criticisms in his Presidential Lecture to the Society of the Public Teachers of Law and after the stormy reception of the Report he replied in detail to his critics in an article characteristically entitled 'The Evidence Report; Sense or Nonsense—A very wicked animal defends the 11th Report of the Criminal Law Revision Committee'[1] and also in his Lionel Cohen Lecture at the Hebrew University of Jerusalem. In the first of these replies, he acknowledged, as he did in his book, that the possibility of the browbeating of suspects by the police was a danger, but thought it could be met by requiring the interrogation to be tape recorded and by insisting on the suspect's right to consult a lawyer. So though the Report did not disclose this, Cross was one of the minority of three among those signing the Report who stipulated that the relaxation of the right to silence under interrogation be suspended until adequate arrangements for tape recording could be made. But he later came to doubt whether tape recording was a practical solution, because of the undesirable publicity which could be given to the records of police interrogation which might be concerned with the part played in various crimes by persons not under arrest. For this reason Cross thought that a difficult choice had to be made between preserving the unmodified right to silence under interrogation and introducing a system of tape recording interrogation with the risks of publicity which might lead to the apprehension of fewer criminals. Between these two Cross eventually confessed that he was insufficiently conversant with the ways of the police and their suspects to express an informed view.[2]

On this issue therefore as also on the question of the liability of the accused to cross-examination on his criminal record, which Cross would have excluded except where the accused tendered evidence of his own good character, the majority signing the

[1] *Criminal Law Review* (1973), p. 329.

[2] *An Attempt to Update the Law of Evidence*, p. 19.

Report went much further than Cross was prepared to go. Much of the odium which the Report as a whole attracted was due to this and to the fact that its somewhat sketchy discussion of a proposal to substitute administrative directions for the Judges' Rules left, as Cross realized, the misleading impression that the Report was intended to interfere with the suspect's existing rights under the Judges' Rules to consult a lawyer. But though on these issues Cross differed from the majority, he was at pains to emphasize that if the status quo had to be preserved, this was for him only a requirement of 'expediency', not a matter of fundamental principle or right. Indeed he vigorously repudiated the idea that the right of the accused not to have any adverse inference drawn from his silence was a fundamental right and a protection of liberty which a civilized society must guarantee. He urged that if the accused was protected as he should be against cross-examination on his criminal record, the pressure on him to make a statement on interrogation or to testify, exerted by the risk of adverse inferences being drawn from silence, was neither cruel nor a derogation from human dignity, like compelling a man to dig his own grave as many critics claimed it was, and Cross thought the description of the accused's consequent liability to cross-examination as 'self-accusation', loaded and tendentious. The Report did not propose, as some critics suggested it did, that the accused's silence should in itself constitute proof of guilt, but only that it should be an item of evidence against the accused, which might often be explained away or be insufficient to justify a finding of guilty. Cross thought it contrary to common sense to ignore the proper probative force of silence, though its weight would vary with different circumstances. He endorsed Bentham's view that 'between deliquency on the one hand and silence under enquiry on the other, there is a manifest connection: a connection too natural not to be constant and inseparable'.

Cross's main reply to his critics was based on his whole conception of the point and purpose of the Report. It was not for him primarily a matter of correcting the existing law where it was too favourable to criminals. His main concern was to free the law of evidence from its present dependence on a host of unreal distinctions. So that even if the present rules of evidence produced no wrongful acquittal, he would still have been in favour of most of the Committee's recommendations, because 'they would spare the judge from talking gibberish to the jury, the conscientious magistrate from directing himself in imbecile terms and the writer on the law of evidence from drawing distinc-

tions, absurd enough to bring a blush to the most hardened academic face.'[1]

Criticisms of the Report had in Cross's view grossly exaggerated the extent of the change which adoption of its proposals would make, because they had not understood how often the line which the judges were at present supposed to draw, between permissible and prohibited comment on the accused's silence, was based on such totally unreal distinctions. Thus according to established practice a judge may tell a jury that silence on the part of the accused under interrogation is 'unfortunate and a matter to be regarded with reference to the weight of the defence when the accused raises a defence of alibi at his trial, but it may not be treated as evidence against him'. Why Cross asked, if the accused's silence may detract from the weight of an alibi, even to the extent of rendering it incredible, is this not the same as treating it as evidence against him? So too, where the accused refuses to testify, the judge according to the established case law may say to the jury, 'The accused is not bound to give evidence. He can sit back and see if the prosecution has proved its case: it is true that you have been deprived of the opportunity of hearing his story, tested in cross-examination but you must not assume that the accused is guilty because he has not gone into the witness box.' What is this, Cross asked, but a concise way of stressing that though the accused admits nothing it is permissible to infer from his refusal to testify that his defence is not a good one?[2] So Cross argued, since the only reason for the comments at present permitted is to draw attention to legitimate inferences, the only change that the Report would make is to enable the judge to be more explicit about the type of inference proper to be drawn in given circumstances.

But apart from these examples Cross found the law of evidence distorted by many other similarly untenable distinctions. These included: the distinction between cross-examining the accused person as to credibility and as to the issue; that between the accused's silence as something which might be properly taken into account and as something which could corroborate the evidence of an accomplice against him; that between admitting the previous statement of a witness as corroborating or impugning his testimony and as evidence of the fact stated; and that between treating an accused's confession implicating a co-accused as evidence against himself but not against the co-accused.

The outcry that greeted the Report, largely because of its

[1] *Criminal Law Review* (1973), p. 333.

[2] *An Attempt to Update the Law of Evidence*, p. 11.

proposals concerning the right to silence, had disastrous consequences. Though it put forward many other reforms which were certainly long overdue and largely uncontroversial, nothing at all was done about it for ten years. But though it was put on the shelf it was not, as Cross feared, 'put into its coffin'.[1] For since his death half a dozen of its relatively minor proposals have been adopted, though not altogether in the form Cross wished, in new legislation. These include the reform of the law relating to the evidence of spouses which Cross had advanced in 1961. But as Mr P. R. Glazebrook has said, in his scholarly and illuminating article[2] on Cross and his work, occasioned by the publication of a memorial volume of essays[3] in Cross's honour, 'The opportunity to effect a comprehensive revision of the law of criminal evidence was lost, so that most of it remains in as big a mess as it was twelve years ago when the Committee reported.'

