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THE CONCEPT OF MENS REA IN THE CRIMINAL LAW

EUGENE J. CHESNEY*

The essence of criminal law has been said to lie in the maxim—"actus non facit reum nisi mens sit rea." Bishop writes:¹ "There can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist." This examination of the mental element or mens rea requisite for crime, will be restricted with reference to the use of the term itself in so far as it signifies the mental element necessary to convict for any crime, and only regarding crimes not based upon negligence.

A possible division for such consideration is the following:

1. *Requisite mens rea in the early law.*
2. *Beginnings of the mens rea concept.*
3. *Subsequent development of a general mens rea as necessary for crime.*
4. *Application of the general concept to some individual crimes,*
5. *Application of the general concept regarding some specific defenses.*
6. *Some general present day applications of the term.*

1.

Most of the records agree that early criminal law developed from the blood feud and rested upon the desire for vengeance. It is worthy of note that the criminal law concerned itself with those injuries which were highly provocative and the most injurious of these are the intentional ones. Justice Holmes wrote:² "Vengeance imports a feeling of blame and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted; even a

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¹ Criminal Law, 9th Edition (1930) 287.

² The Common Law, 3.

dog distinguishes between being stumbled over and being kicked . . . The early English appeals for personal violence seem to have been confined to intentional wrongs."

It must be borne in mind that the cumbersome early forms of trial precluded the drawing of fine distinctions based upon factors not apparent to all. Deep-seated injuries are the essence of blood feuds; the nice considerations of the mental factors prompting the inquiry do not constitute the feuds. Sayre writes:³ "In trial by battle the issues must be framed in the large; if the defendant cannot readily satisfy the judges that he is above suspicion, he may be ordered to settle the dispute by his body, and there is an end of the matter." It must also be noted that in these early developments there was no distinction between tort and crime. It might be said that the early English law grew from a point bordering on absolute liability. It has been written:⁴ "Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows." Wigmore states:⁵ "The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer; the owner of an instrument which caused harm was responsible because he was the owner, though the instrument had been wielded by a thief; the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master; the master was liable to his servant's relatives for the death, even accidental, of the servant, when his business had been the occasion of the evil; the rachimburgius, or popular judge, was responsible for a wrong judgment, without regard to his knowledge or his good faith; the oath-helper who swore in support of the party's oath was responsible, without regard to his belief or his good faith; one who merely attempted an evil was not liable because there was no evil result to attribute to him; a mere counsellor or instigator of a wrong was not liable, because the evil was sufficiently avenged by taking the prime actor, and where several cooperated equally, a lot was cast to select which one should be held amenable; while the one who harbored or assisted the wrong-doer, even unwittingly, was guilty, because he had associated himself with one tainted by the evil result."

At this period the law was attempting to replace the blood feud by inducing the victim or his kin to accept money payments instead

³ *Mens Rea*, Harvard Law Review, 45:976.

⁴ Pollack and Maitland, *History of English Law* (2nd ed.) 2:470.

⁵ *Responsibility for Tortious Acts*, Harvard Law Review, 7:317, 18.

of force and revenge. This gave rise to the 'wer.' Concerning the 'wer,' "We must have regard to the rank of the injured person or his kin, because, if his or their rank is distinguished, a larger bribe is needed to keep them quiet."⁶ Granting the limitations of the early records, it is manifest that at least prior to the twelfth century, criminal intent was not sine qua non for criminality. Walter states,⁷ that the old Westgothic Law was "Whoever shall have killed a man, whether he committed the homicide intending to or not intending to . . . let him be handed over into the power of the parents or next of kin of the deceased."

Leges Henrici Primi dating from about 1118 indicate that liability was most certainly imposed without much regard to intent of the offender. As an example, in these so-called laws is found: "Si quis in ludo sagittandi vel alicujus exercicii, jaculo vel hujusmodi casu aliquem occidat, reddat eum; legis enim est, qui inscienter peccat, scienter emendet."⁸

Sayre writes:⁹ "The clearest indication of criminal liability imposed by the early law without blameworthy intent is perhaps to be found in the cases of killing through misadventure and in self-defense. In early times, with the exception of killings under the king's warrant or in the pursuit of justice, which had always been justifiable, so far as we know the killer seems to have been held liable for every death which he caused, whether intentionally or accidentally."

