

CRIMINOLOGY AND THE LAW OF GUILT

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INTRODUCTION

In the substantive criminal law which determines the criminality of human conduct there are, among others, two important theoretical problems. The one is that of the relevance of extra-legal materials, particularly criminological materials, in the law of guilt.¹ The other is that of the utility and validity of the so-called "general principles" of substantive criminal law.² Tersely expressed these problems are: To what extent may there be developed a "functional approach" to criminal law; and to what extent, under the guise of "general principles", can a decision about one specific crime be useful in settling the law for another specific crime?³

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1. See Coates, *Criminal Law and Criminology* (1929) 7 N. C. L. REV. 150. Professor Coates inquired into whether criminological materials should be conveyed to law students by (1) an elective pre-legal course, (2) a required pre-legal course, (3) a parallel law school course, or (4) by integration into the conventional law school course in criminal law. He concluded in favor of (4). He stopped short, however, of proposing a technique for doing this. This paper of his was originally prepared for an address before the Round Table on Wrongs of the Association of American Law Schools at its December, 1928, meeting, which was then considering the problem which formed the subject matter of Professor Coates' paper.

2. The conflict in viewpoint as to the proper scope of the law school course in criminal law formed the subject of informal discussion by the Round Table on Wrongs of the Association of American Law Schools at its December, 1932, meeting. Three viewpoints were apparent, (1) that the emphasis should be on procedure in the course, (2) that the emphasis should be on the specific crimes, and (3) that the emphasis should be on the general principles of criminal law.

3. See, as reflecting the view denying the validity of "general principles," the following articles: Arnold, *Criminal Attempts, the Rise and Fall of an Abstraction* (1930) 40 YALE L. J. 53; Tulin, *The Role of Penalties in the Criminal Law* (1928) 37 YALE L. J. 1048. In the same vein, but more with reference to pedagogical problems, see Baker, *The Organization of a Course of Study in Criminal Law* (1932) 22 J. CRIM. L. & CRIMIN. 833. See also a review by Professor Baker of Dean Harno's casebook on Criminal Law and Procedure (1934) 28 ILL. L. REV. 856, which also treats of the three ways of teaching a course in criminal law. Two of the newer casebooks on Criminal Law, those of Dean Harno and the third edition by Professor Mikell, purport to emphasize the "specific crimes" approach. That of Professor Waite frankly adheres to the "general principles" plan. Professor Waite thus expresses his viewpoint in some mimeographed material collateral to the casebook which is furnished by the publishers: "The particular detailed requirements of specific crimes are not covered, as such, in this book. In my opinion any student fit to be graduated from a law school can work out those details for himself whenever there is need. They vary markedly in different states, and while it is not always clearly determinable whether breaking and entering of a warehouse constitutes 'burglary' in some particular state, or whether embezzlement by a banker's clerk, as distinct from the cashier, constitutes 'larceny', that difficulty is simply one of ascertainment and application of existing law."

The writer believes both that extra-legal materials have significance in the criminal law and that general principles are valid and useful.⁴ He further feels that the two problems are related ones, and that a consideration of the relevance of extra-legal materials in criminal law will serve to prove that there exist valid general principles of guilt-finding.

It is proposed to make a joint inquiry into the problems by attempting a critical re-examination of the so-called general principles in an effort to discover whether they have been or can be so worded as to be of value in deciding novel problems of human guilt under the law. If they have been or can be shaped into such a coherent whole as to furnish an organon for the application of criminal prohibitions to novel situations it would seem that they are valid. In making such inquiry it is proposed to illuminate the treatment with a consideration of the relevant doctrines of criminology concerning the ethics of punishment.⁵ This is done because it is believed that these conflicting human demands concerning the crime problem have influenced decision and legislation in the past and may do so in the future.

The question is this: Are there elements of criminality in the abstract, examples of which can readily be perceived in all instances of specific named crimes? If such recurring elements can be observed in decided cases interpreting past criminal prohibitions, then the general principles based on these elements can be applied to future novel applications of stated crimes, old and new.

In beginning the inquiry, it is proposed to assume, if only tentatively for purposes of discussion, a definition of crime in the abstract. In the present sense of human guilt *vel non* we shall define a crime as *a stated socially damaging occurrence legally caused by a person in a manner indicating that he is possessed of an anti-social tendency*. This definition, so it is believed, comprehends the three elements of criminality as found in the Anglo-American law, which are here considered to be (1) a certain social damage, *i. e.*, the criminal result or the corpus delicti, (2) the defendant's creation of this damage, sometimes called the act,⁶ but better named the causation or socially dangerous conduct, and (3) the offender's anti-social tendency or likelihood of recidivism or mens rea or so-called criminal intent. Traditionally the law has demanded that, for guilt, there be a concurrence

4. The present writer has previously expressed his sentiments concerning more specific problems of the integration of extra-legal materials into the criminal law and of the validity of general principles in the following two articles: *The Effect of Impossibility on Criminal Attempts* (1930) 78 U. OF PA. L. REV. 962; and *Probation, Parole and Legal Rules of Guilt* (1935) 26 J. CRIM. L. & CRIMIN. 168.

5. Both the casebooks of Professor Waite and of Dean Harno have introductory chapters of readings on the purpose of punishment. No further attempt is made in these books, however, formally to develop the course in terms of any analysis based on these considerations.

6. See Cook, *Act, Intention and Motive in the Criminal Law* (1917) 26 YALE L. J. 645, 647, analyzing the elements of criminality into (1) the act, (2) the concomitant circumstances, (3) the consequences, and (4) the state of mind.

of these three elements in a particular case. If any one be missing, there is no guilt. All of the various criminal defenses are manifestations of the specific absence of some one or more of these elements of criminality, frequently the *mens rea*.⁷ An objective of the present article will be to inquire into their elemental nature in the order of the three abstract elements.

The relevant criminological theory, in the present limited sense of the crystallized human attitudes concerning the ethics and desirability of punishment, can be grouped under three heads, herein called the vengeance theory, the deterrence theory, and the recidivism theory. The *vengeance*⁸ theory includes numerous subsidiary attitudes toward criminal justice, all of which emphasize only what has already happened. Thus the attitude toward the criminal may be to call for vengeance upon him, either for its own sake, or to restore the aesthetic balance, or as a way of making reparation, or to appease the lynch instinct either of the victim, his friends, and relatives, or of the populace, or to appease the gods, or as a way of expiation for the offender. No matter what the subsidiary object may be believed to be, the application of societal treatment is purely retroactive. The determining factor is whether that event which calls for action to achieve such ends has already happened. The occurred result of the offender's activity is important here and furnishes the measure of societal treatment. The activity itself and its potentialities are in the background, as is the personality of the offender. The legal requirement of the *corpus delicti* gives effect to this theory.

