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Edmund H. Schwenk

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Criminal Codification and General Principles of Criminal Law in Argentina, Mexico, Chile, and the United States: A Comparative Study

EDMUND H. SCHWENK*

Most fields of law have been open to development and adjustment, whereas criminal law is inflexible by virtue of its very nature. The common law "rule of strict interpretation" seems to obstruct progress of any kind.¹ The field of criminal law needs more legislative attention than any other; but unfortunately it has received only secondary consideration. Legislatures do not always seem to realize that a criminal indictment involves the right to liberty and life, as distinguished from a civil suit which usually affects the pocket book of the losing party. An awakened public interest in criminal law is likely to stimulate more legislation in this field in the near future than has been the case in the past.

Comparative study is an important preliminary step in any adequate modern legislation,² and the criminal law of foreign countries should be considered. For us, the Latin-American countries are of particular importance. Since it is impossible to deal with all of them, this study is devoted to three: Argentina, Mexico, and Chile. The criminal law of all three countries is codified.³ Each code is divided into a general and a special part.

* J.U.D., University of Breslau, LL.M., Tulane University. Holder of Brandeis Fellowship at Harvard Law School; author of various legal articles abroad and in this country. The writer is indebted to Professor Wex S. Malone for some valuable suggestions.

1. Hall, *Strict or Liberal Construction of Penal Statutes* (1935) 48 Harv. L. Rev. 748.

2. Cohn, *Task and Organization of Comparative Jurisprudence* (1939) 51 Jurid. Rev. 134; Kuhn, *Function of the Comparative Method in Legal History and Philosophy* (1939) 13 Tulane L. Rev. 350.

3. *Criminal Code of Argentina*, October 29, 1921; *Criminal Code of Mexico*, August 14, 1931 (in effect since September 17, 1931); *Criminal Code of Chile*, November 12, 1874.

The *Criminal Code of Argentina* is the result of thorough preliminary work. It is based upon (1) the projet of Dr. Carlos Tejedor, (2) the projet of 1891, (3) the projet of 1906, and (4) the projet of 1917. Special attention was

The general part states the general principles of criminal law relating to jurisdiction, concept of crime, circumstances which exclude the criminal responsibility, attempted crime, participation in the commission of a crime, merger; continuing crime, recidivists and habitual criminals, penalties, and circumstances which extinguish responsibility. The special part of each code defines specific offenses.

1. JURISDICTION

In the field of criminal law the term jurisdiction is used in two different ways: jurisdiction of the sovereign and jurisdiction of the courts.⁴ The latter term refers more properly to matters of venue, and the present consideration is limited to the jurisdiction of the sovereign which involves two problems.

The first problem deals with the scope of jurisdiction. How far may a sovereign exercise the right to punish? Since jurisdiction is an incident of sovereignty, and sovereignty means power, the logical answer should be that the sovereign has the right to punish all persons within the sphere of his power. However, this jurisdiction is subject to a limitation which has been expressed by the Supreme Court of the United States as follows:

“the general and almost universal rule is that the char-

given to the European codes and drafts (Draft of Germany, 1909; Draft of Austria, 1909; Draft of Sweden, 1916; Draft of Switzerland, 1916). See Diaz, *ElCodigo Penal Para La Republica Argentina* (1928) 37, no. 67; 1 Malagariga, *Codigo Penal Argentina* (1927) no. VII; 1 Moreno, *Codigo Penal* (1922) 56, 74, 87, 95, 96.

The Criminal Code of *Mexico* was drafted upon the following principles established by the Commission for the Draft of a New Criminal Code: (1) amplification of judicial discretion within the constitutional limits, (2) avoidance of details within the same limits, (3) individualization of the penal sanctions (i.e., shifting from punishment to protection of society), (4) effectiveness of the right to recover damages, (5) simplification of the procedure. See Zabre, *Codigo Penal* (1936) 9.

The Criminal Code of *Chile* was drafted in 1870 after two previous attempts in 1846 and 1856. Originally, the Criminal Code of Belgium was suggested as a model of the draft. However, Alejandro Reyes, a member of the commission for the draft, opposed the plan on the ground that the Criminal Code of Spain was a more proper model than that of other countries. See Lazo, *Codigo Penal* (1916) XI, XII.

4. Jurisdiction of the sovereign means the right of a state or country to punish. Its scope depends upon international and constitutional law. Jurisdiction of the courts means the right of a particular court to hear and determine a particular case. It is a matter of statutory procedure. Jurisdiction of the sovereign may exist without jurisdiction of the courts, but jurisdiction of the courts cannot exist without jurisdiction of the sovereign. See *Standard Stocker Co., Inc. v. Lower*, 46 F.(2d) 678, 683 (D.Md. 1931); *Paige v. Sinclair*, 237 Mass. 482, 130 N.E. 177 (1921). Berge, *Criminal Jurisdiction and the Territorial Principle* (1931) 30 Mich. L. Rev. 238; Levitt, *Jurisdiction over Crimes* (1925) 16 J. Crim. L. 316, 319; Hegler, *Principien des Internationalen Strafrechts* (1906) 140; Stimson, *Conflict of Criminal Laws* (1936) 1 et seq.

acter of an act as lawful or unlawful must be determined wholly by the law of the country where the act in done."⁵

This leads to the second problem. When is a crime within the area of a sovereign? Three viewpoints are possible. The decisive factor may be the place where the criminal acts of the accused took place (territorial commission theory), or where they took effect (territorial effect theory), or both places (territorial security theory).