III

Cross's earliest publications were some articles in the field of family law written before his return to Oxford as a Fellow of Magdalen. But while still a lecturer at the Law Society's School of Law, he had developed what proved to be a lifelong interest in criminal law. By the time his *Evidence* was published he had already an established reputation as a talented teacher of criminal law with a special gift for guiding and interesting the beginner, and as a constructive critic of the law and of conventional forms of exposition of the law. But though he early became a specialist in criminal law, he conceived of the subject in no narrow fashion. It is true that like Bentham with whom in general he had not much sympathy he distrusted 'vague generalities', and thought a mastery of detail essential, and he had a lively appreciation of the value of apparently small points when these showed that something of unsuspected importance turned on some detail that had been overlooked or thought irrelevant. But he sought to broaden the horizons of the study of the criminal law in two main ways. In 1965 he surprised many when he chose for his Inaugural Lecture as Vinerian Professor a topic, *Paradoxes in Prison Sentences*, drawn not from the two fields, criminal law and the law of evidence in which he was recognized as an expert, but from the sentencing

[1] *An Attempt to Update the Law of Evidence*, p. 27.

[2] 'The Twelfth Vinerian Professor: Rupert Cross and Criminal Justice', *Oxford Journal of Legal Studies* (1985), p. 113.

[3] C. Tapper (ed.), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London, 1981).

practices of the Courts; and in his Hamlyn Lectures on *Punishment, Prison and the Public* he proclaimed himself as one convinced that 'a criminal lawyer who confines his attention to the criminal law to the exclusion of theories of punishment and the treatment of offenders is a miserable specimen'. So too he was early convinced that the basic principles of criminal liability long obscured by the cloudy terminology of *actus reus* and *mens rea* and by fluctuating definitions of 'intention', 'recklessness', 'negligence', and 'strict liability' could only be clarified and fruitfully criticized, if the exposition of the law was married to a detailed appreciation of the rationale offered by different theories of punishment for treating a given state of a man's mind or knowledge or will or the extent of his capacity to control his conduct as a necessary condition of liability to punishment or as relevant to the determination of its severity.

Cross's most widely known work on criminal law was *An Introduction to Criminal Law* written in partnership with Philip Asterley Jones, who when a fellow lecturer at the Law Society's School of Law had sought Cross's advice in revising his first draft of a book on criminal law. The joint work which grew out of this was first published in 1948, and 'Cross and Jones' with its accompanying *Cases on Criminal Law* was an immediate success and became a classic among introductory textbooks on the subject. A second edition was published within a year; it was substantially rewritten and enlarged for the third edition in 1953; a further six editions were published in Cross's lifetime and a tenth edition after his death.

The chief factors in the great success of the book was its exemplary clarity, thoroughness and cool common sense and its uncondescending simplicity which never degenerated into superficiality. The reader of the book was made aware that, besides clear well settled law which he could absorb from the text of the book, much of the criminal law was controversial and called for argument and the intelligent and informed weighing of conflicting views. Though primarily addressed to students the book provides for the advanced or critical reader references to the extensive periodical literature, to Bills going through Parliament, to the Papers of the Law Commission, and to Reports of the Criminal Law Revision Committee. The authors took extraordinary pains in revising their work for its successive editions. This was a matter not merely of adding recent decisions and enactments to the text but often of recasting in the light of further reflection the form and substance and arrangement of parts of the

book. During the progress of the book from edition to edition, Cross published a continuous stream of articles and lectures on among other topics the criminal law. These were not merely or primarily pedagogic in aim but were contributions to the advanced study of the subject, yet he distilled from his work on these new points and fresh perspectives for inclusion in 'Cross and Jones', so that without losing its clear outlines and appeal to students it became a continuous work in progress.

Of the articles which Cross published some sixteen are wholly or in part concerned with the mental element in crime and some of his most original and interesting work was done on the subject. He had early come to think that the exposition of the basic principles of criminal liability in terms of *actus reus* and *mens rea* and the virtual identification of the latter with knowledge of the relevant circumstances and foresight of the relevant consequences of conduct had in many ways been unfortunate. It had led some writers to dwell uselessly on such questions as whether inadvertent negligence was a form of *mens rea* long after the Courts had held that the crime of manslaughter could be committed by gross inadvertent negligence and the legislature had created a number of statutory offences in which such negligence was made punishable. As Cross wrote: 'The accused who is negligent is culpable because he could have avoided behaving as he did if he had exercised a reasonable degree of self-control . . . So the question whether he had *mens rea* is only the verbal question whether failure to exercise powers of control is to be called a guilty mind.'[1] The same stress on the dichotomy between *actus reus* and *mens rea* and the narrow meaning given to the latter had bred such empty questions as whether duress and necessity negatived the *actus reus* or *mens rea* or whether 'voluntariness' in the sense of a man's capacity to control the movements of his body was a matter of *actus reus* or *mens rea*. Such questions were not only useless, but obscured the fact that behind the verbal questions whether or not *mens rea* included such elements the real issues requiring consideration were first, whether they were in fact recognized by the law as relevant to liability to criminal punishment or to its severity, and secondly what, if any, moral reasons called for such recognition.

But the narrow interpretation of *mens rea* in terms of the offender's knowledge and foresight had, Cross thought, obscured other matters of importance requiring attention in the analysis of the state of mind of an offender, especially in cases of violent crime. To treat as central the question whether an accused had foreseen

[1] *An Introduction to Criminal Law* (7th edn., 1972), p. 48.

the consequences of his action when he killed or wounded another in a fit of temper, or in a panic, or in a split second response to a blow or insult, might be quite inappropriate. In such cases, as in other areas of the criminal law, the question requiring consideration on any reasonable theory of responsibility was not whether at the moment of action the thought of its consequences flashed across the accused's mind, but whether he had sufficient control of the situation to enable him to desist and if not whether his loss of control was culpable and in what degree. So as early as 1967 Cross boldly wrote, 'the time has come for academic lawyers to make a fresh approach to the mental element in crime. . . . In the first place there should be a much greater concern for the question of the accused's control of the situation as distinct from his knowledge of relevant circumstances and foresight of relevant consequences. . . . At the same time academic lawyers might consider the wisdom of their practice of discussing the mental element in crime in terms of a man's *actus reus* and *mens rea*.'[1]

Though Cross harboured such radical ideas and ventilated them in many criticisms of the law in his articles, he was scrupulously careful to secure that the readers of 'Cross and Jones' should be given as accurate an account as possible of the law as it stood, before being asked to consider criticisms and the need for reform. But he was himself deeply involved in proposals for the reform of the substance of law as he had been in reform of the law of evidence, and the 12th, 13th, and 14th Reports of the Criminal Law Revision Committee which he signed reflect many ideas which Cross had canvassed in 'Cross and Jones' and in his articles. The brief 13th Report published in 1977 proposed the repeal of section 16(ii)(a) of the Theft Act 1968, which Cross in common with other lawyers had criticized for its obscurity. This was accepted, as was the Committee's proposal that the repealed section should be replaced by new offences to cover clear cases deserving punishment which the old section had failed to cover. These were enacted by the Theft Act 1978.