The *deterrence* theory, on the other hand, looks to the future and to other potential criminals and takes action for a past occurrence on the theory that doing so will prevent the creation of future social damage by others by frightening them out of doing the same causative thing. The attitude is that the present offender must be dealt with abstractly as an advertisement to future offenders of the unpleasant consequences of crime. Subsidiary aspects of this are the beliefs that criminal punishment serves either to give the criminal's fellow citizens a vicarious feeling of goodness, or to reaffirm the moral code. The guiding principle of all these is that societal action must be taken whenever there has occurred such activity, the doing of which, by anyone, will lead to social damage. The emphasis should be on the typical causative activity most in need of deterrence. What the offender

7. Except for the consent and condonation defenses, all of the general principles of criminal law usually denoted "defenses" fall under the heading of the *mens rea* element.

8. The word "vengeance" has been chosen as the best, although by no means a perfect, word to express the idea of state punishment determined solely by the quality or quantity of social damage actually created by the offender's act and regardless of his personality and of the objective danger from such conduct. This word, better than any other, such as retribution, seems to express the idea of measuring the amount of state action calculated to restore the aesthetic balance, make reparation, satisfy the victim, his friends, relatives, the populace and the gods, or provide sufficient atonement from the offender.

does and its potentialities rather than the result he has actually achieved is the important thing here. The legal requirement of *causation* gives effect to this theory.

While the deterrence theory looks to the future and treats the instant criminal in terms of other human beings, the *recidivism* theory, although also interested in the future, looks to the future conduct of the defendant himself. This latter theory, to the extent manifested in our law of guilt, is that the defendant demonstrates by his crime an anti-social tendency which, if he be allowed to remain at large and unchanged, will function again so that he will cause future social damage. In order to prevent this future damage, society must deal with him. The object may be to render him less likely to cause future damage than if no action be taken. This may be accomplished by punishment administered to him so that his memory of it will cause him to refrain; or by non-penal, but positive steps for improving his personality so as to reform him; or by the mere removal of him from his environment which may, in a negative way, work his reformation. But in a slightly different attitude the objective may be not so much to improve him as to render social damage from him temporarily or permanently impossible by segregating or despatching him.⁹ Whatever may be the subsidiary objects of this recidivistic approach, the common denominator of them all is the application of societal treatment according to the present likelihood of future social damage from the instant defendant, in an endeavor to prevent that future damage. Thus the rule should be to apply treatment to those who are likely to repeat, to acquit those whose likelihood is too slight to be important, and to scale the length and nature of the treatment in terms of the relative likelihood of recidivism. This theory is not interested in what the defendant's conduct has caused nor has been, except, incidentally, as these may be indicative of that with which it is directly concerned, *viz.*, what social damage this offender himself will cause in the future. The legal requirement of the *mens rea* or *criminal intent* gives effect to this theory.

9. The present analysis of criminological theory concerning the purposes of state punishment is more concerned with the need for some societal treatment for crime, and how much, whatever its internal nature, than with the problem of the internal nature of, or motive for, that treatment. From the standpoint of the present approach the nature of societal treatment may be considered as a constant and the variables will be, respectively, the demand for vengeance because of the instant social damage, the need for deterrence of the instant socially dangerous conduct, and the likelihood of recidivism of the instant human offender. On this difference between the quantity and quality of societal treatment consider the following: "Inasmuch as punishment appears neither to deter nor to reform unless it is applied to the actual offender I shall tentatively consider retribution as the most fundamental element of the morality of state action in punishment. From the point of view of theory deterrence appears to be a by-product of, and therefore incidental to, more fundamental aspects of punishment; while reformation is essentially a criterion of successful state action. Neither is in any sense an ethical justification of punishment." De Boer, *On the Nature of State Action in Punishment* (1932) 42 *MONIST* 605, 607.

This classification of stated theories of the ethics of punishment or of human demands concerning punishment has been adopted for two reasons.¹⁰ Not only does it fit closest to the orthodox classification of the legalistic elements of criminality and best adapts itself to an attempt at integration of legal and extra-legal materials, but it also seems in its own right a valid trichotomy based on the common denominators of the various individual theories howsoever they have, thanks to the versatility of the English and other languages, been worded by the endless writers who have engaged in expressing them.¹¹ The classification is in terms of the varying but common emphasis of the various theories.

The vengeance theories emphasize past occurrences only and have no concern for the future or for the potentiality either of the type of causative conduct or of the defendant personally. In the deterrence theories, which look to the future objectively, the occurred social damage is of interest only insofar as it may help indicate the potentialities of the particular type of causative conduct when engaged in by men generally. In the recidivism theories, which look to the future subjectively, the objective potentiality of the conduct is relevant only to the extent to which it gives a start to the subjective investigation of the defendant's personal dangerousness or likelihood of recidivism by allowing a tentative assumption that he will repeat whatever type conduct he has once engaged in. Whether the sub-motive be to reform, educate, frighten, segregate, or despatch the offender, the common question of recidivism is whether he needs any or all of these types of treatment. This is a matter of his presently manifested anti-social tendency.¹²

The criminal law does not squarely adhere to any one of these basic theories to the exclusion of the others¹³ although one might venture an

10. This classification is not offered as a novel one. The writer chooses to use it as the one best adapted for integrating legal and criminological knowledge. See Glueck, *Principles of a Rational Penal Code* (1928) 41 HARV. L. REV. 453, 456-462, offering the following classification: (1) retributive-expiative theory; (2) punishment as a deterrent; (3) punishment as a preventive. See also De Boer, *supra* note 9, at 605, 606: "The traditional theories of the ethical basis of punishment are three in number, *viz.*, the deterrent, the reformatory, and the retributive. Lately there has been added a fourth, which stresses the factor of education; but I do not see that it differs essentially from the reformatory theory."

11. The writer does not plan to cite authorities for the phrasing of the various sub-theories of the ethics of punishment. There are so many different phrasings of any one theory that an attempt at completeness of citation would be too voluminous. The writer has drawn on various sources for his information as to the phrasing of these sub-theories by criminological writers. Particularly has OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* (1913) proven useful. The complete files of the *Journal of Criminal Law and Criminology* have furnished numerous types of phraseology as have the various articles and books cited throughout the present article for other purposes. EWING, *THE MORALITY OF PUNISHMENT* (1929) is a recent treatment in book form of the various theories.

12. One occasionally sees the name "prevention" used as descriptive of one class of theory concerning the ethics of punishment. As so used this comprehends what the present writer has here subdivided into deterrence and recidivism.

13. Glueck, *supra* note 10, at 455: "Too often in the past has the basic principle of penal codes been implied, rather than expressed and defended, with the result that our penal statutes are full of confusions and inconsistencies, containing statutory and case-law accretions of many epochs and philosophies." See also MICHAEL AND ADLER, *CRIME, LAW AND SOCIAL SCIENCE* (1933) 371 *et seq.*: "The existing Anglo-American criminal law is a texture of in-

opinion that originally the greatest emphasis was on vengeance, and that later in time deterrence became predominant, and that today there is a shift towards recidivism. As a result the criminal law has become an eclectic mixture of all three types of theory. It refuses to convict an offender unless there concur certain factors recognizing in turn each of these three theories.¹⁴ There is no guilt unless there coincide in the stated manner: (1) something for which vengeance is demanded, which is the *corpus delicti*, (2) the defendant's connection with it by virtue of some course of conduct which it is thought desirable to deter on the part of other persons, *i. e.*, the defendant's causation, and (3) a likelihood of recidivism or an anti-social tendency on the part of the defendant, *viz.*, the criminal intent. If there be lacking any one of these as stated in the definition of the instant crime, there is not guilt thereof.