At common law only those crimes are subject to the jurisdiction of the state which have been committed within its boundaries.⁶ This rule has been so strictly applied that the full faith and credit clause of the Federal Constitution is said to be inapplicable in order to execute a foreign judgment of criminal nature.⁷ A crime has been perpetrated within the state if the criminal acts took place in the state.⁸ Thus, the common law adheres to the territorial commission theory and rejects the territorial effect theory as well as the territorial security theory. This seems to be due to the fact that only the presence of the criminal within the state at the time of the crime confers jurisdiction upon the sovereign.⁹ As a result, difficulties have arisen in those instances in which the criminal act merely took effect within the state. The device of constructive presence was resorted to in order to justify the jurisdiction of the state.¹⁰ The

5. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356, 29 S.Ct. 511, 512, 53 L.Ed. 826, 832, 16 Ann. Cas. 1047, 1048 (1909). See also Hall, *The Substantive Law of Crimes—1887-1936* (1937) 50 Harv. L. Rev. 616, 640; Berge, supra note 4, at 238; Levitt, supra note 4, at 495.

6. *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892); *People v. McDonald*, 24 Cal. App. (2d) 702, 76 P. (2d) 121 (1938); *State v. Volpe*, 113 Conn. 288, 155 Atl. 223, 76 A.L.R. 1083 (1931); *People v. Hillman*, 246 N.Y. 467, 159 N.E. 400 (1927); *State v. Hall*, 114 N.C. 909, 19 S.E. 602, 28 L.R.A. 59, 41 Am. St. Rep. 822 (1894). Levitt, supra note 4, at 324-329; Perkins, *Parties to a Crime* (1941) 89 U. of Pa. L. Rev. 609.

7. *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892); *Atchison, T. & S.F. Ry. v. Nichols*, 264 U.S. 348, 44 S.Ct. 353, 68 L.Ed. 720 (1924); *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 47 S.Ct. 308, 71 L.Ed. 569 (1927). See Comment (1914) 1 Va. L. Rev. 390; Note (1927) 25 Mich. L. Rev. 903; A.L.I., *Restatement of the Law of Conflict of Laws* (1934) §§ 444, 611. See also Barry, *Comity* (1926) 12 Va. L. Rev. 353.

8. *Stewart v. Jessup*, 51 Ind. 413, 19 Am. Rep. 739 (1875); *State v. Kelly*, 76 Me. 331, 49 Am. Rep. 620 (1884); *People v. Devine*, 185 Mich. 50, 151 N.W. 646 (1915); *State v. Kief*, 12 Mont. 92, 29 Pac. 654, 15 L.R.A. 722 (1892); *State v. Cutshall*, 110 N.C. 538, 15 S.E. 261, 16 L.R.A. 130 (1892); *State v. Hall*, 114 N.C. 909, 19 S.E. 602, 28 L.R.A. 59, 41 Am. St. Rep. 822 (1894).

9. *Simpson v. State*, 92 Ga. 41, 17 S.E. 984, 22 L.R.A. 248, 44 Am. St. Rep. 75 (1893); *Ex Parte Kuhns*, 36 Nev. 487, 137 Pac. 83, 50 L.R.A. (N.S.) 507 (1913). Levitt, supra note 4, at 321.

10. *Hyde v. United States*, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114, Ann. Cas. 1914A 614 (1912); *State v. Chapin*, 17 Ark. 561, 65 Am. Dec. 452 (1856);

state of New York has gone even further by statutory enactment.¹¹

The Criminal Code of Argentina provides that all crimes shall be punished if either the commission or the effect took place within the territory of Argentina,¹² thereby adopting the territorial security theory and recognizing that the territorial commission theory is inadequate to protect persons and property within the state.¹³ The code goes even further and covers agents and employees of Argentine authorities if they commit a crime abroad in the exercise of their duties. This is due to the fact that many agents and employees enjoy immunity abroad and would not be punishable at all if the scope of criminal jurisdiction were not enlarged.¹⁴ However, the code provision comprises even employees and agents who are not immune, such as consuls.¹⁵ On the other hand, the immunity is limited to those crimes which have been committed in the exercise of their duties, although it attaches to all crimes.¹⁶

The Mexican code likewise provides that the commission of

Simpson v. State, 92 Ga. 41, 17 S.E. 984, 22 L.R.A. 248, 44 Am. St. Rep. 75 (1893); People v. Adams, 3 Denio 190, 45 Am. Dec. 468 (N.Y. 1846). Levitt, *supra* note 4, at 321.

11. N.Y. Penal Code (Gilbert's Ann. Crim. Code & Penal Law, 1941) § 1930 reads:

"The following persons are liable to punishment within the state:

"(2) A person who commits without the state any offense which, if committed within the state, would be larceny under the laws of the state, and is afterward found, with any of the property stolen or feloniously appropriated within this state;

"(3) A person who, being without the state, causes, procures, aids, or abets another to commit a crime within the state;

"(4) A person who, being out of this state, abducts or kidnaps by force or fraud, any person contrary to the laws of the place where such act is committed, and brings, sends or conveys such person within the limits of this state, and is afterwards found therein;

"(5) A person who, being out of the state and with intent to cause within it a result contrary to the laws of this state does an act which in its natural and usual course results in an act or effect contrary to its law. See also, N.Y. Penal Code, Section 1047 (dwelling out of state), Section 1301 (bringing stolen goods into the state, larceny), Section 1933 (punishment of act committed out of state)."

12. Criminal Code of Argentina, Art. 1. See also Diaz, *op. cit. supra* note 3, at 49, no. 101; Jofre, *El Código Penal de 1922* (1922) 31-34; 1 Malagarriga, *op. cit. supra* note 3, at 66, Art. 1, no. 7; 1 Moreno, *op. cit. supra* note 3, at 223-250, nos. 103-119.