The 12th Report published in 1973 recommended provisionally, pending the completion of the Committee's report on offences against the person, that the sentence for murder should continue to be a mandatory life sentence and not merely a maximum, as those who wished for the amalgamation of the offences of murder and manslaughter had proposed. Cross had urged in 1967[2] that consideration should be given to this proposal, on the footing that, with the end of the death penalty for murder,

[1] *Law Quarterly Review* (1967), p. 226. [2] Ibid., p. 227.

this might be part of a great simplification of the law relating to offences against the person. But he later argued[1] for the retention of the mandatory penalty on the ground subsequently adopted in the Committee's 14th Report, that the retention of murder as a separate offence with a unique penalty served, even though the death penalty had been abolished, to express and confirm the sense that murder was the most dastardly of crimes, and if it were not thus marked off by an exceptional mandatory form of punishment it might cease to be so regarded. So to argue was to adopt a view first powerfully expressed by the Victorian judge James Fitzjames Stephen that a principal and proper function of criminal punishment was to express and so help to maintain widely felt moral condemnation for crimes. Cross saw in this 'denunciatory theory', as it came to be called, a long-term form of deterrence rather than retribution, and like many English judges, but unlike a considerable number of academic writers who thought its factual basis questionable, Cross was much attracted by this conception of the role and effect of criminal punishment.

The 14th Report was published after years of preparation only six months before Cross's death. It was strongly influenced by Cross and the two other distinguished academic lawyers on the Committee, Professors Glanville Williams and J. C. Smith, and its adoption would certainly introduce much needed clarification and simplification into the law, especially in relation to the mental element in crime and to homicide. Cross had long urged that the offence of murder with its mandatory fixed penalty and stigma should be confined to unlawful killing by one who intends to kill, which is what ordinary people understand by murder, but he accepted that an intention to kill should include besides 'direct' intention where the killer's aim or purpose is to kill, one form of indirect intention where the killer, though it is not his aim or purpose to kill, knows that his conduct will in the ordinary course of things result in death. Cross thought that the development of the law which had eliminated various forms of constructive murder had not gone far enough in that direction, since the most recent decisions of the House of Lords had left standing the doctrine that killing by an act intended to cause serious bodily harm or killing by an act believed by the accused to be likely to result in death was sufficient to constitute murder.

The Committee's recommendations came very close to Cross's earlier proposals. For the Report, while accepting a definition of intention in general terms as either wanting a particular result to

[1] *University of W. Australia Law Review* (1969–70), p. 57.

follow from an act or knowing that in the ordinary course of events it would do so, recommended that an act causing death should be murder only if done with intent to cause death or if it is an unlawful act done with an intent to cause serious injury and known by the actor to involve a risk of causing death.

Similarly with the forms of involuntary manslaughter which are still recognized by the law and carry a maximum sentence of imprisonment for life. Cross had for many years urged the reconsideration of the doctrine that causing death by any unlawful act or by gross inadvertent negligence is sufficient to constitute manslaughter and the readers of 'Cross and Jones' were asked rhetorically,[1] 'Why should someone be liable to a maximum punishment of life imprisonment if he causes death by a common assault for which he could not receive more than a year's imprisonment if he had not caused death?' 'Why should someone who causes death by gross inadvertent negligence be liable to be convicted of manslaughter whereas had he merely caused bodily harm he would not have been guilty of any offence against the person and probably of no offence at all?' In the event the Committee recommended that all the existing forms of involuntary manslaughter including killing by gross inadvertent negligence be abolished, while causing death with intent to cause serious injury or being reckless whether death or serious injury be caused, which at present constitutes murder, should be recognized as manslaughter.

It is now fifteen years since the Criminal Law Revision Committee was first asked to consider the law of offences against the person and five years since it published its Report. Though most of its main recommendations have been generally well received and criticism has been confined to relatively minor points, nothing has been done to implement the Report. It is much to be hoped, though perhaps it is too much to hope, that the Report to which Cross's ardent spirit contributed so much will not be 'put in its coffin', as he feared the 11th Report of the Committee would be.

Cross was exceedingly well read in the literature of the criminal law, as he was in that of all branches of the law in which he was primarily interested. He studied the work both of his predecessors and contemporaries with great care and wrote with appreciation and sympathetic understanding of their work even when he differed from them. He wrote interestingly about Blackstone, whose earthy common-sense respect for tradition he liked, and about Blackstone's successor as Vinerian Professor at Oxford, Sir

[1] *An Introduction to Criminal Law* (7th edn. 1972), p. 160.

Robert Chambers. He championed Blackstone, perhaps somewhat unfairly, against Bentham, whose remorseless questioning of all things established in the name of utility was not to his taste. But his main historical interest was in the criminal law of the nineteenth century. He had a great admiration for Macaulay and more still for James Fitzjames Stephen and published a short essay on each of them. He praised both for having demonstrated in radically different ways that the codification of English criminal law, a project much after Cross's heart, was perfectly feasible, and he thought the failure to adopt Stephen's code a great misfortune for English law. Cross's imagination was fired by Stephen's energy, boldness, and clarity: and he thought highly of his campaign against the doctrine of felony murder and of his respect for the moral sentiment of ordinary reasonable people as something which the law should both respect and reflect. When it was purged of its brutal expression in terms of the legitimacy of hating not only crime but the criminal, Cross also saw much merit in Stephen's theory of punishment. At the time of his death Cross was engaged in writing a book on Stephen which would have provided a valuable account of his work and thought as judge and jurist. Leslie Stephen excused himself as 'no lawyer' from including this in his biography of his brother, to which Cross's work would have been an admirable much needed complement.