Not only must there exist some manifestation of all of these factors, but they must concur. They must arise out of a single course of conduct. The *mens rea* must be deduced from the manner of the causation of the social damage. As the traditional phrase puts it, "act and intent must concur."¹⁵ This requirement of the presence and concurrence of the three separable elements of crime, each justifying punishment by one of the three general types of human demand concerning the crime problem, is merely a specific application of what the writer considers a fundamental principle of jurisprudence, *i. e.*, that the desideratum of the judicial process is public satisfaction with judicial decision. The state is reluctant to take the serious step involved in punishment unless in doing so it will satisfy the greatest possible number of people.¹⁶ Some of the public want vengeance, others believe in deterrence, still others, and perhaps the most intelligent, emphasize recidivism.¹⁷ By requiring factors indicating some vestige of each as many as possible of the populace are satisfied.¹⁸

consistencies and confusions which have resulted from inconsistent conceptions of the ends it should serve and from the unsystematic and haphazard nature of its development."

14. See BOLITHO, *MURDER FOR PROFIT* (1926) 55, where the author, in treating of the trial of Burke, Hare *et al.* said: "This is the narrative to which Lords-Justices had now, by deputation of ancient law, to fit an end, in which must carefully be dosed public revenge, social utility, and the glorification of the moral system."

15. As an example of the "concurrence" doctrine, witness the rule that there can be no criminality by ratification of the criminal act of another. The criminality, if it exists at all vicariously, exists at the very moment of the principal's act.

16. See Blanc, *A Preliminary Analysis for the Formulation of a Philosophy of Criminal Law* (1928) 2 ST. JOHN'S L. REV. 177, 179.

17. HOLMES, *THE COMMON LAW* (1881) 42: ". . . we should naturally expect that the most important purposes of punishment would be co-extensive with the whole field of its application. It remains to be discovered whether such a general purpose exists, and if so what it is. Different theories still divide opinion on the subject.

"It has been thought that the purpose of punishment is to reform the criminal; that it is to deter the criminal and others from committing similar crimes; and that it is retribution."

18. Sayre, *Criminal Responsibility for the Acts of Another* (1930) 43 HARV. L. REV. 689, 720: "Out of this eternal conflict between the social interest in the general security and the individual interest of the particular defendant has come the compromise of law—the legal requirement of *mens rea* as a necessary element of criminality, the legal defenses of infancy and insanity, the nice distinctions and balanced considerations which make up the substantive law."

Where there is an extraordinary justification for punishment in the name of one alone of these theories, the law occasionally favors it by requiring for conviction slighter evidence than otherwise in support of the other type elements. Thus, under this "sliding scale", we will see that when the demand for vengeance is high less is required than otherwise in the way of proof of the deterrence and recidivism elements, and vice versa.

The requirement of concurrence gives a tri-dimensional perspective to a criminal case and to the incident problem of public satisfaction with the result. This parallel between the elements of criminality and the conflicting views of the ethics of punishment is merely one of the greatest emphasis. Although one cannot chop up the whole criminal law into neat compartments, yet it is the writer's thesis that these three elements of guilt have as their function the emphasizing of these three types of human demand respectively; that the *corpus delicti* requirement emphasizes the demand for vengeance, the rules of causation emphasize the need for deterrence, and the *mens rea* requirement and the defenses concerned therewith emphasize the likelihood of recidivism. It remains to be seen whether the specific rules based on these elements of criminality have functioned in the spirit of emphasizing these viewpoints. The writer purports not so much to philosophize as to what ought to be nor to show the defect of what is, as to describe, in terms suitable to the integration of legal and criminological principles, what the criminal law is actually trying to do by its principles of guilt-finding.

VENGEANCE AND THE CORPUS DELICTI

The first requirement for a criminal conviction is to prove the *corpus delicti*, or criminal result or objective crime or impairment of interest or social damage. This requirement, factual proof of which is dramatized in the courtroom usually only in murder cases, is, nevertheless, a theoretical legal element of all crimes. Such problems as whether the prosecutrix consented in a rape case, or the prosecutor in one of larceny; whether the child was born alive in an infanticide case; whether the building was broken into in burglary, or burned in arson;¹⁹ are as much a matter of the *corpus delicti* as whether the bones found in defendant's furnace are human or not.²⁰

19. Another example of the *corpus delicti* requirement is the rule that only such false testimony as is material to the case in which it is given is perjury. Unless the testimony falsely sworn to is material there is no social damage, call for vengeance, or *corpus delicti*. Consider, too, the following borderline problems of criminality, all of which involve the question of the presence of the requisite *corpus delicti*: In common law burglary, was the building entered a dwelling house, was it in the night-time, was there a sufficient "breaking" and "entering"? In rape, was there penetration? In mayhem, was there the injury of a member capable of aiding the victim in fighting? In battery, was there a touching? In robbery, were there force and fear? In larceny, was there an interference with possession, or was the property of a type to be the subject of larceny? In the crime of receiving, were the goods at the time actually stolen goods, and did the defendant actually receive them? In common law arson, was it the burning of a dwelling house?

20. *Commonwealth v. Webster*, 5 Cush. 295 (Mass. 1850), is such a case on the *corpus delicti* in a murder trial.

The requirement of the *corpus delicti*, as it appears both in the specific details of a given crime, and in the general principles about to be discussed, emphasizes the vengeance theory of criminology. It is the function of rules of this sort to require proof of the existence of the type of social damage which the law has stated previously to be necessary for a conviction. The law looks backwards in this regard.

There must be some occurred event which arouses a demand for societal action regardless of the nature of the conduct creating it or of the personality of the offender. What occurred events will thus arouse a demand for societal action are determined by the law-makers, *i. e.*, the legislatures and courts. The outlines of the occurred events raising a demand for state vengeance must be pre-stated by governmental fiat in statute or decision and these events may or may not "naturally" arouse a demand for vengeance. Certain prohibitions, originally written on the statute books or into the reports by a "natural" demand for vengeance on the perpetrators of such results are interpreted as to their details in such a vein. Other prohibitions, engendered by an "artificial" call for vengeance, and enacted or decided in the spirit of "indirect social damage" or "public welfare crimes" receive their application in this latter manner. The common denominator of both types is the requirement that there exist a *corpus delicti*, *viz.*, something of the sort contemplated by the statutory or case-law prohibition to raise the demand for societal action administered *quid pro quo*.

This determination of the extent of social damage, both by legislatures in enacting and by courts in interpreting has usually depended on social attitudes toward various types of crimes, with the physical harms incident to murder, battery, and rape at the head of the list and the offenses against property and habitation not far behind. This supposed difference in social damage and call for vengeance is recognized in the difference in penalty for different crimes. For the instant problem, which is that of guilt or innocence of a certain crime, the question is whether there has happened the social damage of the degree which the law has ordained must be present before penalties are inflicted in such a name. If it has not happened there cannot be a conviction for that crime, regardless of the need for deterrence of the type conduct or of the likelihood of future social damage from the instant defendant. Judicial technique in construing the *corpus delicti* aspect of crime crystallized in the days when vengeance was the dominant theory. This technique remains today even though deterrence and recidivism have greater importance than before.