13. Jofre, *op. cit. supra* note 12, at 31; 1 Malagarriga, *op. cit. supra* note 3, at 49, no. 101; 1 Moreno, *op. cit. supra* note 3, at 223, no. 103.

14. *Ibid.*

15. Criminal Code of Argentina, Art. 1, provides that all crimes committed within the territory of the nation or on places subject to its jurisdiction are punishable, as well as those which take effect there. In addition, the code is applicable to crimes committed abroad by agents or employees of Argentine authorities in the exercise of their duties.

16. Wilson, *On International Law* (1939) 177, § 65.

the criminal act as well as its effect confers jurisdiction.¹⁷ However, the general scope of jurisdiction is partly restricted and partly extended. Not all crimes committed on board a foreign vessel anchoring in a national port or territorial water are punishable.¹⁸ On the other hand, jurisdiction extends to all crimes committed in Mexican embassies and legacies, if they have not been adjudicated in the country where they were committed.¹⁹ It further extends to those crimes which were committed abroad if either the perpetrator or the injured was a Mexican citizen.²⁰

Chile generally follows the territorial commission principle of jurisdiction without restriction or extension.²¹

The modern criminal law of the United States tends to enlarge the scope of jurisdiction in spite of the fact that the actual power of the sovereign cannot exceed the territorial limits,²² and that

17. Criminal Code of Mexico, Art. 2, provides that all crimes committed within the jurisdiction of Mexico are punishable. Crimes are also punishable, if they have been prepared, begun or committed abroad. In the latter case, however, only if they take effect or are intended to take effect, or are continued, within the national territory.

18. Criminal Code of Mexico, Art. 5, provides that crimes committed aboard a foreign vessel anchoring in a national port or in a territorial water are subject to the Mexican jurisdiction only if the public peace has been disturbed or if the delinquent or the injured did not belong to the crew of the vessel.

19. Criminal Code of Mexico, Art. 5, provides that all crimes committed in Mexican embassies and legacies are punishable. However, crimes committed in Mexican consulates or against its personnel are subject to punishment only if they have not been adjudicated in the country where they were committed.

20. Criminal Code of Mexico, Art. 4, provides that a crime is subject to the Mexican jurisdiction if committed abroad by a national against a national or foreigner, or by a foreigner against a national, provided that (1) the accused is domiciled within the national boundaries, (2) the crime has not been definitely adjudicated where it was committed, and (3) the act is punishable according to the law of the place where it was perpetrated as well as according to the Mexican law.

21. Criminal Code of Chile, Art. 5, provides that the penal law is applicable to all inhabitants of the Republic including foreigners, and that crimes committed within its territory or the adjacent sea are subject to its jurisdiction.

Article 6 provides that crimes committed abroad by Chileans or foreigners shall not be punished except in certain cases expressly enumerated in the code. The exceptional cases are contained in Art. 106 (inducement of a foreign country to declare war), and Art. 174 (falsification of shares, bonds of municipal corporations, or coupons). See Fernandez, *Codigo Penal de la Republica de Chile* (1899) 71, art. 6; Lazo, *op. cit. supra* note 3, at 25, 26.

22. *Strassheim v. Daily*, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed. 735 (1911). Note (1926) 42 A.L.R. 272.

It is well settled that a nation has the power to prohibit and punish acts by its own citizens while they are in a foreign state or country, if the legislature sees fit to do so. In England, a statute punishes the murder of one British subject by another, though committed abroad. See 9 Geo. IV, c. 31, § 7, and *Rex v. Sawyer, Russ & Ry*, 294, 168 Eng. Reprint 810 (1815); *Reg v. Azzopardi*, 1 Car. & K. 203, 175 Eng. Reprint 176 (1843), affirmed 2 Mood. 289, 169 Eng. Reprint 115 (1843). See also *United States v. Dawson*, 15 U.S. 467, 14 L.Ed. 775 (1853).

some constitutional doubt must be removed, as far as the federal government is concerned.²³ There are many grounds which make the extension of jurisdiction desirable, if not necessary. The state has a definite interest in the welfare as well as in the conduct of its citizens living abroad. Furthermore, the political security of the state may be affected by certain crimes committed abroad. Finally, a crime perpetrated abroad may jeopardize the economic structure of the state.²⁴ The federal government has not hesitated to extend its criminal jurisdiction to certain crimes committed abroad and thus to shift from the territorial commission theory to a liberal territorial security theory.²⁵

II. CONCEPT OF CRIME

A determination of the concept of crime is not merely of academic importance. It becomes important in connection with contempt of court,²⁶ the full faith and credit clause,²⁷ the ex post facto clause,²⁸ and with equity powers.²⁹ At common law, crime

23. U.S. Const. Amend. VI provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ." (Italics supplied.)

It has been held that the Sixth Amendment does not prevent the United States Government from enacting criminal laws operative abroad. See *United States v. Bowman*, 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149 (1922). See also Note (1916) 30 Harv. L. Rev. 194.

24. It seems to be unnecessary to limit the extraterritorial jurisdiction to those crimes which are committed by citizens or against citizens. It may be extended to those crimes which "immediately affect national interest." If, for example, United States banknotes should be forged abroad by foreigners, the United States Government would have a definite interest in punishing the perpetrators, although they were foreigners.

See also Hall, *supra* note 5, at 640, 641; Levitt, *supra* note 4, at 495; *United States v. Bowman*, 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149 (1922); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936).

25. Acts by United States citizens committed abroad are punishable if they involve certain correspondence with a foreign government. 35 Stat. 1088 (1909), 18 U.S.C.A. § 5 (1927). Acts by United States citizens or by foreigners committed abroad are punishable if they involve perjury or subornation of perjury before consular and other officers of the United States. U.S. Rev. Stat. § 1750 (1878), 22 U.S.C.A. § 131 (1927).