IV

Cross described himself as merely an 'armchair penologist'[1] on the ground that he did not possess the numeracy, skills, and knowledge required for the conduct and assessment of empirical research. But in his main work on sentencing, *The English Sentencing System*,[2] he deployed his diverse gifts with great success and the book has gone through three editions. Short and modest in its proposed aims it was written primarily for law students taking the optional paper in criminal law and penology in the Honour School of Jurisprudence at Oxford. But in this as in his other books Cross was able to provide a vivid and illuminating exposition of the detail of his subject which would serve both to steer the beginner through its complexities and at the same time to stimulate critical thought and reflection. So the book though designed for students is one that can be read with profit even by

[1] In the subtitle of his Hamlyn Lectures, *Punishment, Prison and the Public*.

[2] All references here to this work are to the second edition (1975). The third edition (1981) is by Cross and Dr Andrew Ashworth.

a seasoned teacher or High Court Judge. The only originality which Cross claimed for the book was that it linked its account of the actual sentencing practice of the Courts with theories of punishment, but the resulting novel combination of detailed exposition of the practice of the Courts with what are essentially moral issues of justification, accounts for the great liveliness even of the first part of the book, where it is concerned to expound and explain the bewildering varieties of penal measures between which a sentencing judge has to choose in exercise of the vast discretion which English criminal law leaves to judges. In less skilled hands than Cross's this exposition of detail might easily be a dreary catalogue to be committed to memory by a luckless student, but in Cross's hands it is made food for thought, partly by the judicious selection of illustrative cases and extracts from judgements, but above all by his continual pressing of the question, 'What if any theory of punishment justified that?'

In explaining his own approach to the justification of punishment, Cross said that he was 'with qualifications what is disparagingly described as a traditional retributivist'.[1] Writing in a period when once unfashionable retributive ideas were coming back into vogue, he took some pleasure in reminding those still convinced that in an enlightened system of criminal law the primary aim of punishment should be the rehabilitation and reform of the offender, that 'retribution was not a thing of the past'. But his rather brief and brisk summary[2] of his own variant of retributive principles concealed some of its nuances and qualifications. By 'retribution' Cross meant that punishment must be reserved for those who by their offence morally deserved it and the severity of punishment should be 'no more and no less' than the offence deserved. But he presented this in the form of what he called 'a dual approach', which does not make its retributive character immediately apparent. For he claimed that there are two objectives which punishment by the State must have if it is to be justified, and neither of them as stated refers to retribution.

The first of these two objectives is the reduction of crime, and the second is promotion of respect for the criminal law. That punishment should take the specific retributive form of giving offenders their deserts 'no more and no less' is derived from the second of these objectives on the footing, which Cross did not question, that the majority of society whose acceptance of the practice of punishment is necessary if it is to work successfully,

[1] *Reflections on the English Sentencing System* (Child and Co. Lecture, 1980), p. 10.
[2] *The English Sentencing System*, pp. 108 ff.

approved of punishment only if it was inflicted according to deserts. But Cross's theory also makes retribution subordinate though in a very limited sense to the first objective, for he thought of the reduction of crime and retribution as mutually dependent. 'If punishment is to deter it may only do so by giving offenders their deserts' and 'the only reason for giving offenders their deserts is that it deters'.[1] So Cross thought that Kant was in error in holding that retributive punishment would still be required even if, as on the last day of a society's existence, it was certain that it could make no contribution direct or indirect to the reduction of crime. Though it might be 'intrinsically right' that offenders should be given their deserts, none the less for the State to inflict punishment in such circumstances would, Cross thought, be 'to allocate to itself the role of the Deity'.[2] But this subordination of retribution to the goal of reducing crime might in practice be of minor importance, if an offender's punishment in accordance with deserts, except in the extraordinary circumstances imagined by Kant, would often make *some* contribution to the reduction of crime,[3] and this is taken to justify the infliction of punishment in accordance with deserts even if that was more severe than was required for the reduction of crime. It is perhaps not obvious why inflicting punishment beyond that required for the reduction of crime is not also to play 'the role of the Deity'.

To the retributive principle that punishment should be no more and no less than what the offender deserves for his offence, Cross admitted two main qualifications. He thought of retribution mainly as setting an upper limit to the use of punishment for other ends, so he was strongly opposed to the idea that prison sentences of the length exceeding that deserved on retributive grounds could be justified as a means of securing the rehabilitation or 'cure' or reform of the offender. He none the less welcomed the use by the Courts in proper cases of the power to grant an absolute discharge or to suspend sentence or to put an offender on probation, even though on retributive grounds he merited a punitive sentence. Conversely, as a second qualification on retributive principles, he was prepared as he said 'in an imperfect world' to allow 'that retributive justice may have to yield to preventive justice'.[4] But though he accepted this in principle he was in the present state of

[1] *The English Sentencing System*, p. 110.

[2] Ibid., p. 109.

[3] Ibid., p. 177. Cross's view was that in the absence of evidence that it does not do this we must act on the assumption that it does.

[4] *Reflections on the English Sentencing System* (Child and Co. Lecture, 1980), p. 10.

knowledge strongly opposed to general schemes, such as the Advisory Council on the Penal System had proposed, for special extended sentences for dangerous offenders going beyond the maximum appropriate on retributive grounds. His view was that since there are at present no adequate means of identifying the dangerous offenders who will repeat their crimes, such sentences would often be imposed on those who would not repeat them and so work great injustice.

Cross thought that in general the English sentencing system conformed to his retributive principles thus qualified. But the fit was far from precise and he realized, but perhaps did not sufficiently emphasize, this fact. In the exercise of the vast discretion left to them to fix a sentence within the statutory prescribed maximum the Courts often purport to be guided by a 'tariff' range of sentences loosely grading punishments according to the 'gravity' of different kinds of offence and different instances of the same offence. But this by no means coincides with grading punishment according to deserts. The vague principles (which Cross sought to identify and clarify), on which the ranges of tariff sentences are constructed, are never made explicit by the Courts or published, but have to be inferred mainly from the observations of the Court of Appeal when hearing appeals against sentences. From these and other scattered hints dropped by judges it is plain that the 'gravity' to which the Courts claim to make their punishments proportionate comprises much besides moral culpability or wickedness of conduct. It includes such matters as the prevalence of the type of offence committed, the social disapproval felt for an offence, the alarm caused by it, the amount of harm done, even when unintended. The inclusion of such factors only tenuously, if at all, related to the moral blameworthiness of an offender blurs the retributive picture of giving offenders their deserts. It is further blurred by the perfectly reasonable willingness of the Courts to take into account the offender's contrition or his plea of guilty or his co-operation with the Courts as an informer.