During the twelfth century the influence of canon law seems to have revised this notion. Mental intent was the real criterion of guilt and an unwitting killing or one in self-defense still merited conviction by the judge under the old laws, but could be pardoned by the sovereign.¹⁰ Such pardon did not prevent a forfeiture of the wrong-doer's goods.

Sayre contends¹¹ that up to the twelfth century the present conceptions of mens rea were non-existent. But he adds that the mental element was not completely disregarded. The very nature of many early offenses necessitated a criminal intent in their commission. Waylaying, robbery, rape, housebreaking and house-burning are examples. The same writer states:¹² ". . . it is significant

⁶ History of English Law. Holdsworth, 2:51.

⁷ Corpus Juris Germanica, 1:668.

⁸ Chapter 86:6.

⁹ Mens Rea, Harvard Law Review, 45:979.

¹⁰ 2, Pollock and Maitland, 481, 589; 3, Holdsworth, 312.

¹¹ *Supra*, 981.

¹² *Supra*, 981.

that from the earliest times of which we have any record the felony of arson depended upon proof of an intent to burn." It is worthy of note that the laws of Alfred provide for unintentional killing or injury "it is moreover decreed, if a man have a spear over his shoulder, and any man stake himself upon it, that he pay the wer without the wite. If he be accused of wilfulness in the deed, let him clear himself according to the wite; and with that let the wite abate."¹³

Though it is necessary to draw very guarded conclusions from the fragmentary records regarding criminal intent in the early law, still it seems reasonable to assert that a criminal intent was not always essential for criminality and many evil doers were convicted on proof of causation and without proof of an evil intent to harm.

2.

To comprehend the beginnings of the mens rea concept at the end of the twelfth century, two specific influences must be observed. One was the Roman law, recently revived and sweeping over the European continent with renewed vigor. It was again recalled that Cicero (*Pro Tullio*, 22,51) had set it down that it is an implied rule of mankind (*tacita lex est humanitatis*) to punish not the occurrence but the 'consilium,' and that 'sciens dolo malo' had been found in the laws of Numa. The Roman 'dolus' and 'culpa' were being grafted onto the English Law and along with them the notion of mental element in crime.¹⁴

The second influence, more powerful than the first, was canon law and a consequent insistence upon moral guilt. A consideration of sin from the view point of canon law involves the mental element almost equally with the physical act. In the Sermon on the Mount, Christ seems to have laid the philosophy to support this proposition (*Matt. 5:27-28*). Here, as was pointed out, the desire, wish, and intent determine culpability. Although, as previously observed, *Leges Henrici Primi* (c. 5 §28) clearly set forth the early notion of absolute liability regardless of evil intent, nevertheless, in discussing perjury, the same work offers "reum non facit nisi mens rea" as the law applicable thereto.

Lévitte writes:¹⁵ "The mutual reactions of the teaching of St.

¹³ Alfred 13, 1 Thorpe, 85.

¹⁴ See Bodenstein, *Phases in the Development of Criminal Mens Rea*, 36 *So. African Law Journal* 323, 327-333.

¹⁵ *Origin of the Doctrine of Mens Rea*, 17 *Illinois Law Review* 117.

Augustine and Theodore of Tarsus led to the definite acceptance of the doctrine of mens rea as a part of our criminal law." Amplifying this thought Lévitte adds that St. Augustine taught that good works become compensation for an injury done to God. In other words they are the 'bot' of the Anglo-Saxon law as applied by the Church to spiritual things. It must be here observed that about this same time the court of chancery was gaining power and its chancellor, a high ecclesiastic, was softening the rigors of the law with the principles of equity. Also, about the middle of the thirteenth century Bracton wrote his work, *De Legibus et Consuetudinibus Angliae*, thereby strongly influencing the later shaping of the common law. It is worthy of note that Bracton's work was replete with ideas borrowed from canon law. Maitland¹⁶ has asserted that Bracton in writing on homicide has literally taken over a dissertation from the canonist, Bernard of Pavia, and inserted it as part of the common law.

Sayre writes:¹⁷ "Although the greater part of Bracton's book is a statement of the actual English practice, in some passages it is very evident that he is merely pouring into English common law molds, ideas gained from the canonists." He further comments that in *De Legibus* (101 b) Bracton writes: "We must consider with what mind (*animo*) or with what intent (*voluntate*) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment. For to take away the will makes every act indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure (*nocendi voluntas*) intervene, nor is a theft committed except with the intent to steal."