To have legal guilt of crime there must have occurred the requisite social damage or impairment of some interest sought to be protected by the prohibition as worded. We find that certain general principles of criminal law emphasize the vengeance attitude and *corpus delicti* requirement.

First is the relative²¹ criminal attempt. One should point out the functional error of classifying attempts along with solicitations and conspiracies. The latter are punished because they are conduct unusually potentially dangerous and worthy of deterrence even though they do not create occurred social damage consonant with the punishment inflicted. Attempts, on the other hand, are punished because of the social damage actually created and the demand for vengeance actually aroused by the result of the attempt.²² The punishment is scaled in proportion thereto. For attempts, the conduct sought to be deterred is exactly the same whether there results complete crime, criminal attempt, or non-criminal attempt. The likelihood of repetition, or *mens rea*, must be as great or even greater for the attempt than for the completed crime. It may be equally great even though there be no criminality under the law. The difference between complete crime, criminal attempt, and non-criminal attempt is purely one of the difference in social damage actually occurred. The problem is only one of the *corpus delicti*.

The *corpus delicti* of the criminal attempt is a partial infringement or impairment of some interest protected by the major prohibition, *i. e.*, a lesser, but discernible, criminal result. Attempted murders are punished only if some human being have his life put in danger or he be put in fear thereof; attempted rapes only if some woman suffer that fright and horror aroused by receiving an offer of sexual violence. Criminal attempts at the various "public welfare crimes", wherein social, rather than individual interests are primarily protected, must involve socially dangerous proximity to success.

Then, to the limited extent they are available, the defenses of consent and condonation must be set off, functionally, from the apparently similar one of entrapment. Consent, as a defense to rape, simple assault, larceny, and related crimes²³ involves the consideration that these offences are set up primarily to protect individual interests in physical integrity and property. The consent of the injured party negatives the impairment of the

21. In a previous article, *The Effect of Impossibility on Criminal Attempts* (1930) 78 U. OF PA. L. REV. 962, the present writer has distinguished between "relative" and "direct" criminal attempts. Relative attempts are those punished under the common law principle which by a single legal proposition punished attempts at any and all crimes. Direct attempts, on the other hand, are those crimes actually in the nature of an attempt where the *corpus delicti* is specifically stated in the prohibition so that recourse to interpretation is unnecessary and where the prohibition is limited to attempts of a very specific sort. Examples of direct attempts are perjury, burglary, and treason.

22. The present writer, in the article referred to in the preceding footnote, attempted to apply the analysis herein adopted to a specific problem of guilt-finding, *viz.*, the effect of impossibility. The three most difficult problems of the criminal attempt can all be rationalized in terms of the *corpus delicti* and social damage. These are (1) impossibility, (2) when preparation becomes a criminal attempt, and (3) attempts at minor crimes, and at crimes themselves attempts.

23. CLARK AND MARSHALL, *CRIMES* (3d ed. 1927) § 150, lists "rape, perhaps assault, and as a rule, offenses against property", as those for which consent is an effective defense. Why should not also false imprisonment, kidnapping, and abduction be included?

interest protected, so there is no demand for vengeance and, regardless of defendant's committing conduct in need of deterrence, or manifesting a likelihood of recidivism, he goes free because there is no corpus delicti as the crime is stated. In other crimes, where the law purports to protect other than personal interests, such as in abortion, carnal abuse, murder, and mayhem, the corpus delicti and social demand for vengeance exist and so there is guilt regardless of the consent of the other party. To recognize condonation as a statutory defense is to accept the vengeance theory and that alone.²⁴ Entrapment, on the other hand, involves a different theory, later to be discussed. There is as much social damage and demand for vengeance then as if guilt were held. But the entrapment indicates that the defendant does not possess sufficient mens rea or anti-social tendency and so he goes free because of the absence of *this* element of guilt.

As an incident of the corpus delicti and vengeance there are the two problems, of whether the law punishes "mere intent", and of "indirect social damage." The former problem has been, under that name, the subject of much dialectic.²⁵ Under such a name one cannot think efficiently about the problem. Translated into objective terms the problem is this: To what extent does the law ever punish in terms of the consummated crime for nothing more than those manifestations of anti-social tendency as would, if accompanied by corpus delicti and causative conduct, normally lead to conviction?

The answer is never. The idea of vengeance has this effect. There is no all-pervading criminal principle whereby one is punished solely because he has manifested a great likelihood of future social damage, or solely because he has committed conduct in need of deterrence, or both. The concurrence principle and the corpus delicti requirement explain this. Occasionally, however, by specific rules, the law gives more than normal emphasis to deterrence and recidivism in situations where the need for deterrence or likelihood of recidivism is unusually great, by pre-stating certain situations to be socially damaging and deserving of more punishment than seems obvious by "natural" vengeance standards alone. But still there must be a pre-stated corpus delicti.

Thus we can observe the cause of deterrence exceptionally served by the crimes of solicitation and conspiracy, by the liquor laws, the narcotic laws, the pure food laws, many regulations of the sex act, and most of the direct omission crimes wherein the omission is itself the corpus delicti, as

24. In the absence of statute, condonation by or settlement with the injured person is no defense. Minnesota has a statutory provision permitting prosecutions for adultery only at the instigation of the aggrieved spouse. See *State v. Allison*, 175 Minn. 218, 220 N. W. 563 (1928). The bad check laws and occasional laws of the embezzlement type recognize settlements with the injured person as defensive. Occasionally prosecutions for sex offenses are stipulated to be suspended upon the marriage of the parties or the man's offer thereof.

25. See Sayre, *Criminal Attempts* (1928) 41 HARV. L. REV. 821, 821-837, 858. Contrast the ancient crime of "compassing the death of the King." On this see 4 BL. COMM. *76 *et seq.*, and *Trial of John Horne Tooke*, 25 HOWELL, STATE TRIALS (1818) 1.

distinct from those situations where it is the causation of separate social damage. In all these the punishment is assessed with an eye to the ultimate rather than the immediate consequences of the conduct. The emphasis is on conduct in need of deterrence although the matter is immediately stated as the *corpus delicti* of a specific crime.

Then we find the recidivism theory emphasized by the peculiar crimes of possession of such things as contraband liquor, narcotics, burglar tools, weapons, and counterfeit money and apparatus. The same spirit underlies many of the crimes of specific intent, such as the aggravated assaults where social damage which would, of its own force, call for some vengeance, is punished far more than such demand for vengeance indicates due to a present indication of unusual anti-social tendency. The possessor of burglar tools and concealed weapons is punished severely not because of what he has done and not so much to deter others from that specific conduct, but because he has thereby manifested his own anti-social tendency. Many of the "prima facie" cases of guilt which allow conviction in the name of occurred social damage for what is actually less than normal proof thereof, really punish because of the anti-social tendency shown by the "prima facie" case. The permitted rebutting evidence purports to show a lack of this anti-social tendency.