Cross's book on sentencing is a great *tour de force*, discussing in 200 short pages a vast range of subjects with exemplary clarity. These include: the complex detail of custodial and non-custodial sentences; the variety of retributive and utilitarian ideas which, though often unacknowledged, influence sentencing; the 'tariff' system; parole and remission; the many heterogeneous considerations which a sentencer may take into account; some general schemes of reform and some well-selected statistics. No useful summary of Cross's exceedingly well-informed, carefully argued,

and perceptive treatment of these subjects seems to me possible; instead I offer a brief characterization of his general outlook. Of this there were two main components. First was his deep sympathy with the traditional retributivism of the judiciary, though he was critical of it at particular points.[1] Secondly he was very sceptical of the idea that empirical research could, or would in the foreseeable future, provide answers to most questions about the relative effectiveness of sentences of different kinds or severity, which need to be answered if effectiveness, not retribution, were a principle criterion of a proper sentence.

These two considerations made Cross view with great reserve the use of long sentences of imprisonment and this reserve is manifest throughout his work and especially in his Hamlyn Lectures. He thought the belief which many judges shared, and some had only recently come to doubt, that long sentences were more effective than short ones as individual or general deterrents, was quite unsupported by evidence and the idea that prison sentences could be profitably used or lengthened to secure the reform or 'training' of an offender seemed to him 'a baneful myth'.[2] The place for rehabilitation of offenders was, Cross thought, in the community, not in prison, and he hoped for large expansion of the probation and after-care services to undertake it. Indeed he saw this 'as the call of the future'. He approved of humane efforts to make prison life more tolerable, both for its own sake and as a means not of reform but of preventing offenders deteriorating in prison. So the aim as he put it was 'cold storage',[3] not therapy.

Cross was a keen advocate of short sentences especially for offenders serving a first prison sentence, on the grounds that such offenders were both most likely to be contaminated in prison and, as the statistics of reconviction showed, were least likely to commit further crimes. So he formulated in his Hamlyn Lectures, albeit tentatively, quite far-reaching proposals for reducing the maximum sentences which judges could impose and, in the case of first prison sentences, he suggested the maximum should be three months.[4] He was moreover in general prepared, so long as the

[1] Cross deplored, as an aberrant form of retribution, the readiness of some judges to increase sentences in order to afford 'vindicative satisfaction' to the victim or to assuage general resentment. He endorsed, however, the idea that the Courts should express in the severity of their sentences the disapproval of society for an offence, on the footing that failure to do this might cause social standards to weaken or decay.

[2] *Punishment, Prison and the Public*, p. 168.

[3] Ibid., p. 85.

[4] While recognizing 'that this may be impossible in cases of serious offences tried by higher Courts' (ibid., p. 186).

maximum sentence to be served was fixed by the judge, to leave to the executive the power to release an offender.

Though Cross's book on sentencing has come to be generally regarded as the best introduction to the subject, some may think that it is insufficiently critical and fails to bring out with sufficient clarity how free the sentencer, especially in the lower Courts, is in his choice of sentence, and that in spite of the Court of Appeal's readiness to allow appeals against sentences which it considers excessively harsh, it has produced few rules for the guidance of the lower Courts and has needlessly left conflicts unresolved. Cross doubted whether much was to be gained by requiring judges to state their reasons for particular prison sentences, but others have since argued cogently that only by forcing judges to articulate their reasons, including the moral judgments by which their sentences are influenced, are we likely to get a clear understanding of the principles and preferences upon which their sentencing practice is based.

V

Notwithstanding his down to earth common sense, Cross had a taste for abstract speculation as long as it was reined in by respect for literal truth and fact, and might make some contribution, direct or indirect, to the understanding of perplexing features of human experience. The inventiveness, and the power and clarity of mind that made him so fine a chess player would have made him an excellent logician, but his main philosophical interests were in the problems of philosophy of mind and action, moral philosophy and philosophy of language, which lie on the borders of jurisprudence and which must be addressed in any profound study of legal institutions and doctrines. Indeed he conceived of much of his own work as a form of analytical jurisprudence concerned as it was with the elucidation of the concepts which structure legal thought and the fundamental assumptions whose validity and meaning is taken for granted by the lawyer. But though his main philosophical interests were linked to the law, his natural curiosity and fascination with the subject occasionally took him further afield. He rapidly saw the point of a philosophical argument even on subjects unfamiliar to him and philosophically minded friends found that discussion with him often blew away clouds obscuring their own thought. He found particular stimulus in the work of J. L. Austin and he liked to reflect on what he had read of the later work of Wittgenstein. These philosophers' frequent concentration

on concrete examples and their fine discrimination of different functions of human discourse were much to Cross's taste.

However, these philosophical interests lay very much in the background of Cross's work. They did not obtrude on to the surface, even of his two most 'jurisprudential' books, *Precedent in English Law* and *Statutory Interpretation*, though I think they sharpened his instinct for what was essential in the positions which he defended or attacked and his sense of the limits of profitable generalization in these subjects. These two works had the same Janus-faced character of most of his books; for both were primarily designed for students, yet both came to be recognized as leading authoritative works and as the best current acounts of their subjects.

The first edition of *Precedent in English Law* was published in 1961 and was written in the belief that the English law of precedent was more rigid than it had ever been before and had become an obstruction to the fruitful development of the law. But in 1966 the House of Lords issued its Practice Statement, announcing its proposal to modify its existing practice by departing from previous decisions when it appeared right to do so while treating such decisions as normally binding. This was but the last of a number of developments which led Cross, when he came to revise his book for its second edition published in 1968, to announce what he called 'a complete *volte face*' and to claim that English law was far less rigid than it had ever been. The third edition of the book was published in 1977. In this a more prominent place was given to legal theory and particularly to a critical examination of Professor D. Workin's attack on the main positions advanced by me in my book, *The Concept of Law*.

In spite of its brevity Cross's treatment of its subject is remarkably wide-ranging. It comprises a thoughtful summary of the history of the English doctrine and of the similarities and differences between it and the law and practice in Scotland, France, the United States, and parts of the Commonwealth. Moreover Cross's book is unique among works on this subject in that it does not focus exclusively on precedent simply as a source of law, but discusses its bearing on the general topic of legal reasoning and on the general theory and definition of law.