Bracton's writings reveal, however, that he was conscious of the existing discrepancies of the Roman legal ideas and the actual English practice, in such matters, for example, as seeking the king's pardon after the felon has been declared guilty. He further states (*De Legibus*, 134) that the king "must sometimes as a favor (*de gratia*) concede to a man life and limb, as where one has killed a man through misadventure or in self-defense." Bracton has also emphasized the mental element in felonies other than homicide, in his time, these being arson, rape, robbery, burglary, and larceny. The Roman Law inclination of this writer is shown when his writings regarding larceny are examined. The old appeal of larceny was

¹⁶ 2, Pollock and Maitland, 477.

¹⁷ *Mens Rea*, 45 *Harvard Law Review* 985.

the early procedure to recover stolen goods in the possession of another, and was the 'actio furti' in the early English law. It could be successfully upheld without any proof of a mental element ". . . against one who is no thief, but an honest man."¹⁸ However, when Bracton lays down the definition of larceny, he makes part and parcel of the 'actio furti,' the mental element of 'animus furandi.'

It is quite apparent that Roman law and canon law, as evidenced in the writings of Bracton emphasized to a high degree the mental requisites of criminality, and in this respect marked the beginning of a *moral mens rea* concept in criminal law.

3.

Bracton seems to have put the final seal of acceptance upon the mental element in English criminal law. The old maxim cited in *Leges Henrici Primi*, "reum non facit nisi mens rea" gradually evolved until we find it appearing in Coke's Third Institute as "actus non facit reum nisi mens sit rea."¹⁹

The period subsequent to Bracton showed clearly the transition from the primitive liability concept, to one of general moral blameworthiness. And this change was an orderly one since a majority of the thirteenth century felonies involved mental intent, e. g., robbery, rape, house breaking, larceny, arson and homicide. Sayre writes:²⁰ ". . . but already by the thirteenth century, the killer in self-defense or by misadventure, though strictly a felon and liable to forfeiture of goods, was being relieved from the ordinary felon's punishment of death . . . Perhaps it is more correct to say that the newer concept of criminal liability involved, not so much a transition of thought, as shift of emphasis and change in the avenue of approach, which resulted in the recognition of new legal doctrines and attitudes." It is interesting to observe the statements of judges and counsel bearing out this attitude regarding an evil intent, together with the shaping of new legal defenses to exhibit the lack of evil intent and therefore criminal liability, e. g., duress, non compos mentis, infancy, etc."

It ought to be here noted that this doctrine of evil intent continued to thrive to such an extent, that long after Bracton's time it was made a line of demarcation between crime and tort. And flourishing concurrently with this concept of moral blameworthiness

¹⁸ 2, Pollock and Maitland, 162.

¹⁹ Coke, Third Institute—6, 107.

²⁰ Mens Rea, 45 Harvard Law Review 989.

was the equally strong and independent doctrine of damages regardless of evil mind. As one writer states:²¹ "The general law is that a man is liable for the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of action provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally. In adjudicating upon questions of civil liability the law makes no attempt to try the intent of a man, and the conception of negligence has as yet hardly arisen. A man acts at his peril."

The English Year Books of this period contain statements in accord with the trend towards the necessity of an evil mind to prove a felony. In *Y. B. Trinity* 21 Hen. VII f. 28, pl. 5 (1506) is found an opinion by Rede, J., who writes that in trespass "the intent cannot be construed, but in felony it shall be. As when a man is shooting at the butts, and kills a man, it is not felony; and this will be so, as he had no intent to kill him; and thus of a tiler on a house, who unwittingly with a stone kills a man, it is not felony."

The English bench while undoubtedly greatly influenced by this trend towards the doctrine of evil intent did not go to the extreme. Although Stamford writing in the middle of the sixteenth century states²² that ". . . in the time of Edward III, voluntas reputabatur pro facto as well in this crime (i. e., robbery), as in other crimes, nevertheless such a doctrine was not generally accepted because it is fundamentally extreme and far from workable in a system of criminal law. This fact is evidenced in *Hales v. Petit*.²³ In that case the court said: "The imagination of the mind to do wrong, without an act done, is not punishable in our law, neither is the resolution to do wrong, which he does not, punishable, but the doing of the act is the only point which the law regards; for until the act is done it cannot be an offense to the world, and when the act is done it is punishable." Stamford²⁴ admits that the doctrine that 'the will is taken for the deed' was not the law in his day, but 'in the ancient times.'