26. If a contempt is criminal, the President may exercise his power to pardon crimes. *Ex parte Grossman*, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131 (1925).

27. The full faith and credit clause has no effect in regard to crime. See note 7, *supra*.

28. U.S. Const., Art. I, § 9(3), prohibits the United States Government from passing ex post facto laws, and Art. I, § 10, addresses the same prohibition to the states. It has been held that the ex post facto law clause refers only to crimes. *Calder v. Bull*, 3 U.S. 386, 1 L.Ed. 648 (1798). Hence, it is important to determine whether a wrong constitutes a crime or merely a tort. See Field, *Ex Post Facto in the Constitution* (1922) 20 Mich. L. Rev. 315; McAllister, *Ex Post Facto Laws in the Supreme Court of the United States* (1927) 15 Calif. L. Rev. 269.

29. It has been held to be not permissible to enjoin a person from com-

has been defined as any act or omission which is forbidden by law, to which a punishment is annexed, and which the state prosecutes in its own name.³⁰ Pursuant to this definition, it is said that a crime consists of two elements, the objective and the subjective elements.³¹ It is submitted that this analysis is not complete. If a person intentionally kills another in self-defense, he certainly consummates the objective element of the crime of murder as well as the subjective element. Yet he is free of punishment. Why? It seems that a third element must be included in the definition of crime, namely, the illegality of the objective elements. The objective elements are illegal if they are not justifiable. They are justifiable in case of self-defense, defense of others, consent,³² and public and domestic authority.³³ Hence it is suggested that a crime is composed of the following elements: (1)

mitting a crime, since prosecution of the crime constitutes an adequate remedy and the accused cannot be deprived indirectly of his right to trial by jury. *People v. Prouty*, 262 Ill. 218, 104 N.E. 387, 51 L.R.A. (N.S.) 1140, Ann. Cas. 1915B 115 (1914); *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371 (N.Y. 1817). See, however, *Featherstone v. Independent Service Station Ass'n of Texas*, 10 S.W. (2d) 124 (Tex. Civ. App. 1928), commented upon in (1928) 42 Harv. L. Rev. 693, (1929) 7 Tex. L. Rev. 638, noted in (1929) 27 Mich. L. Rev. 833.

On account of the fact that the courts declined to issue an injunction to enjoin a person from committing a crime, statutes were enacted to give relief by means of injunction. However, their constitutionality was doubted on the ground that the United States Constitution provides for trial by jury if a crime is involved. In *Hedden v. Hand*, 90 N.J. Eq. 583, 107 Atl. 285, 5 A.L.R. 1463 (1919), the legislation was held to be unconstitutional. The opposite result was reached in *Carleton v. Rugg*, 149 Mass. 550, 22 N.E. 55, 5 L.R.A. 193, 14 Am. St. Rep. 446 (1889), and *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887). See also *Simpson, Fifty Years of American Equity* (1936) 50 Harv. L. Rev. 171, 226, 227.

30. *United States v. Eaton*, 144 U.S. 677, 12 S.Ct. 764, 36 L.Ed. 591 (1892); *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99, 1 Ann. Cas. 585 (1904); *Mossew v. United States*, 266 Fed. 18, 11 A.L.R. 1261 (C.C.A. 2d, 1920). See Note (1900) 78 Am. St. Rep. 235.

31. *Reg. v. Tolson*, 23 Q.B.D. 168, 1 Hale P.C. 474 (1889); *Gordon v. State*, 52 Ala. 308, 23 Am. Rep. 575 (1875); *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249, 31 L.R.A. (N.S.) 467, 20 Ann. Cas. 1152 (1910); *People v. Welch*, 71 Mich. 548, 39 N.W. 747, 1 L.R.A. 385 (1888); *Commonwealth v. Weiss*, 139 Pa. 247, 21 Atl. 10, 11 L.R.A. 530, 23 Am. St. Rep. 182 (1891).

32. Consent is of legal effect only in those crimes in which either want of consent is an element of the crime or the crime does not violate a public interest. See *Beale, Consent in the Criminal Law* (1895) 8 Harv. L. Rev. 317; *Beale, The Borderland of Larceny* (1892) 6 Harv. L. Rev. 244; *Grayson, The Law as to Consent When Pleaded as a Defense to Certain Crimes Against the Person* (1903) 51 U. of Pa. L. Rev. 467; *Puttkammer, Consent in Criminal Assault* (1925) 19 Ill. L. Rev. 617.

33. Public authority and domestic authority seem also to exclude the illegality of the act. On the other hand, mistake of fact and of law (as far as recognized, see note 32), insanity, drunkenness, compulsion, coercion, exclude merely the culpability, i.e., mens rea. It is doubtful whether necessity and command of a superior to an inferior (if recognized) belong to the first or second group. See *Hall, Prolegomena to a Science of Criminal Law* (1941) 89 U. of Pa. L. Rev. 561.

an act or omission, (2) illegality of the act or omission (that is, non-existence of legal justification),³⁴ (3) culpability,³⁵ (4) punishability (which may be excluded by certain personal circumstances, such as immunity of ambassadors, legislators, and so forth). It has been said that the voluntary nature of the criminal act is another element of the concept of crime.³⁶ This, however, seems to be an unnecessary requirement since the absence of volition—such as compulsion—excludes *mens rea*.³⁷

In view of the suggested analysis of the concept of crime, the definitions in the criminal codes of Argentina, Mexico, and Chile are extremely narrow.³⁸ However, they are sufficient to serve the purpose for which they were included in the codes. That purpose was to prevent the punishment of a person who has not committed an act or omission previously prohibited by law.³⁹ To give not only statutory, but also constitutional emphasis to this guarantee, the Constitution of Argentina provides that no inhabitant can be punished without conviction based upon a law that existed before the prosecution began.⁴⁰ It also prohibits trial before a special commission or before a special judge ("special criminal court").⁴¹ Finally, it concludes that such private acts which merely offend the public order or morale

34. Illegality of the act or omission is excluded by self-defense, defense of others, consent, public or domestic authority.