The central theme of the book is the detailed elaboration of the conception of the *ratio decidendi* of a case, as any rule of law expressly or impliedly treated by the judge as a necessary step to his conclusion having regard to the line of reasoning adopted by him. Normally the *ratio decidendi* so defined will also be the rule of

law for which a case stands as authority, but the two are not always identical, since the Courts' decision may be subject to interpretation and reformulation by a later Court, and when this is done the rule as reformulated and not the original *ratio decidendi* becomes the rule for which the case is authority. The book shows with a wealth of detail not matched in any previous treatment of the subject, how this concept of the *ratio decidendi* of a case fits, sometimes uneasily, into the hierarchy of the English Courts; how it is that some cases may have more than one *ratio decidendi* and, more rarely, how it is that some may have none; how the contrast of *ratio decidendi* and *obiter dictum* is in some types of case unimportant and misleading; and what exceptions there are to the whole principle of *stare decisis* on which the doctrine of precedent rests.

Previous attempts by academic writers to tie down the elusive notion of *ratio decidendi* in a way which would realistically reflect the practice of the Courts had generated a voluminous literature which Cross surveys in detail in this book. Much of it was inconclusive and some of it misleading, particularly in suggesting that the judge's reasoning and opinion need not be consulted to find the rule of law for which a case is authority. But Cross regarded Dr A. L. Goodhart as having made the single most important advance towards a proper recognition of the part played by the judge's reasoning in determining the rule for which his decision becomes a binding authority. Goodhart's view was that the judge makes law by choosing material facts from among the facts of a case, and what he termed 'the principle' of the case was found by simply taking account of the facts found by the judge as material and his decision based on those material facts. But though this was an important advance, since an essential step in determining the *ratio decidendi* of a case is to isolate the facts which the judge considered material to its decision, Cross none the less found Goodhart's theory in some ways defective and indeed paradoxical. For while insisting on the importance of the facts treated by the judge as material Goodhart seemed strangely unaware of the fact that this was only an indirect way of identifying the rule of law which the judge explicitly or implicitly takes as the basis of his decision. Even more strangely, Goodhart denied that a rule of law explicitly set forth by the judge could constitute the 'principle' of the case. But more serious defects which Cross found in Goodhart's theory was the failure to see that, beside the identification of the facts treated as material by the judge, many other things must often be considered in order to identify the *ratio decidendi* of the case. These things include, as Cross illuminatingly showed, the

arguments of Counsel addressed to the Court, the precise issue between the parties, observations made by the judge in earlier or in later cases, and above all the reason why the judge selects certain facts as material. In the course of his detailed exploration of the subject Cross advanced a number of fresh and illuminating ideas. Among these was the novel claim that it was a mistake to treat the dichotomy of *ratio decidendi* and *obiter dictum* as an exhaustive classification of judicial statements of law. For as Cross shows, statements *about* the rules of precedent fall outside this dichotomy since they are in no way dependent on the facts of the case and cannot ever solely determine the issue which is litigated between the parties. He used this insight to demonstrate the spurious character of a number of technical problems which other writers had found in the Practice Statement of the House of Lords. This short but effective revelation of a source of confusion was made with a logical acumen and clarity of which any professional philosopher might be proud.

Cross's lucid and balanced work on *Statutory Interpretation* was written in the conviction that English academic lawyers writing on this subject had without sufficient reason abandoned their ordinary practice of synthesizing and criticizing case law. He recognized that there were special difficulties in giving a coherent account of the topic of statutory interpretation and in assessing the merits of criticisms. These difficulties include the fact that generally a decision on the interpretation of one statute cannot constitute a binding precedent with regard to other statutes, so that the subject of statutory interpretation is dependent not on decisions but on persuasive *dicta*, to which varying weight can be attached. Competing judicial statements are easily found. So a leading work on the subject such as that by Maxwell on the *Interpretation of Statutes* presents itself unashamedly as 'a practitioner's armoury', able to provide authority for both sides in any dispute, and it made no serious attempt to show how the principles or rules which it cited were consistent with one another. Cross believed that though great caution was necessary and the subject required diffidence, hesitation, and reservation on the part of an expositor, none the less much more could be done than had been done to introduce an intelligible framework and some order into the apparent chaos.

In particular Cross sought to demonstrate that it had been a mistake on the part of English academic lawyers to treat what was called the 'literal' rule, the 'mischief' rule, and the 'golden' rule as if they were three wholly separate and independent rules, and

to accept the view that the Courts merely invoked 'whichever of these three rules produces a result which satisfies its sense of justice in the case before it'. That view had been forcefully maintained by Professor John Willis in what Cross considered to be an unfortunately influential article written in 1938.[1] Against this, Cross argued that much more can be done with the *dicta* and decisions than to treat them simply as illustrations of these three rules. He claimed that an impressive array of *dicta* and decisions (which his book in effect marshals) provides support for a coherent general picture presenting the three rules as parts of a single scheme. In this scheme the primary rule is a form of the literal rule, restated in accordance with the firm trend of modern case law, as the rule that the judge must give effect to the ordinary or, where appropriate, the technical meaning of words, *in the general context of the statute* and must determine the extent of general words with reference to their context. The mischief rule then appears as part of the literal rule on the footing that ascertainment of the ordinary meaning of the words of a statute can never be a narrowly semantic exercise, but must take account of the object and purpose of the statute, and hence of the mischief it is intended to remedy, as an essential part of its context. So the mischief rule is not a rule permitting departures from the literal meaning, as it was treated in Heydon's case but is a guide to the literal meaning. Similarly the golden rule is presented as a gloss upon the literal rule thus amplified, in the form of a recognition that the judge, if he considers that the application of words in their ordinary sense would lead to an 'absurd' result, may apply them in any secondary meaning which they are capable of bearing. The golden rule is not therefore as the Law Commission had suggested merely a less explicit form of the mischief rule, since unlike the latter it authorizes a departure from the ordinary meaning in context in favour of a secondary meaning which the words of the statute can bear.

This scheme does not, as Cross warns his readers, provide an algorithm or code for determining the meaning of statutory words. The words used in a statute do not always have a plain meaning even when due allowance is made for context, and even when they have, the judges may still disagree about what the plain meaning in context is. They may differ also on such issues as to whether a given meaning is one which words are capable of bearing and over the question, which arises in applying the golden rule, whether a result is 'absurd'. Cross argued convincingly (here differing from the Canadian writer E. A. Driedger whose work, as

[1] *Canadian Bar Review* (1938), p. 1.