So strong was the notion, however, that it persisted in the legal treatises and texts. Bacon referring in his *Maxims* (Reg. 15) to the law in Queen Elizabeth's time says: "All crimes have their conception in a corrupt intent, and have their consummation and

²¹ *History of the English Law*, 3:375.

²² *Pleas of the Crown*, 27.

²³ *Plowden*, 253 (1563).

²⁴ *Supra*, 17.

issuing in some particular fact." In his same work (Reg. 7) he observes: "In capital cases in favorem vitae, the law will not punish in so high a degree, except the malice of the will and intention appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him who was the wrongdoer . . . So, if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course; but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will; and he shall be punished in the law, as deeply as if he had done it of malice . . . So, if an infant within years of discretion, or a madman kill another, he shall not be impeached thereof; but if he put out a man's eye, or do him like corporal hurt, they shall be punished in trespass."

Sayre writes:²⁵ "By the second half of the seventeenth century, it was universally accepted law that an evil intent was as necessary for felony as the act itself." And he cites Hale, who discussing death through casualty and misfortune, stated:²⁶ ". . . as to criminal proceedings, if the act that is committed be simply casual and per infortunium, regularly that act, which, were it done ex animi intentione, were punishable with death, is not by the laws of England to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act and event, to make the offense capital."

4.

It is safe to assert at the outset, that the general concept of mens rea necessary for criminality was very vague. But with the ever developing but painfully slow processes of the law, more precise and discriminating lines were being established regarding the evil mind necessary when a given set of circumstances was present. It was just as logical then as now, that since every felony involved different social and public interests, the mental requisites for criminality in one must needs differ from the other. A short statement of the developing mental requirements for some of the then better known felonies, follows:

Homicide. As far back as the beginning of the thirteenth century Leges Henrici Primi (c. 90 §11) indicated that to all homicide was attached responsibility, save in execution of a warrant. However, in fairness, it must be stated that the 'king's pardon' was

²⁵ Mens Rea, 45 Harvard Law Review, 993.

²⁶ 1, Pleas of the Crown, 38.

usually available in self-defense or misadventure cases. The point to be remembered is that there was no dividing into murder and manslaughter. The mental element was of negligible importance. The succeeding two centuries, however, saw the rise and prevalence of the 'mental element' in homicide and the relieving from criminal responsibility of those who killed without criminal intent. The greatest homicide was murder. At the end of the twelfth century this consisted of 'homicide which is committed in secret, no one seeing or knowing it' (Glanville, 14, c. 3). At that time the mental element had no important place in murder. The original "murdrum" Bracton writes²⁷ was introduced into England by King Cnute to prevent the Danes from being secretly slain by the English, and consisted of a heavy amercement for which the "hundred" was liable. By the middle of the fourteenth century the 'presentment of Englishry' was abolished by statute.²⁸ However, in the popular mind, the term lived on as the worst form of homicide.

Sayre says²⁹ that the only remaining legal classification of homicide was: 1) *justifiable homicide* (i. e., done in pursuit of justice and therefore acquitable); 2) *homicide by misadventure or in self-defense* (and this involved imprisonment before trial, expense of obtaining a pardon, forfeiture of goods and a continuing liability to an appeal); 3) *any other kind of homicide which involved liability to a felon's punishment*. The Statute of Gloucester³⁰ regulated pardons and if a jury found the killing by misadventure or in self-defense, "the king shall pardon him if it pleases him." This meant that killing either by misadventure or in self-defense was necessary for a pardon. It is interesting to note that in 1389 a decree³¹ restricted the king's pardoning power and stated that "no charter of pardon shall henceforth be allowed before any justice for murder, the death of a man killed by making assault or malice prepense." Stephen³² cites this as one of the earliest statutory recognitions of "malice aforethought."

From this time on through the middle of the sixteenth century, statutes were enacted dividing the felony of homicide, and most of the legislation passed contained such phrases as 'wilful prepensed murders;' 'murders upon malice prepensed;' 'wilful murder of

²⁷ De Legibus, 134 b.

²⁸ 14 Edw. III St. 1, c. 4.

²⁹ Mens Rea, 45 Harvard Law Review 995.

³⁰ 6 Edw. I, c. 9.

³¹ Richard St. II, c. 1.