Should one wish to name this group of crimes one could call them either "indirect social damage" or, following Professor Sayre, "public welfare offenses."²⁶ It would be hard to say for any crime that its rationale was purely in terms of vengeance. One could, of course, attempt to classify all specific crimes as well as general principles in terms of whether the instant *raison d'être* was vengeance, deterrence, or recidivism. To do this would be to set off from the "old-fashioned" or "individual interest" crimes frankly set up to protect individual interests in person, property, and habitation, the "public welfare crimes" of indirect social damage, some of which exist as devices for deterring *conduct* potentially socially dangerous although social damage has not actually occurred, and others of which exist as devices for enabling the apprehension of *persons* who are unusually socially dangerous.

These former crimes are the ones immediately arousing a call for vengeance and which directly involve social damage as here understood. Different attitudes and techniques have to be used in interpreting and applying different crimes of the sorts thus classified according to their varying function.

The importance of the *corpus delicti* dates back to the erstwhile complete sway of the vengeance theory. The attempt and the consent principles display the influence of vengeance the most. The essential problem in each

26. Sayre, *Public Welfare Offenses* (1933) 33 COL. L. REV. 55.

is to investigate whether there is present the corpus delicti of the instant crime.

As much as anything else this requirement purports to prevent "frame-ups." These are distasteful to the public. If public satisfaction with judicial decision is a desideratum, then the public will be satisfied with rules which tend to prevent frame-ups. The attempt and consent devices as well as the general requirement that for each crime the specific corpus delicti be established, all tend to make frame-ups difficult and so serve a valid end. This, to a degree, makes the vengeance attitude a justifiable one.

Then, the most respectable aspect of the vengeance theory is that some vestige of it is necessary for us to determine just what ultimate social damage it is we wish to avoid so that we may have a starting point for functioning either by the deterrence or the recidivism theories. We must have some way of choosing what conduct needs to be deterred or what human tendencies are anti-social in nature. For, is it possible to work out standards of "prevention", *i. e.*, of deterrence and recidivism, and their calendar of social damage we wish not to occur, without using as a yardstick some conception of what ultimate happenings will, when they do occur, cause a "natural" demand for vengeance on the part of human beings? ²⁷

For that matter, getting too far away from vengeance standards, that is, from human demands, tends to make the system break down because of the stubbornness of the human beings who have to run it. Witness the unpopularity of the Baumes Laws,²⁸ the technicalities written into the law by English judges in order to avoid too many hangings,²⁹ and the failure of the Jones "Five and Ten" Law,³⁰ as examples of the failure of criminal principles which give too much emphasis to recidivism or deterrence.

It is unfortunate that vengeance considerations cannot be kept in a proper place. They should not be allowed to influence such matters as the length and nature of societal treatment. As providing a starting point for

27. "The ideal punishment of remorse is thus replaced by an artificial substitute which is supposed to coincide with the degree of resentment felt by the public. There would be nothing objectionable in this if we had reason to believe—which, of course we have not—that public resentment is on the whole a safe index of the degree of depravity pre-supposed by the offense. It must be admitted that relative to a given level of moral insight feelings of resentment and indignation are worthy of cultivation." De Boer, *supra* note 9, at 618.

28. *I. e.*, the laws providing for increased penalties, even life imprisonment, for recidivists. They take their name from State Senator Baumes of New York, who sponsored the New York version of them. Their unpopularity has been due, no doubt, to their rigid inclusion of various offenses not popularly acceptable as properly within the scope of such provisions.

29. It is generally understood that many of the peculiar technicalities of the Anglo-American criminal law result from judicial utterances of the English judges who were rationalizing their action in refusing to convict persons of crimes which, while minor in nature, were then subject to capital punishment. The only device available for avoiding capital punishment in specific cases was to reverse a conviction, or to apply a technical rule to prevent one.

30. 46 STAT. 1036 (1931), 27 U. S. C. A. § 91 (1934), as amended, which provided maximum penalties of five years imprisonment and \$10,000 fine for certain liquor law violations.

applying more valid and humane theories, and as underlying the attempt and consent devices, vengeance has more justification. The most recognition that should be given to vengeance and, for that matter, deterrence is to attempt to prevent private vengeance and its incidental disorder, and as well to deter other offenders by the spectacle of the efficient and certain administration of *some* societal treatment for all crime, the quality and quantity of which should be determined by recidivistic considerations alone.

DETERRENCE AND CAUSATION

The basic theory of deterrence is that the objective of criminal punishment should not necessarily be to compensate for occurred criminal results but rather to prevent future similar results by frightening potential offenders away from committing conduct causative of such results. In this vein the emphasis is not on the actual result but on the offender's conduct and its objective potentialities.

Persons may legally cause social damage directly by physical conduct, indirectly by encouraging others, and indirectly by the omission of conduct preventive of such damage. Thus the three problems of deterrence and causation are: first, proximate cause; second, encouragement to crime, including solicitation, conspiracy, and the vicarious guilt of principals and accessories; and, third, the related matters of crimes of omission, master and servant, and corporate criminality. First will come a statement of what the writer considers the general principles of deterrence which show how these legal rules of causation emphasize the deterrence theory.

Causative conduct may be either by way of commission or omission. A general statement for both of these is "course of conduct." The object of deterrence is to prevent future social damage. In doing this society must prevent future courses of conduct creative of social damage. This is attempted by the spectacle of punishment for such past courses of conduct as either already have created social damage or are very likely to do so.³¹ Thus the first principle is that of "likelihood." That past causative conduct which is punished in order to discourage imitation must be conduct likely to cause social damage if committed in the future. The potential results are immediately important although actual occurred results aid in determining potentiality. Should type conduct be equivocal and be socially desirable on some occasions, the law solves the dilemma by adding a subjective requirement of *mens rea*. The "likelihood" principle is seen in the general rule for encouragement, the extraordinary rules for conspiracy, the rule of vicarious liability for unplanned crimes, the limitation of omission criminality to relational situations, and the vicarious guilt of employers.

31. Levitt, *Cause, Legal Cause and Proximate Cause* (1922) 21 MICH. L. REV. 34, 35: "The law takes cognizance only of such acts which the experience of society has shown to be dangerous. Only such acts which have produced hurt or are likely to produce hurt are forbidden by law."

The other general principle is that of "emphasis." Deterrent punishment seeks to frighten future offenders.³² It serves as an advertisement. There must be a dramatic common denominator between the conduct punished and that sought to be deterred. The lesson must be carried home in simple terms that punishment follows bad conduct. But it must also be emphasized that punishment follows only for socially dangerous conduct and for nothing else, and that doing the right or socially desirable thing entails the pleasant consequence of no punishment. Any societal action which suggests that punishment can follow for anything other than socially dangerous conduct violates this principle of deterrence.³³

Thus the state must act carefully to avoid punishing one for a *corpus delicti* which appears as though it might have happened anyhow even had the offender observed societal rules. Occasionally the state may have to go so far as to free an actually socially dangerous individual for fear that punishing him will create this unfortunate appearance and thus violate the principle of emphasis. This is because deterrent punishment, at most, can work only to the extent to which the spectacle of immediate punishment causes the man in the street to react in a societal manner.³⁴ It is equally important to emphasize to him the bad consequences of bad conduct and the good consequences of good conduct. The state claims the right to use the individual unpleasantly for a deterrent effect on his fellow men. Likewise it must be ready to free the individual when a converse but equally telling effect can be achieved or preserved by doing so.