Cross said, had profoundly influenced his own) that it was wrong to confine the notion of absurdity to a contradiction or repugnancy or disharmony internal to the statute. Following the trend of the majority of *dicta* stemming from Lord Wensleydale's original formulation of the golden rule in 1857,[1] Cross treats the notion of 'absurdity' as including results which cannot reasonably be supposed to have been intended by the legislature. There will, Cross thought, be frequent agreement on the question whether a result is absurd in this sense. None the less it is true, as Cross saw, that the answer to this question may involve value judgements, on which different judges take different views, but this as he points out is a type of infirmity to which a great many legal rules are subject.

Among the many aspects of the subject which Cross considered in this most informative book is the question whether the Courts in England interpret statutes too narrowly or too conservatively, or without regard to the social purposes of legislation. Many examples of an excessively literal approach, ignoring purpose, could be cited but they are not typical, at least of the decisions of the last forty years. Cross found more to criticize in the reluctance of judges to recognize that the authorities established that they have a limited power to alter, ignore, or even add to statutory words in order to prevent a provision from being unintelligible, totally unreasonable, unworkable, or irreconcilable with the rest of the statute. But he did not think that this or indeed other failings in the practice of the Courts could be remedied by legislation. The subject of statutory interpretation simply does not lend itself to legislation, and the extraction from the cases of reasonable general principles of interpretation was a task for the academic lawyer, even though they had long neglected it. Cross's book is a major contribution, temperate, constructive, and scholarly, to the repair of that neglect.

VI

No record of Cross's life would be complete without some account of his remarkable talent for combining prodigiously hard work with pleasure. Indeed the poet's phrase '*qui miscuit utile dulci*' might have been invented for him. I realized this when I had the good fortune to share with him the conduct of a seminar on the psychological conditions of criminal responsibility, which though primarily designed for graduate law students attracted a number of philosophers and a sprinkling of dons and visiting scholars.

[1] *Grey* v. *Pearson* (1857) 6 HL Cases, 61 at p. 106.

The seminar met weekly in one term for seven or eight two-hour sessions, and preparing for it with Cross was a strenuous but most enjoyable experience. We would meet several times in the vacation before the term in which the seminar was due and we would hammer out a programme for each of the sessions. In this the main questions to be discussed in each of the sessions were carefully formulated, relevant cases and articles and chapters from books (legal and philosophical) were listed and excerpts were given from statutes and codes, and reports or working papers of such bodies as the Law Commission and the Criminal Law Revision Committee. Most of this material was selected by Cross who also organized its assembly into a dossier of about twelve pages, which was distributed to those attending the seminar at its first session. At each session Cross and I took turns in reading a short paper arguing in favour of some solution to the questions raised and each of us would comment on the other's paper. We pulled no punches and the resulting general discussion by the seminar was often lively and I think profitable. But our meetings in the vacation were only the first part of the preparation which Cross thought necessary. For each night before the weekly meeting he would have me to dine with him at All Souls. We would sit agreeably in Common Room over dessert, claret, and port, which Cross found an excellent preliminary to an evening's work and about 9 o'clock we would adjourn to his room. There, often until midnight, we would discuss the next day's session, outlining the papers we proposed to read to it and arguing in detail about the questions raised. But we also ranged farther afield into the historical, jurisprudential, and philosophical background of the issues. I learnt more from these often exhilarating discussions than I had succeeded in picking up from many books and articles. Next day, as a final act of preparation Cross would have me to an excellent tea where for an hour before the seminar began we would tie up any loose ends and make such changes as second thoughts suggested.

It is doubtful whether Cross's thoughts ever dwelt upon the scale of his achievements or on the fact that so many of his books were widely recognized as the best of their kind. Though he was pleased by the praise of discerning critics and by the honours that came to him he was singularly free from thinking about his reputation or status and never indulged in any form of self-congratulation. Though he was a formidable opponent and critic, often assertive and combative in argument, he was in fact extraordinarily

modest, viewing himself and his work with cool detachment. When, as he lay dying, friends came to tell him that a volume of essays in his honour had been prepared by friends and colleagues, he was genuinely surprised as well as touched and delighted. Like Dr Johnson with whom Cross shared many traits of mind and character (though he had none of Johnson's gloom or religiosity) Cross hid, behind a brisk no-nonsense and occasionally impatient manner, a disposition harbouring great kindness and much concern for others. He took extreme pains to help pupils or younger colleagues in their careers and in spite of the formidable programme of work which he imposed upon himself he seemed always to be accessible to pupils or visiting scholars or friends in need of his never failing practical advice. He was a marvellously efficient administrator of his intellectual resources and his energies, and he dedicated them to helping others with the same vigour and care as he put into his academic work. His was a life-enhancing presence and many felt their own lives sadly diminished by his death.

H. L. A. HART

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BIBLIOGRAPHY

BOOKS (SOLE AUTHOR)

Evidence (1st edn. 1958; 2nd edn. 1963; 3rd edn. 1967; Suppl. 1969; 4th edn. 1974; 5th edn. 1979).
Australian edition
(J. A. Gobbo) (1st edn. 1970).
(J. A. Gobbo, D. Byrne, J. D. Heydon) (2nd edn. 1979).
New Zealand edition
(D. L. Mathieson) (1st edn. 1963; 2nd edn. 1971; 3rd edn. 1979).

Precedent in English Law (1st edn. 1961; 2nd edn. 1968; 3rd edn. 1977).

Punishment, Prison and the Public (23rd Hamlyn Lectures, 1971).

Statutory Interpretation, 1976.

The English Sentencing System (1st edn. 1971; 2nd edn. 1975).

The Law of Wills (1st edn. 1947; 2nd edn. 1951; 3rd edn. 1953).

Books (joint author)

Cases on Criminal Law (with P. A. Jones) (1st edn. 1949; 2nd edn. 1953; 3rd edn. 1962; 4th edn. 1968; 5th edn. 1973).

Cases and Statutes on Criminal Law (ed. R. Card) (6th edn. 1977).

Introduction to Criminal Law (with P. A. Jones) (1st edn. 1948; 2nd edn. 1949; 3rd edn. 1953; 4th edn. 1959; 5th edn. 1964; Suppl. 1967; 6th edn. 1968; 7th edn. 1972).

(P. A. Jones and R. Card) (8th edn. 1976).

(P. A. Jones and R. Card) (9th edn. 1980).

Outline of the Law of Evidence (with N. Wilkins) (1st edn. 1964; 2nd edn. 1968; 3rd edn. 1971; 4th edn. 1975; 5th edn. 1980).