³² History of English Law, 3:43.

malice prepensed,' etc.³³ The final result was two main divisions of homicide, viz., *with* and *without* malice aforethought. The former (no benefit of clergy permitted) carried the death penalty; the latter, was punishable by a year's imprisonment and a branding on the thumb.

The presence or absence of 'malice aforethought' was, therefore, made the test. Sayre stated³⁴ that in the beginning "malice was construed in its popular sense and was purely a physical element. The early evidence all points to its being general malevolence and cold-blooded desire to injure." However, the term was soon embracing things far afield from its original meaning. Coke,³⁵ defines murder as unlawful killing "with malice aforethought, whether expressed by the party or implied by law." This latter phrase 'implied by law' was far-reaching in its implications and paved the way for a later 'implied malice.' Sayre has stated³⁶ that, "a term used at the beginning to designate a purely physical element was thus given a tortured and artificial meaning in order to enable courts to visit with a severe penalty killers, who in the public opinion of the day, ought not to be let off with the comparatively slight punishment attaching to clergyable offenses."

It would certainly seem, from the data available, that the public state of mind had a great deal to do with the meaning which the term 'malice' was assuming. Rising from Coke's 'implied malice' the term has assumed such proportions that Stephen³⁷ defines it: "Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated:

a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;

b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to such person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) An intent to commit any felony whatever;

³³ 12 Hen. VII, c. 7; 4 Hen. VIII, 2; 23 Hen. VIII, c. 1; 1 Edw. VI, c. 12 §10.

³⁴ *Mens Rea*, 45 Harvard Law Review 997.

³⁵ Third Institute, 47, 52.

³⁶ *Supra*.

³⁷ Digest of Criminal Law (7th ed.) 225.

d) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or in prison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed."

It can be observed without difficulty, that, at this period, malice aforethought had practically no connection with the thirteenth century conception of mens rea derived from the canonists

Larceny. Bracton wrote:³⁸ "Theft is, according to the law, the fraudulent taking of another's property with an animus furandi against the will of the owner. I say with intent, because without an animus furandi the crime is not committed." This differs greatly from the early *actio furti* where possession, even in the hands of a proved honest man, was enough to make larceny, i. e., *actio furti*. One of the outstanding earlier cases exhibiting this intent in larceny, is the so-called "Carriers cases" dating back to 1473.³⁹ The opinion in that case makes it clear that the court considered that a 'corrupt intent' might constitute larceny even when there was no taking of possessions, *vi et armis*. Sayre cites Coke,⁴⁰ who writing one hundred fifty years later on the necessity of animus furandi in larceny, states: "First it must be felonious, *id est animo furandi*; as hath been said, *actus non facit reum nisi mens sit rea*. And this intent to steal must be when it cometh to his hands or possessions; for if he hath the possession of it once lawfully, though he hath animus furandi afterward, and carryeth it away, it is no larceny." This notion of mens rea as applied to the specific act of larceny is certainly a far cry from the early evil intent with its concomitant of moral guilt. In its seventeenth century use, mens rea is being employed in a broad sense to denote the mental intent for any crime. Observe, this was not a constant, but varied with different overt acts.

Stephen writes⁴¹ that Bracton's animus furandi had developed into an intention to deprive the owner of his property permanently, fraudulently, and without claim of right. And it seems that even in our times, courts are still defining, expanding, and contracting the limits and bounds of this same animus furandi in larceny cases, e. g., borrowing without consent; a taking, but with intent to later repay; a taking for gain; for curiosity; a temporary taking, and later abandonment or destruction of the subject matter, etc. These, and

³⁸ De Legibus, 150 b.

³⁹ Sayre, Cases of Criminal Law, 924.

⁴⁰ Third Institute, 107.

⁴¹ History of English Law, 2:95.

more, are all elaborations of the central idea expressed in *animus furandi* and denote the complexity and technicality involved in the mental requirements for larceny.

Burglary. It is not too much to assume that the criminal offense of house-breaking requires an intent, *sui juris*, as it were. However, it is most difficult to find any specific mental requirement set forth by the early writers. Sayre,⁴² cites Britton,⁴³ who writing about 1300, said burglars are "all those who feloniously in time of peace break churches, or the houses of others, or the walls or gates of our cities or boroughs." There seems to have been an earnestly difficult problem for courts to distinguish between felony and tort. Sayre⁴⁴ states that as early as 1411 it was held that an indictment for merely breaking another's 'close' was not held felony, but indictment for *feloniously* breaking another's dwelling house would be. And he further observes that whether or not the breaking was 'felonious,' was made to depend upon the accused's state of mind. Moile, J., in an opinion written in 1469 states "In burglary one has to discuss the intent."⁴⁵

Coke⁴⁶ defines burglar as "a felon that in the night breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." Later⁴⁷ he observes that "The intent must be to commit felony, and not trespass, or other thing that is not felony . . . so as there must be a felonious and burglarious intent." Coke's ideas on the *mens rea* of burglary seem to be reflected in our current notion that to indict for burglary there must be an intent to commit a felony within the house entered.