Punishment must thus avoid disgusting the man in the street.³⁵ If it gives to him the impression of unpleasant consequences following regardless

32. Laylin and Tuttle, *Due Process and Punishment* (1922) 20 MICH. L. REV. 614, 632: "It is submitted that the justification of punishment on the basis of prevention [deterrence?] goes no further than this: Punishment may be imposed for a voluntary act, because it will deter other like voluntary acts; it may be imposed for omission to act when the omitted action is possible and would prevent the evil, because it will stimulate the desired action. But it cannot be imposed because of a mere occurrence, coupled with a static condition which has no causal connection with the occurrence, because it will not prevent either the condition or the occurrence; it cannot be imposed because of a mere occurrence, coupled with an act or omission itself lawful, for the same reason."

33. Cf. OPPENHEIMER, *op. cit. supra* note 11, at 235-236 in connection with the importance of appearances in state punishment for deterrent purposes. Oppenheimer in this passage quotes extensively from Bentham.

34. There are two aspects of state punishment for deterrence, (1) the matter of the severity of the punishment and (2) that of the certainty of punishment, howsoever severe. There are those who believe that more deterrence is accomplished by making some societal action certain than merely by providing a theoretical threat of a very severe punishment which does not occur in all cases. On this see BURTT, *LEGAL PSYCHOLOGY* (1931) c. 16. The common law custom of burying a suicide at the cross-roads with a stake through the heart must be understood as an attempt to deter suicides by the fear of ignominious burial in a situation where the ordinary deterrent fear of the death penalty is impossible.

35. See Levitt, *Extent and Function of the Doctrine of Mens Rea* (1923) 17 ILL. L. REV. 578, 593-594, in which the author rationalizes the requirement of *mens rea* in terms of a device to avoid disgusting the average man. He considers that to punish without a guilty mind would arouse resentment on the part of the punished individual and his cohorts, with the result that these individuals would jump to the conclusion that the thing which was done ought not to be punished under any circumstances. While the present writer does not agree

of conduct, it may induce him to commit crimes for "good measure." This principle of "emphasis" is reflected in the legal propositions of proximate cause, the merger rule, the limitations on vicarious guilt for unplanned crimes, and the "scope of employment" limitation on the vicarious guilt of employers.

Proximate cause

The deterrence policy is to punish conduct which either has caused social damage, or is very likely to do so. This is done in order to prevent future damage from others by preventing conduct likely to be causative. This policy involves, however, the troublesome and metaphysical problem of "cause." The law attempts to avoid the metaphysical complications by the dual requirement of cause in fact or cause sine qua non and proximate cause. These devices attempt to provide rules of thumb which are workable at the hustings.

The normal principles of causation punish only that conduct which actually has created social damage. Conduct which is only likely to create social damage is, exceptionally, punished with deterrence motives under the headings of solicitation, conspiracy, and "indirect social damage." One wonders whether the modern additional and stricter requirement of proximate cause in the normal situations is to be explained in terms of the replacement of vengeance theories by deterrence ones in public consciousness.³⁶

The legal doctrine of proximate cause is, in substance, a rule providing that there shall not be guilt in certain cases even where there is cause in fact. It is substantially a criminal defense serving the policy of deterrence. The writer believes that a consideration of proximate cause in this spirit will serve to demonstrate the validity of the view held by Dean Green and others to the effect that the principle cannot be refined into any statement more detailed than that of the "substantial factor" test.³⁷

that this is the true rationale of the mens rea problem he does find it a valuable treatment of the problem of disgusting the man in the street, which is more relevant on the question of deterrence and causation.

36. 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1898) 470-471: "Guesswork perhaps would have taught us that barbarians will not trace the chain of causation beyond its nearest link, and that, for example, they will not impute one man's death to another unless that other has struck a blow which laid a corpse at his feet. All the evidence, however, points the other way:—I have slain a man if but for some act of mine he might perhaps be yet alive. Very instructive is a formula which was still in use in the England of the 13th century; one who was accused of homicide and was going to battle was expected to swear that he had done nothing whereby the dead man was 'further from life or nearer to death'." See, to the same effect, 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (2d ed. 1931) 51-52.

37. GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927) 137-142; Edgerton, *Legal Cause* (1924) 72 U. OF PA. L. REV. 211, 343; Smith, *Legal Cause in Actions of Tort* (1912) 25 HARV. L. REV. 103, 223, 303. If we accept the function of the defense of no proximate cause as representing a desire to acquit rather than to disgust the man in the street, then we submit to the jury exactly that problem, would conviction disgust you, as average men. This problem cannot be stated in any more refined form than "proximate cause" or "substantial factor".

In serving the deterrence theory the proximate cause rule particularly concerns the principle of "emphasis."³⁸ The function of the rule seems to be to exempt from guilt certain persons who have "caused in fact" social damage as a way of emphasizing and advertising that punishment follows only for the creation of stated social damage and for nothing else. The rule seeks primarily to avoid nullifying the normal deterrent effect in cases where there is substantial proximate cause. The writer believes that the proper function of the proximate cause rule is to exempt from punishment in those cases of cause in fact where, should punishment be imposed, the type of fact situation would possibly create in the popular mind an impression that punishment was being inflicted for social damage that might have happened anyhow even had the defendant behaved himself. We hang a murderer to advertise the unpleasant consequences of murder. But where there is raised any doubt as to his conduct being the only cause of the result, we set him free. The reason for this is to advertise to the public that good behavior leads to freedom. We express the test of the doubt by the rule of proximate cause.

It seems that proximate cause means this: In the light of all the facts, particularly the type of the offender's conduct, and the type of result, what was the degree of *apparent likelihood* of this type of social damage occurring anyhow, even had defendant not acted? If there was a high likelihood of its occurring anyhow, then there is no proximate cause, for to punish would give the man in the street an unfortunate impression. If the result was little likely of occurring but for the conduct, then punishment is safe because the man in the street will not be disgusted.³⁹ Is not this the issue we present to the jury when we advise them to measure the situation by the yardstick of "substantial factor" or its equivalent?

The defense of no proximate cause purports to apply the cause in fact requirement on a basis of external appearances and typical situations. Its

38. On the function of the proximate cause rule, see McLaughlin, *Proximate Cause* (1925) 39 HARV. L. REV. 149, 194; Edgerton, *supra* note 37, at 343-347, 355, 356, 359, 361, 363, 364, 367; Beale, *The Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633, 636, 640; I COOLEY, TORTS (4th ed. 1932) § 50. These various writers suggest "justice", "discouraging harmful conduct", "speed", and "certainty" as the motives for the proximate cause rule. The former two are close to what the present writer believes to be the true function of the rule.