The English Sentencing System (3rd edn. 1981, with A. Ashworth).

Lectures

Unmaking Criminal Law (Allen Hope Southey Memorial Lecture, 1962).

Paradoxes in Prison Sentences (Inaugural Lecture, 1965).

Necessity Knows No Law (E. W. Turner Memorial Lecture, 1968).

An Attempt to Update the Law of Evidence (19th Lionel Cohen Lecture, 1973).

Blackstone v. *Bentham* (Blackstone Lecture, 1976).

The Golden Thread of the English Criminal Law (Rede Lecture, 1976).

Murder Under Duress (Cecil A. Wright Lecture, 1978).

Discretion and the Law of Evidence: When it comes to the 'Forensic Crunch' (6th MacDermott Lecture, 1979).

The First Two Vinerian Professors: Blackstone and Chambers (George Wythe Lecture, 1979).

Reflections on the English Sentencing System (Child and Co. Lecture, 1980).

Articles

CRIMINAL LAW REVIEW

The Definition of Embezzlement, 1955: 734.

Russell v. *Smith* Reconsidered, 1958: 529.

Hill v. *Baxter* and the Law of Evidence, 1959: 27.

Monroe v. *Twistleton* Today, 1959: 262.

The Functions of the Judge and Jury with Regard to Confessions, 1960: 385.

The Need for a Redefinition of Murder, 1960: 728.

Specific Intent, 1961: 510.

What Should be Done about the Rule against Hearsay, 1965: 68, 97.

Penal Reform in 1965—a Mass of Unexplained and Unfounded Assumptions, 1966: 184.

The Theft Bill—Theft and Deception, 1966: 415.

The Behaviour of the Jury—a Review of the American Evidence: a Comment, 1967: 575.

Sentencing in a Rational Society, 1970: 4.

The Evidence Report; Sense or Nonsense—A very wicked animal defends the 11th Report of the Criminal Law Revision Committee, 1973: 329.

Clause 3 of the Draft Criminal Evidence Bill, Research and Codification, 1973: 400.

Fourth Time Lucky—Similar Fact Evidence in the House of Lords, 1975: 62.

The Making of English Criminal Law (5) Macaulay, 1978: 519.

The Making of English Criminal Law (6) Sir James Fitzjames Stephen, 1978: 652.

LAW QUARTERLY REVIEW

Larceny *de Lege Lata*, (66) 1950: 497.

Larceny by an Owner and *Animus Furandi*, (68) 1952: 99.

Duress and Aiding and Abetting (A Reply), (69) 1953: 354.

The Scope of the Rule against Hearsay, (72) 1956: 91.

Stealing Through a Mistake, (72) 1956: 181.

Complaints of Sexual Offences, (74) 1958: 352.

Imputations on the Prosecutor's Character, (75) 1959: 176.

R v. *Sims* in England and the Commonwealth, (75) 1959: 333.

Criminal Evidence Act 1898, section 1(f)(i), (76) 1960: 537.

Reflections on *Bratty*'s case, (78) 1962: 237.

Criminal Evidence Act 1898, and the House of Lords as a Court of Criminal Appeal, (78) 1962: 407.

Paradoxes in Prison Sentences, (81) 1965: 205.

Stare decisis in Contemporary England, (82) 1966: 203.

The Mental Element in Crime, (83) 1967: 215.

Centenary Reflections on *Prince*'s case, (91) 1975: 540.

Blackstone v. *Bentham*, (92) 1976: 516.

The *Ratio Decidendi* and a Plurality of Speeches in the House of Lords, (93) 1977: 378.

MODERN LAW REVIEW

Volenti Non Fit Iniuria, (8) 1945: 75.

The Revival of a Matrimonial Offence by Subsequent Misconduct, (8) 1945: 149.

Absolute Bars to Divorce, (9) 1946: 75.

Family Allowances Act 1945, (9) 1946: 284.

Matrimonial Causes: Final Report of the Committee on Procedure in Matrimonial Causes, (10) 1947: 184.

Larceny and the Formation of a Felonious Intent after Taking Possession, (12) 1949: 228.

Mens Rea and Receiving Stolen Goods, (13) 1950: 521.

Some Proposals for Reform in the Law of Evidence, (24) 1961: 32.

OTHERS

Recognition of Foreign Nullity Decrees, 3 ILQ 247 (1950).

Criminal Liability: a Study of the Root Principles, 51 LS Gaz 513 (1954).

Unmaking Criminal Laws, 3 U Melbourne L Rev 415 (1962).

Official Secrets, 6 Lawyers 31 (1963).

Periphery of Hearsay, 7 U Melbourne L Rev 1 (1966).

Confessions and Cognate Matters, 66 Columbia L Rev 79 (1966).

Necessity Knows No Law, 3 U Tasmania LJ 1 (1968).

Problem of the Accused with a Record, 6 Sydney UL Rev 173 (1969).

Recent Developments in the Practice of Precedent—the Triumph of Common Sense, 43 Australian LJ 3 (1969).

Proposals for the Reform of the Law of Murder, 9 U W Australia L Rev 50 (1969).

Right to Silence and the Presumption of Innocence—Sacred Cows or Safeguards of Liberty? 11 JSPTL 66 (1970).

Murder under Duress, 28 U Toronto LJ 369 (1978).

Proposed Canadian Evidence Code and the Civil Evidence Act 1968, 56 Canadian Bar Rev 306 (1978).

Discretion and the Law of Evidence: When it Comes to the 'Forensic Crunch', 30 N Ireland LQ 289 (1979).

The First Two Vinerian Professors: Blackstone and Chambers, 20 William and Mary L Rev 602 (1979).

Contributions to Collections and Collaborations

Chapter on Various Topics Relating to Marriage, in Dicey, *Conflict of Laws* (6th edn.), 1949.

Chapters on Criminal Law, Evidence and Procedure, in *Annual Survey of Commonwealth Law*, 1965: 160; 1966: 180; 1967: 192.

Some Secondary Arguments, in *The Hanging Question* (ed. L. Blom-Cooper), 1969.

The House of Lords and the Rules of Precedent, in *Law, Morality and Society* (ed. P. Hacker and J. Raz), 1977.

Reports of the Criminal Law Commissioners (1833–1849) and the Abortive Bills of 1853, in *Reshaping the Criminal Law* (ed. P. R. Glazebrook), 1978.