Arson. Some of the earliest criminal law writings reveal that the crime of arson was considered a grave one. Thorpe⁴⁸ cites the laws of Aethelston and King Cnute making arson carry the death penalty. Bracton⁴⁹ was certain that to convict for arson, "*mala conscientia*" must be shown, i. e., a burning, the result of negligence was not the crime of arson. Coke,⁵⁰ later adopts Bracton and points

⁴² *Supra.*

⁴³ *Lib. I, c. XI, F. 17.*

⁴⁴ *Supra.*

⁴⁵ *Criminal Attempts*, 41 *Harvard Law Review* 821-27.

⁴⁶ *Third Institute*, 63.

⁴⁷ *Third Institute*, 65.

⁴⁸ *I, Ancient Laws and Institutes of England*, 225.

⁴⁹ *De Legibus*, 146.

⁵⁰ *Third Institute*, 67.

out the necessity of establishing the act "maliciously and voluntarily" and calls attention to the words of the indictment for arson, "voluntarie, ex malitia sua praecogitata, et felonice." It is still in the law of arson that the act must be 'ex malitia.' But it is the common observation that the mental requisite is now not a motive of malice, desire to injure, or general evil-mindedness. The narrow specific intent to fire a building, seems to be sufficient, irrespective of the motivating purpose.

Pollock and Maitland⁵¹ call attention to the fact that prior to Bracton many offenses less than felony were tried in *civil* courts and often a fine and even corporal punishment was meted out. And here is cited the fact that after the adoption of Bracton's view on the mental element necessary for crime, the courts were frequently at a loss to distinguish between the civil and criminal elements of trespass.

5.

Just as specific mental intents were required for specific felonies, after the twelfth century, so, certain specific defenses were beginning to take form. In so far as freedom of will or choice entered into the idea of a criminal mental intent, so did the lack or absence of this freedom constitute the basis of freedom from blame or fault therein. This can better be illustrated by examining briefly several of these 'new' defenses showing lack of criminal intent.

Insanity. If we grant the premise that criminal responsibility rests upon the mental intent or moral blameworthiness, then it must follow that whatever prevents the exercise of one's intelligent choice between good and evil destroys criminal responsibility. Hence insanity is a fitting and proper legal defense. However, it was not always so. Coke⁵² reminds us that "the ancient law was, that if a mad man had killed or offered to kill the king, it was holden for treason; and so it appeareth by King Alfred's law before the conquest." In the evaluation of insanity as a defense, like self-defense, it did not directly excuse the crime, but became one of the reasons for the allowing of the king's pardon. Fitzherbert⁵³ writes, that if "it was found by inquest that a lunatic man killed a man . . . whereupon the king granted him a charter of pardon." Sayre⁵⁴

⁵¹ History of English Law 2:512.

⁵² Third Institute, 6.

⁵³ Corone (Abridgement) 351.

⁵⁴ Mens Rea, 45 Harvard Law Review 1005.

states that in early times the king's pardon did not relieve from forfeiture of goods, but gradually a royal pardon afforded this relief also. "Presentment was made that one being insane, stabbed himself with his own knife. Recovering his sanity, he received the rites of the Church, and then died by reason of his self-inflicted wound. There is no confiscation of his chattels." (Cf. Selden Society, *Eyre of Kent*, 6 & 7 Edw. II, 81.)

Then, too, the evolution of this defense does not reveal it to be the highly developed excuse of the present day. Sayre (*supra*) points out that at first it relieved only when insanity was present in its 'grossest form.' Bracton wrote⁵⁵ that one insane was not far removed from the brutes and Fitzherbert stated in 1534⁵⁶ that the crown might seize the goods of one non compos mentis, whom he said was a person "who cannot account or number twenty pence, nor can tell who was his father or mother, or how old he is."