35. It has been said that "public welfare offenses" do not require *mens rea*. See Hall, *supra* note 33, at 568, 569; Hall and Seligman, *Mistake of Law and Mens Rea* (1941) 8 U. of Chi. L. Rev. 641; Sayre, *Public Welfare Offenses* (1933) 33 Col. L. Rev. 55.

The same theory was suggested for the German criminal law, but was rejected by the Supreme Court. See 2 RGSt 321 (1880), 21 RGSt 259 (1891), 29 RGSt 73 (1896). See also Ebermayer, Lobe, and Rosenberg, *Das Reichs-Strafgesetzbuch* (1922) 257, § 59, no. 13; Frank, *Das Strafgesetzbuch für das Deutsche Reich* (1926) 189, § 59, X.

36. Criminal Code of Chile, Art. 1, provides that a crime is a voluntary action or omission for which the law imposes punishment.

37. This is, however, not true of the common law insofar as it does not fully recognize compulsion as a defense. It is plain that the recognition of compulsion results from the concept of *mens rea*. On the defense of compulsion, see note 76, *infra*.

38. The Criminal Code of Argentina does not contain any definition of "crime"; the Criminal Code of Mexico, Art. 7, provides that a crime is an act or omission which is punishable; the Criminal Code of Chile, Art. 1, provides that a crime is any voluntary act or omission for which the law imposes punishment. On account of the Criminal Code of Chile, Art. 1, it has been held that suicide and attempted suicide are not crimes, nor does bestiality constitute a crime. Appellate Court of Iquique, April 10, 1897 (I Gac. de los Tribunales (1897) 488, § 798), and May 8, 1899 (I Gac. de los Trib. (1899) 524, § 609). See also Court de Casacion, October 6, 1909 (2 Gac. de los Trib. (1909) 231, § 836).

39. 1 Moreno, *op. cit. supra* note 3, at 128, nr. 46.

40. 1 Moreno, *op. cit. supra* note 3, at 128-131, nr. 46. Argentina Const., Art. 18.

41. *Ibid.*

shall not be prosecuted, but are reserved to God, and that nobody shall be either compelled to do anything that the law does not prescribe or to omit anything that it does not forbid.⁴²

III. MENS REA

At common law there is no single concept of mens rea that is applicable to all crimes.⁴³ For some crimes a specific intent is required, as in larceny, where there must be an intent to take property known to belong to another. The most general significance of mens rea that is found in common law crimes is illustrated by the rule that a reasonable mistake of fact will be a defense if, on the facts as the defendant believed them to be, his act would have been lawful. Nevertheless, in many statutory crimes this defense is not allowed.⁴⁴ The codes under examination use a general concept of criminal intent and negligence, although in particular instances they may depart from it.

In the criminal law of Argentina, mens rea generally means actual intent.⁴⁵ However, there are some crimes which may be committed negligently or imprudently.⁴⁶ No definition of intent or negligence is given.⁴⁷ The Mexican code likewise distinguishes between crimes committed intentionally and those committed negligently.⁴⁸ It enumerates certain circumstances which never exclude the existence of the criminal intent and thus admits a conclusion of what is meant by intent.⁴⁹ It provides that intent

42. 1 Moreno, *op. cit. supra* note 3, at 128, nr. 46. Argentina Const., Art. 19.

43. Lévit, *The Origin of the Doctrine of Mens Rea* (1922) 17 Ill. L. Rev. 117; Lévit, *Extent and Function of the Doctrine of Mens Rea* (1923) 17 Ill. L. Rev. 578; Perkins, *A Rationale of Mens Rea* (1939) 52 Harv. L. Rev. 905; Sayre, *Mens Rea* (1932) 45 Harv. L. Rev. 974; Sayre, *The Present Signification of Mens Rea in the Criminal Law*, Harvard Legal Essays (1934); Stroud, *Mens Rea* (1914) c. I; Turner, *The Mental Element in Crimes at Common Law* (1936) 6 Camb. L. J. 31.

44. See Sayre, *loc. cit. supra* note 35.

45. Diaz, *op. cit. supra* note 3, at 68-71, nr. 150-154; Jofre, *op. cit. supra* note 12, at 85-89, Art. 34; 1 Malagarriga, *op. cit. supra* note 3, at 201-203, Art. 34, nr. 2; 2 Moreno, *op. cit. supra* note 3, at 217, no. 173.

46. They are provided for in the Criminal Code of Argentina, Art. 84 (homicide) and Art. 94 (mayhem). See Diaz, *op. cit. supra* note 3, at 152; 3 Moreno, at 395, nr. 273; 4 Moreno, *op. cit. supra* note 3, at 52, nr. 38.

47. *Ibid.* It has been said that the enumeration of those circumstances which exclude criminal responsibility admits an inference of what is meant by criminal intent.