39. A very important recent case on proximate cause in homicide is *Stephenson v. State*, 205 Ind. 141, 179 N. E. 633 (1932). Defendant abducted and raped a girl and she, while still detained by him, took poison from which she died. The court, by a three to two majority, held this sufficient to predicate a conviction for murder against the defendant. This case is discussed in Note (1933) 31 MICH. L. REV. 659 (an exhaustive treatment of the whole problem of proximate cause in homicide); Note (1932) 81 U. OF PA. L. REV. 189 (including some treatment of the question of whether the rules of causation are the same in crime, tort, and workmen's compensation). It can be suggested that in the *Stephenson* case the court had to stretch the causation device in order to avoid acquitting the defendant for a heinous crime. In view of the fact that the most available evidence against the defendant was the victim's dying declaration, usable only in a homicide case, it was practically impossible to convict him of rape, abduction, or battery. There was no danger that a finding of proximate cause would disgust the average man in the particular case.

function is at once to make the requirement of cause sine qua non capable of hasty application at the hustings, and to avoid the socially undesirable external appearance of unjust punishment, *viz.*, of punishment for something very likely to have occurred anyhow despite the defendant's conduct.

Cause in fact is a matter of whether the result actually would have happened but for defendant's conduct. Proximate cause is a matter of whether it would probably so have happened. The extent of the likelihood of other things than the defendant's conduct having created the instant social damage, *i. e.*, the probability of the result having happened anyhow, gives some indication of how dangerous the instant conduct is and how desirable it is of being deterred and should gauge the punishability for deterrence purposes.

Encouragement to crime—solicitation, conspiracy, principals and accessories

One can as well legally "cause" social damage by encouraging another person to do the physical legally causative conduct as by doing it himself. When there is encouragement by one human being to another to commit a crime, whether one-way or mutual encouragement, by words or by conduct, by request or by command, it is recognized that this encouragement goes far to diminish the normal effect of the deterrent fear of punishment on the encouraged person. The result is that he offends the sooner and much social damage occurs which otherwise would not. Since encouragement to crime is as causative as the physical conduct involved in proximate cause, it is as socially dangerous. Thus it must be similarly punished in order to deter others from encouraging and so to prevent future causation of this sort.

The deterrence policy is carried out by the rules of solicitation, conspiracy, and the vicarious guilt of principals and accessories. Future encouragement is sought to be deterred by the punishment of those who have already encouraged. Considerations of relative dangerousness, however, scale the punishment and divide the encouragers into three classes according to the extent to which the encouragement has taken effect. The slightest and least probable punishment is given the least potentially socially dangerous conduct of one-way encouragement or solicitation. It is recognized that such conduct, even though the recipient rejects the encouragement, is slightly socially dangerous because future recipients might not reject it. More punishment is given for the more potentially dangerous conduct of mutual encouragement to crime, or conspiracy. Not only is the punishment usually greater, but the greater potentiality of mutual encouragement is recognized in the rule that it may be a crime to *conspire* to do something which, when actually done by an individual alone, is no crime. Experience

has shown that mutual encouragement results in organization which in turn creates much social damage otherwise non-existent.⁴⁰

Finally the maximum punishment for encouragement, that for the very crime encouraged or committed, is given whenever the encouragement has caused the happening of the stated corpus delicti of the specific crime encouraged, or some naturally related crime growing out of it. All of the plotters who have encouraged each other in the commission of a specific crime are vicariously guilty through the act of the very perpetrator and may be equally punished.

This vicarious liability is carried even to the extent of guilt for other crimes than the one planned if these other crimes actually and naturally grow out of the one planned. It is believed that there is as much causative conduct in need of deterrence then as there is both in the case of the very crime planned and in the case of physical proximate cause by a single offender. It is believed that the usual type of related unplanned crime naturally growing out of the planned one would never have occurred but for the planning of the encouraged one. There is cause in fact and proximate cause in the cases leading to guilt. The limitation of this sub-rule emphasizes that punishment follows only for causation. A separate crime not naturally growing out of the planned one might have happened anyhow, and so society dares not then punish the encourager for fear of disgusting the man in the street.

So it is with the withdrawal rule. If one, after encouraging another to commit a crime, withdraws from the plot and so notifies his accomplice, he is not vicariously guilty if the accomplice thereafter goes ahead and performs the planned act. In this latter event it is indicated that the perpetrator is committing the crime on his own responsibility and regardless of the encouragement of the withdrawing accomplice. Hence this indicates such a high likelihood of the crime happening anyhow even had the encouragement not occurred that to punish the encourager would violate the principle of emphasis and disgust the average citizen by causing him to feel that punishment might happen regardless of conduct. Of course the withdrawing accomplice can be punished for the corpus delicti he has actually created, *viz.*, solicitation and conspiracy. The withdrawal rule thus encourages the socially desirable preventive conduct of doing acts which may block anti-social results.⁴¹

40. Witness the experience with "racketeers" during the late Prohibition era. The marketing of illicit beer to meet public demands required large organizations of human beings. Once they were set up and started to running smoothly they tended to reach out into other fields more socially damaging. Once an organization is established it tends to expand its sphere of activity.

41. The distinction between principals in the first and second degrees and accessories before the fact is, or was, largely a procedural one. The guilt is the same. But even at that, the distinction can be rationalized functionally. The principal in the first degree commits the most causative conduct, the principal in the second degree relatively less, and the accessory before the fact, who is absent, relatively the least.

Crimes of omission, including master and servant, and corporate criminality

Now we deal with another indirect type of causation, that incident to the omission to engage in conduct preventive of social damage. For if the doing of an abnormal thing can be legal causation, so, too, can the non-doing of a normal thing. At this point we are not interested in "direct" omissions where the omission itself is the stated *corpus delicti*.⁴² Rather we deal with "relative" omissions for which the omission is legally causative of separate social damage, in the name of which latter, if at all, it will be punished with deterrence motives in order to encourage others not to omit. The "direct" omission is a matter of "indirect social damage."

Relative omissions bring together, first, the omission of conduct immediately preventive of social damage which will be punished, if at all, in the name of whatever crime the social damage and *mens rea* indicate and, second, the omission of the more remotely preventive conduct of the proper hiring and supervision of employees by employers, punished by the doctrine of vicarious guilt of the employer. These respectively involve duties to act and duties to hinder the criminality of others.

While both do involve the potential danger from organization, yet it is but nominal to group together the guilt of employers and the topic of principal and accessory under the heading of vicarious guilt. Co-conspirators are punished in order to *deter* positive conduct, *i. e.*, encouragement to crime. Employers are punished in order to *encourage* the doing of that which will hinder likely criminality—the hiring and supervision of competent employees.⁴³ The employer situation more closely resembles the typical omission situation than it does the vicarious guilt of accomplices.

This resemblance is both functional and technical. The state will punish in the name of causation of social damage the omission to engage in preventive conduct only when there exists a legal relation which imposes a duty to act. This may be either the relation of custodian to one in custody or the relation between the master and servant.

42. Examples of "direct omissions" would include the crime of non-payment of taxes, the crime of non-support of wife or child, the crime of a minister's not returning the marriage license and certificate to the proper authorities, and a bank examiner's failure to make a periodical examination as required by law.