Lord Hale, however, seems to have wrought confusion concerning this defense, some of which has lasted down to the present time. He apparently sought to merge the defenses of non compos mentis and infancy on a lack of mens rea basis. He wrote:⁵⁷ "Such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." Sayre⁵⁸ believes that Hale here attempts to measure criminal irresponsibility of the idiot, with the same measure as criminal irresponsibility of the child, and cites Stephen,⁵⁹ quoting: "The one is healthy immaturity, the other diseased maturity, and between these there is no sort of resemblance." The *M'Naghten's Case* (1843) brought the so-called 'right and wrong' test into the foreground and this seems to have succeeded the earlier 'good and evil' test. The majority of present day courts have generally rejected the test laid down by Lord Hale wherein he measures insanity and infancy by the same stick. A leading Ohio case⁶⁰ has this to say: "In proving the defense of insanity in a murder case, questions to be decided by the jury are whether the accused was a free agent in forming the purpose to kill, whether he was capable of judging the right and wrong of the act, and whether he knew at the time

⁵⁵ De Legibus, 100, 420b.

⁵⁶ *Natura Brevium*, 233b.

⁵⁷ 1, *Pleas of the Crown*, 30.

⁵⁸ 45 *Harvard Law Review* 1006.

⁵⁹ Vol. 2, pp. 150-151.

⁶⁰ *Clark v. State*, 156 N. E. 219-230. App. 474.

it was an offense against the law of God and man, and, if found in the negative, the accused would not have the mental capacity to commit the crime, and if he lacked the mental capacity, either by reason of a diseased condition of the brain or native feebleness of mind and lack of intelligence, it would constitute a defense." This fairly represents the present state of modern courts on the question of insanity as a defense. It can be seen that the test for mens rea on the part of one mentally ill, is today vastly different from the mental intent necessary to convict an infant under fourteen years.

Infancy. Just as mental illness may excuse from criminal intent, so may tender years. Sayre⁶¹ states: "However harsh the ancient law regarding infancy may have been, tender years had become recognized by the beginning of the fourteenth century as a valid defense, and the basis of the defense seems to have been the lack of a guilty mind." From this period there is evidence that a child under seven years was excused from criminal responsibility. In an early writer⁶² is found: "An infant under the age of seven years, though he be convicted of felony, shall go free of judgment, because he knoweth not of good and evil . . ." A mens rea applicable to the years of adolescence seems to have presented great difficulty. An early court⁶³ is reported to have said regarding a boy aged eighteen years and charged with felony, ". . . this lad has committed this felony entirely of his own conception, without any suggestion from his parents; and he must suffer judgment." The rule seems to have been 'malitia supplet aetatem' (cf. Fitzherbert, *Corone Abridgement*, pl. 170).

In the sixteenth century the excuse of infancy had become a very rigid defense. The factor of *discretion* appears to have been the test for determining an infant's guilt. Nature Brevium⁶⁴ relates, ". . . an infant of the age of fourteen years hath discretion, as hath been adjudged at such age, and if he at such age commit felony, he shall be hanged for the same."

This element in the criminal law on infants has come down to our own times and was succinctly summed up by Hale in his *Pleas of the Crown*.⁶⁵ Briefly, the principle may be stated: 1. An infant below seven years cannot be a felon, regardless of circumstances indicating discretion; 2. An infant, seven to fourteen years, is not

⁶¹ *Supra*, 1007.

⁶² I, *Selden Society*, 109.

⁶³ I, *Selden Society*, *Eyre of Kent*, 6 & 7 Edw. II, 148.

⁶⁴ Fitzherbert (7th ed.) 202.

⁶⁵ I, *Pleas of the Crown*, 25-28.

doli capex, prima facie, but if it can be shown by very strong evidence that he could perceive the distinction between good and evil, he may be convicted; 3. An infant, fourteen to twenty-one years, is subject to capital punishment the same as others, since he is presumed doli capex after fourteen years, i. e., he can distinguish between good and evil.

These fundamental distinctions broadly prevail in most jurisdictions and represent the basis of modern statute law on these points.