48. Criminal Code of Mexico, Art. 8.

49. *Id.* at Art. 9 provides that criminal intent must not be denied, because (1) the accused did not intend to injure a definite person; (2) he did not intend to cause injury, although the injury was the necessary and notorious result of his act or he should have foreseen that it would be the ordinary result of his act or omission or he decided to violate the law regardless of the consequences; (3) he believed that the purpose of his act was legitimate; (4) he believed that the law was unjust or it was morally permitted him to violate it; (5) he erred about the person or object on whom or which he

will be presumed, until rebutted.⁵⁰

The Chilean Criminal Code recognizes the distinction between intentional and negligent crimes,⁵¹ yet it does not define intent or negligence.⁵²

IV. CIRCUMSTANCES WHICH EXCLUDE CRIMINAL RESPONSIBILITY

In the common law of crimes no special distinction is made between circumstances which exclude the illegality of the act or omission and those which merely exclude mens rea. For example, regardless of whether the defense is one of justification such as self-defense or prevention of a felony, or whether it is one of lack of mental responsibility such as insanity or infancy,⁵³ it is usually referred to in a general manner as a matter of defense. Yet the distinction has been made.⁵⁴ Besides, it has legal importance in other jurisdictions.⁵⁵ The fact that self-defense is not admissible against self-defense is based on the general idea that the assailed acted legally when he resorted to self-defense, and against a legal act no plea of self-defense lies.⁵⁶

The Criminal Codes of Argentina, Mexico, and Chile do not recognize the distinction between circumstances which exclude the illegality of the act and those which exclude mens rea. All the grounds which "exclude the criminal responsibility" are enumerated in one section.⁵⁷ Insanity, compulsion, self-defense,

intended to commit the crime; (6) he acted with the consent of the injured in a case where the consent is immaterial.

50. *Id.* at Art. 9.

51. Criminal Code of Chile, Art. 2, provides that "delicts" are committed with intent or malice, whereas "quasi delicts" are committed negligently. The "delicts" are subdivided into "crimes," "simple delicts," and "misdemeanors" according to the penal sanction. Art. 4, provides that "quasi delicts" are subject to the subdivision, whenever the code prescribes their punishment.

52. However, the concept of *dolo* and *malicia* as well as *culpa* were interpreted by the courts. See Corte de Apelaciones Serena, March 22, 1876 (Gac. 1876, p. 184, § 3, 380); Corte de Apelaciones Tacna, Sept. 26, 1905 (Gac. 1905, t. 1, p. 1099, § 709); Corte de Casacion, July 23, 1910 (Rev. 7, § 1, p. 454); Corte Suprema, March 19, 1907 (Gac. 1907, t. 1, p. 41, § 30) Corte de Casacion, January 10, 1910 (Gac. 1910, t. 1, p. 945, § 550).

53. Cf. Clark and Marshall, Law of Crimes (4 ed. 1940) §§ 64-71 (justification), 73-96 (responsibility).

54. Schwenk, Criminal Codification and General Principles of Criminal Law in Germany and the United States—A Comparative Study (1941) 15 Tulane L. Rev. 541, 557.

55. Schwenk, *supra* note 54, at 557.

56. *State v. Parker*, 106 Mo. 217, 17 S.W. 180 (1891), holds that one who is himself the aggressor will not be excused for killing his adversary in self-defense. This seems to be the logical result of the fact that his adversary acted in self-defense and, therefore, legitimately. Consequently, he cannot exercise self-defense against a legitimate act (namely self-defense of his adversary).

57. Criminal Code of Argentina, Art. 34, exempts seven groups of persons from criminal responsibility: (1) a person who is not able to comprehend the

criminality of the act or to direct his action regardless of whether the reason is the insufficiency of his mind or its morbid character, or the unconsciousness or excusable error of ignorance of facts; (2) a person who is compelled by physical and irresistible force or threats to suffer a grave and imminent injury; (3) a person who causes an injury in order to escape another imminent injury which is greater than that which has been caused; (4) a person who acts in compliance with a duty or in the legal exercise of his right, authority or charge; (5) a person who acts by virtue of a legal duty; (6) a person who acts in his own defense or in the defense of his rights under the following circumstances: (a) illegal attack, (b) reasonable means to prevent or repel the attack, (c) absence of provocation. There is a presumption of the existence of these prerequisites if the attack takes place during the night and within the home of the attacked no matter which injury has been inflicted upon the aggressor; (7) a person who acts in defense of the person or rights of another, provided that the circumstances (a) and (b) of the number (6) exist and the third person has not participated in the provocation of the aggressor.

Criminal Code of Mexico, Art. 15, enumerates the following circumstances which exclude criminal responsibility: (1) that the accused was compelled by a physical, extraneous and irresistible force; (2) that at the time the crime was committed the accused was in a state of unconsciousness caused by accidental or involuntary use of substances of toxic, intoxicating or enervating character or that he was in a state of involuntary mental disturbance of pathological character; (3) that the accused acted in defense of his person, his honor or his goods, or of the person, honor or goods of another in repelling an actual, violent and illegal attack which resulted in an imminent danger. (However, this defense does not exist, if (a) the attacked provoked the aggression in giving sufficient and immediate cause to it, (b) he foresaw the aggression and could easily have avoided it by the use of other legal means, (c) it was not necessary to resort to the means actually used, (d) the injury inflicted by the aggressor was easily reparable by the use of legal means or was of notoriously little importance in comparison with the injury caused as the result of the defense. It will be presumed that the prerequisites for the exercise of the defense exist); (4) that grave fright or well founded and irresistible fear of an imminent and grave injury exists or that in view of an actual, grave and imminent danger it is deemed necessary to save the own person and property or the person or property of another, unless there are other means which are equally effective and less harmful. (This defense is not available if a person is legally bound to endure such a peril by virtue of his employment or duty); (5) that the act was committed in compliance with a duty or in the exercise of a legal right; (6) that an act was committed which is not punishable without the existence of certain circumstances concerning the injured provided that the accused did not know of their existence without any fault at the time, when he committed the crime; (7) that the accused obeyed a legitimate superior, although his mandate constituted a crime, provided that this was not notorious or known by the accused; (8) that the accused violated a penal law prescribing an affirmative act, but was prevented from acting on account of a legitimate reason; (9) that the accused concealed a criminal or his gain or instruments or prevented from finding them, provided that it was not done in his own behalf, that no criminal means were used and that he acted in behalf of; (10) that the accused caused an injury as a result of a mere accident, without any intent or negligence and in the commission of a legal act carried out with all necessary precautions.