43. On the function of vicarious liability see I BENTHAM, COLLECTED WORKS 383: "The obligation imposed upon the master acts as a punishment and diminishes the chances of similar misfortunes. He is interested in knowing their character, and watching over the conduct of them for whom he is answerable. The law makes him an inspector of police, a domestic magistrate, by rendering him liable for their imprudence." See also Laski, *The Basis of Vicarious Liability* (1916) 26 YALE L. J. 105, 110: "The great Pothier ascribed its force to the necessity of making men careful in the selection of their servants; yet it is clear that in the vast majority of cases that have arisen, no such negligence has ever been alleged." Blackstone also considered vicarious liability a matter of public policy inducing masters to be careful in their choice of servants. I BL. COMM. *430. See also BATY, VICARIOUS LIABILITY (1916) 148, giving as one reason for vicarious liability, among others, "carefulness and choice" and listing as supporters thereof Pothier, Robertson, Laurent, and Demolombe. See I POTHIER, OBLIGATIONS (3d ed. 1853) 271-272.

The "likelihood" principle of deterrence underlies this. The unusual or extreme likelihood of the social damage happening from the omission only because of the relation indicates liability therein. The unusually great opportunity for the encouraged act to prevent social damage without undue inconvenience in the relational situations is also relevant. The limitation of employer's guilt to "scope of employment" is a matter of the "emphasis" principle.

The punishment of omissions *immediately* preventive of social damage is usually found limited to homicides and batteries in custodial and employment relations. The parent who omits to feed the child who dies of starvation and the switch-tender whose negligence with the switch has fatal results are guilty of criminal homicide. But why is not the expert swimmer who sits idly by and lets a stranger drown equally guilty? ⁴⁴ This is because of the likelihood principle. It is peculiarly *more* likely that social damage will ensue if custodians and employees omit *their* normal duties, calculated to save human life, than if the occasional by-stander fails to jump off the sea-wall to save a drowning person. The omission of custodial and employment duties is objectively more potentially socially dangerous. Encouragement of them accomplishes more. The relation makes social damage more likely if the incidental duties are not performed efficiently. But for the relation and the accompanying omission there is relatively little likelihood of the social damage having occurred. To the man in the street it looks like causation. But it is not so obvious to the man in the street that the stranger could have prevented the social damage. To punish the stranger might disgust the average citizen. Custodial and employment cases involve typical factors appealing to the man in the street.

The master and servant situations involve similar principles. There is guilt in the master where he acquiesces, or the crime is of a certain type, or where he is a corporation. This is so because it is believed that these factors specially indicate a greater than usual likelihood that the fact of organization, *i. e.*, relation of master and servant, actually did "cause" the servant to create social damage he would not have created but for the organization and the special factors which are requisite.

It is felt that the master and servant relation alone creates a certain potential social danger.⁴⁵ The servant's loyalty to his master, or feeling

44. The law encourages persons to perform properly the duties incident to relations voluntarily assumed, but it takes no steps of punishment to encourage persons not in such relations to engage in preventive conduct. Conversely, the system of granting rewards or medals, such as the Carnegie medals, to persons performing heroic acts is set up to encourage such extra-relational acts. Oddly enough, it is said that Carnegie medals are denied to persons performing heroic acts as incidents to normal duties of employment.

45. "What then, shall be said of the problem of vicarious criminal liability in the case of petty misdemeanors involving merely regulatory offenses? In such cases there is no question of moral wrongdoing. The objective of the law is not to cure or change the mental processes of the defendant. There is no thought of social treatment or rehabilitation. The law's aim is not reformatory but almost exclusively deterrent, to prevent future repetitions of similar offenses. To hold the master liable if he fails to prevent his servant from committing the prohibited conduct will have a powerful deterrent effect. . . ." Sayre, *supra* note 18, at 722.

that the master will use his influence to get him acquitted, will be likely to cause the servant to commit crimes he would never do of his own initiative. There is an implied encouragement to criminality in the relation. But this alone is not enough for vicarious guilt. There must further be acquiescence⁴⁶ by the master, or the crime must be of a type highly likely to be committed by servants, or the master must be a corporation, which is thought highly likely of instilling this anti-social spirit in its employees.⁴⁷ There is sought to be avoided the master's blocking off the normal deterrent effect on the servant of previous punishments of other individuals. Likewise there is sought to be encouraged the master's instilling pro-social ideas in the servant, and better yet, hiring competent ones, and supervising them all. These things are calculated to prevent much social damage which otherwise would arise from the master and servant relation. The threat of vicarious guilt is believed thus to encourage the master to do the preventive things.

But the master is not expected to do the impossible. Vicarious guilt follows only for servant's crimes "within the scope of the employment." This applies the emphasis principle to the particular field. There is no vicarious guilt for servants' crimes which have no relation to the organization the master has set up. To punish for such as these would be to punish for a crime very likely of happening anyhow even had the master done all the things encouraged. Such punishment would disgust the man in the street and violate the principles of deterrence. In order to encourage the master, in the potentially socially dangerous relation of master and servant, to do those things which will subdue the likely social damage incident thereto, the law requires him to do no more than the normally preventive conduct of hiring competent employees, supervising their conduct, and abstaining from contemporaneous acquiescence in their criminality. If they still do

46. *Id.* at 706-707: "A second way of proving causation is through knowledge plus acquiescence . . . if his acquiescence was known to the agent, the defendant thus became a contributing cause. . . ."

47. Arguments against corporate criminality are to be found in Francis, *Criminal Responsibility of the Corporation* (1924) 18 ILL. L. REV. 305; Canfield, *Corporate Responsibility for Crime* (1914) 14 COL. L. REV. 469. See Winn, *The Criminal Responsibility of Corporations* (1929) 3 CUMB. L. J. 398, 414-415, where Mr. Winn argues for limiting the criminal liability of corporations to that for the acts of those "human beings who as primary representatives wield the powers of the groups upon which they are predicated." Edgerton, *Corporate Criminal Responsibility* (1927) 36 YALE L. J. 827, 832, cites Attorney General of Rhode Island, in *State v. Eastern Coal Co.*, 29 R. I. 254, 267, 70 Atl. 1, 7 (1908): "The tendency at the present time is to hold corporations responsible, criminally as well as civilly, for all acts committed by their agents, having any relation to the business of the corporation." Laski, *supra* note 43, at 124: "The dissolution of individual business enterprise into the corporation system has tended to harden the conditions of commercial life. The impersonality of a company employing say five thousand men is perhaps inevitable; but in its methods of operation, it tends to be less careful of human life, more socially wasteful than the individual has been." Hacker, *The Penal Ability and Responsibility of the Corporate Bodies* (1923) 14 J. CRIM. L. & CRIMIN. 91, 97: "On the other hand it is necessary to accept the penal responsibility of the corporate bodies, for only in this way can we punish the real author of many crimes, and we are not obliged to punish in the place of the real criminal his instrument, who is often quite innocent, or who often acts only by pressure, under the influence of his employer, namely, the corporate body, which gives him his daily bread."

those crimes which they might do but for the relation, nothing can be accomplished by punishing the master. To punish would be worse than nothing. Punishment might discourage him from trying to do those things which could be capable of diminishing criminality by servants. And, for that matter, in the case of those crimes without the scope of employment, the relation is not causative because for such crimes there is less likelihood of its blocking off the normal deterrent fear of punishment which affects the servant as an individual.

[To be concluded]