Intoxication. In the earlier development of mens rea, this so-called defense was not permitted on account of the act of becoming drunk was in and of itself morally blameworthy. As one writer⁶⁶ put it: "The reason why ordinary drunkenness is no excuse for crime is that the offender did wrong in getting drunk." This so-called defense has never really completely emerged from the moral significance originally attached to it. Coke wrote:⁶⁷ "Although he who is drunk is for the time non compos mentis, yet his drunkenness does not extenuate his act or offense, nor turn to his avail; but it is a great offense in itself, and therefore aggravates his offense, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, as any other thing that concerns him." Likewise, Hale has stated:⁶⁸ "By the laws of England, such a person, i. e., one intoxicated, shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." Also, Hawkins wrote:⁶⁹ "And he who is guilty of any crime whatever through his voluntary drunkenness, shall be punished for it as much as if he had been sober." Sayre comments:⁷⁰ "It is only within fairly modern times, with the growing realization that criminal liability is to be sharply differentiated from moral delinquency, that intoxication has been allowed as an indirect defense in so far as it negatives the existence of a specific intent required for certain crimes."

Mistake of fact. In cases where the accused has acted under a reasonable mistake of fact in so far that had his supposition been true there would have been no crime, the absence of a mens rea is

⁶⁶ History of English Law, Stephen 2:165.

⁶⁷ Third Institute, 200.

⁶⁸ I, Pleas of the Crown, 32.

⁶⁹ I, Pleas of the Crown, 3.

⁷⁰ Mens Rea, 45 Harvard Law Review 1014.

most important as a defense. Hale⁷¹ reports the case of the lord who, wishing to protect his crops against trespassers, ordered his servant to shoot whenever he would hear anything in the standing crops. The servant obeyed and shot the lord who had rushed into another corner of the crop field. The servant was convicted upon the present day doctrine of criminal negligence and also due to the fact that had there been no negligence, the accused would have been guilty in spite of his innocent mistake unless the mistake were caused by the victim. This indicates that at that time there was recognized no defense of mistake of fact that would overcome criminal intent and free the accused. There appears no judicial pronouncement recognizing mistake of fact as a good defense until the latter part of the seventeenth century.

The foundation for the current defense of mistake of fact is found in Levetts case (1638).⁷² There, the accused with reason, but through error, supposed that one Frances Freeman, was an intruder in his house during the night season, and slew her with his sword. The Court held it to be not homicide, since the accused did it in ignorance and *without intent to hurt the slain person*.

6.

In tracing the development of a mens rea in the criminal law it is difficult to escape the fact that mental intent as a necessity for criminality has ever been a variable. It seems to have varied directly with the ideals and objectives of criminal justice. In the very beginning, the main task of criminal administration was to placate through its efforts, groups of people who would accept it as a substitute for the prevailing system of blood feuds. In this stage, courts had to decide between a malicious intent and an accidental happening. After this, there occurred a shifting in the objectives of criminal justice towards the punishment of unmoral acts. This latter was due to canon law and Church influence on the morals of the people. Moral blameworthiness came into the picture and mens rea was measured by the yardstick of the moral code. Sayre has written:⁷³ “. . . our modern objective tends more and more in this direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests.” Instances of this change of ‘flavor’ in mens rea are noted in cases⁷⁴

⁷¹ I, Pleas of the Crown, 40.

⁷² I, East, Pleas of the Corwn, 274.

⁷³ Mens Rea, 45 Harvard Law Review 1017.

⁷⁴ Reynolds v. United States, 98 U. S. 145.

where the intent prompted by religion and ethics did not stay the conviction of a Mormon who married a second time while his first wife was living. And, where the violation of a Sunday ordinance by one who in conscience believed the Sabbath should be observed, was convicted of crime.⁷⁵ In earliest times such cases would have been measured according to their respective degrees of moral blameworthiness, whereas, now the social and public interests require protection both against such ideas together with their evil intentions.

In conclusion the best statement of summation seems to be that of Holdsworth, who wrote:⁷⁶ "In these various ways the law, starting from the idea that a mens rea or element of moral guilt is a necessary foundation of criminal liability, has so defined and elaborated that idea in reference to various sorts of crimes, that it has come to connote very many shades of guilt in different connections. But though mens rea has thus come to be a very technical conception with different technical meanings in different contexts, it has never wholly lost its natural meaning; and, because its natural meaning has never been wholly lost sight of, the necessity for its presence, in some form, has supplied the principle upon which many of the circumstances, which will negative criminal liability are based. These, in their turn, have been so developed that they have become the foundation of different bodies of technical doctrine; and in these ways a large part of our modern criminal law has been developed."

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⁷⁵ *Commonwealth v. Has*, 122 Mass. 40.

⁷⁶ History of English Law, 8:446.