Criminal Code of Chile, Art. 10, enumerates thirteen circumstances which exclude criminal responsibility: (1) insanity; (2) minority under ten years; (3) minority between ten and sixteen years, unless it is established that the minor acted with an understanding of the act; (4) defense of one's own person or rights; (5) defense of the person or rights of the spouse, of the legitimate consanguineous relative in the whole direct line and collateral line; (6) defense of the person or rights of a stranger provided that the accused has not been induced by vengeance or any other illegitimate motive; (7) necessity, i.e., the doing of an act which causes damage to the property of another in order to avoid an evil, if the following circumstances exist: (a) actual or

defense of others, necessity, exercise of a legal right or duty are considered as defenses by all of the codes.⁵⁸ Self-defense and defense of others are set forth in some detail. Illegal attack by the injured, reasonable means of defense and absence of provocation are the general requisites for the exercise of both of them.⁵⁹ It seems to be a particular feature of the South American criminal law that these requisites will be presumed in the event that the defense is exercised during the night and within the home, inclosure, or walls of the person attacked.⁶⁰ It is another characteristic of the South American codes that self-defense and defense of others may be exercised not only for the protection of life and bodily integrity, but also for the protection of property.⁶¹ Adequate protection of property by the criminal law requires not only the punishment of crimes directed against the unlawful taking away or destroying of property (such as larceny and arson), but also the right to avert them by self-defense. At common law, a man may not protect property by means which endanger life, unless the perpetrator seeks to accomplish his purpose by means of a felony involving violence or surprise.⁶²

The Criminal Codes of Argentina and Mexico permit defense by others under the same circumstances under which self-defense is allowed. The Criminal Code of Chile provides that only persons related to the assailed have the same right of defense; however, others may also have it if they are not induced "by an illegitimate motive."⁶³

The Criminal Code of Mexico precludes the right of self-

imminent danger of the evil which is to be avoided, (b) that the evil which is avoided is greater than that done, (c) that there are no other means which are practicable and less harmful in order to avoid it; (8) the causing of an injury through mere accident in the exercise of a legal act; (9) the commission of a crime in the exercise of a duty or in the legal use of a right, authority, office or charge; (10) the commission of a crime as a result of irresistible force or irresistible fear; (11) if the husband surprises his wife in the commission of adultery and kills, wounds or maltreats her complice, or vice versa; (12) the omission of an act on account of a legal or irresistible cause; (13) the commission of a quasi delict except in the cases expressly provided.

58. See note 57, *supra*.

59. Criminal Code of Argentine, Art. 34(6); Criminal Code of Mexico, Art. 15(3); Criminal Code of Chile, Art. 10(4). See *supra* note 57.

60. *Ibid*.

61. Criminal Code of Argentina, Art. 34(6) (defense of his rights); Criminal Code of Mexico, Art. 15(3) (defense of his person, honor or goods); Criminal Code of Chile, Art. 10(4) (defense of one's own person or rights). See *supra* note 57.

62. It has been held that homicide is not justifiable to prevent larceny. *Reg v. Murphy, Craw. & D. 20* (Ireland, 1839); *Storey v. State*, 71 Ala. 329 (1882); *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159 (1863); *Grigsby v. Commonwealth*, 151 Ky. 496, 152 S.W. 580 (1913).

63. Criminal Code of Chile, Art. 10(4), (5). See *supra* note 57.

defense when other legal means are available to avoid the aggression, or when the inflicted injury was easily reparable by resort to legal remedies or was of little importance compared with the injury caused as the result of the defense.⁶⁴ It seems to be doubtful whether these restrictions on self-defense are advisable. The risk of the attack should be borne by the assailant rather than by the assailed. For this reason, the possibility of flight should not exclude the right to self-defense.⁶⁵ In many jurisdictions the opposite result at common law⁶⁶ hurts human dignity.⁶⁷ The rule applied by these jurisdictions has been thus expressed:

"We may not feel always like retreating in the face of an attack; it may not seem manly to us; but it is the law that if a man can safely retreat, and thereby escape a conflict with another, he must do so, even though it may not seem dig[n]ified and manly."⁶⁸

The South American codes are also faced with the problem of defining the circumstances which preclude free determination of criminal will. In the Mexican code, *mens rea* is expressly excluded by drunkenness, whether voluntary or involuntary.⁶⁹ The broad language in the codes of Argentina and Chile would seem to lead to the same effect;⁷⁰ but in the interpretation of these codes a distinction has been made between voluntary and involuntary drunkenness.⁷¹

64. Criminal Code of Mexico, Art. 15(3) (d). See note 57.

65. 2 Moreno, *op. cit. supra* note 3, at 303, nr. 225; Diaz, *op. cit. supra* note 3, at 79, no. 66. In Chile, it has been held that it is unreasonable to do bodily harm to a drunken person in exercise of self-defense, if it would have been possible to flee or to repel the attack by use of the arms. Corte de Apelaciones Valparaiso, Nov. 29, 1893 (Gac. 1893, t. 3, p. 527, § 4377).

66. Many courts have held that the person assaulted must retreat in all cases, if he can safely do so, though the attack upon him may be felonious and though he may, himself, be free from fault. *Brewer v. State*, 160 Ala. 66, 49 So. 336 (1909); *State v. Donnelly*, 69 Iowa 705, 27 N.W. 369 (1886). See also Beale, *Retreat from a Murderous Assault* (1903) 16 Harv. L. Rev. 567.

67. In *Erwin v. State*, 29 Ohio St. 186, 200, 23 Am. Rep. 733, 740 (1876), it was said: "a true man, who is without fault, is not obliged to flee from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm." See also *Beard v. United States*, 158 U.S. 550, 15 S.Ct. 962, 39 L.Ed. 1086 (1894). Clark and Marshall, *op. cit. supra* note 53, at 352, 353, § 280.

68. *People v. Tomlins*, 213 N.Y. 240, 242, 107 N.E. 496, 497 (1914).

69. Criminal Code of Mexico, Art. 15(2). See note 57, *supra*.

70. Criminal Code of Argentina, Art. 34(1), and Criminal Code of Chile, Art. 10(1). See note 57, *supra*. See also 2 Moreno, *op. cit. supra* note 3, at 252, 253, no. 187. For Chile, see Corte de Apelaciones Concepcion, Dec. 26, 1888 (Gac. 1888, t. 2, p. 1323, § 3383).

71. 2 Moreno, *op. cit. supra* note 3, at 252, 253, no. 187. Corte de Apelaciones Valparaiso, July 8, 1896 (Gac. 1896, t. 1, p. 1108, § 1635); Corte de

At common law, ignorance and mistake have been brought under the formula that they exclude culpability if they relate to facts, but not if they relate to law.⁷² It has recently been pointed out that this formula is too narrow.⁷³ It might be of some help to subdivide the error of law into error of criminal law and other than criminal law, for example, private or constitutional law. It is then submitted that the error of other than criminal law excludes mens rea in the same way as the error of fact does.

In the Criminal Code of Argentina, the effect of error and ignorance is clearly stated.⁷⁴ It is provided that error or ignorance of facts excludes the criminal responsibility if it is excusable. The Mexican Criminal Code enumerates a number of errors which do *not* exclude mens rea.⁷⁵ The code of Chile leaves the problem to judicial determination.

At common law it seems that the concepts of compulsion, duress, and coercion are not quite consistent with the essence of mens rea. Too little emphasis is given to the concept of compulsion, and too much to that of coercion.⁷⁶ Some states have abolished the presumption that a wife acts under coercion if her husband is present at the time of the criminal act.⁷⁷ Others provide for a less severe punishment, even where the wife committed the crime at the "command" or "persuasion" of her husband.⁷⁸ In the Criminal Codes of Argentina, Mexico, and Chile,

Apelaciones Santiago, July 27, 1897 (Gac. 1897, t. 1, p. 1269, § 1973); Corte de Apelaciones Serena, April 24, 1899 (Gac. 1899, t. 1, p. 781, § 923).

72. Hall and Seligman, *op. cit. supra* note 35, at 641; Hall, *op. cit. supra* note 35, at 549; Kohler, Ignorance or Mistake of Law as a Defense in Criminal Cases (1936) 40 Dick. L. Rev. 113; Perkins, Ignorance and Mistake in Criminal Law (1939) 88 U. of Pa. L. Rev. 35; Stumberg, Mistake of Law in Texas Criminal Cases (1937) 15 Tex. L. Rev. 287.

73. Hall and Seligman, *op. cit. supra* note 35, at 641 et seq.; Hall, *supra* note 5, at 646.

74. Criminal Code of Argentina, Art. 34(1). See note 57, *supra*.

75. Criminal Code of Mexico, Art. 9. See note 49, *supra*.

76. Threats of injury to property will not excuse the crime. It has been so held in *M'Growther's Case*, Fost. 13, 168 Eng. Reprint 8 (1746); *Republica v. McCarty*, 2 U.S. 86, 1 L.Ed. 300 (1781).

Threats of injury to the person are a sufficient excuse only if they give rise to reasonable apprehension of instant death or serious bodily harm. *Shannon v. United States*, 76 F.(2d) 490 (C.C.A. 10th, 1935); *Moore v. State*, 23 Ala. App. 432, 127 So. 796 (1929); *People v. Sanders*, 82 Cal. App. 778, 256 Pac. 251 (1927); *Hall v. State*, 136 Fla. 644, 187 So. 392 (1939); *State v. Clay*, 220 Iowa 1191, 264 N.W. 77 (1935); *People v. Merhige*, 212 Mich. 601, 180 N.W. 418 (1920); *State v. Weston*, 109 Ore. 19, 219 Pac. 180 (1923). See also *Hitchler, Duress as a Defense in Criminal Cases* (1917) 4 Va. L. Rev. 519; *Perkins, Parties to a Crime* (1941) 89 U. of Pa. L. Rev. 582, n. 9; *Perkins, The Doctrine of Coercion* (1934) 19 Iowa L. Rev. 507; and *Notes* (1895) 8 Harv. L. Rev. 430, (1920) 34 Harv. L. Rev. 89.

77. See, e.g., New York Penal Code (Gilbert's Ann. Crim. Code and Penal Law) § 1092.

78. See, e.g., Ariz. Code Ann. (1939) §§43-114 which excepts from criminal

compulsion is recognized as a ground which excludes criminal responsibility. In Argentina and Mexico, the plea of compulsion is a good defense if physical force has been exercised or if the accused has been threatened with an imminent and grave injury to his person or property; in Chile, even hunger or mere fear removes the criminal responsibility.⁷⁹

The plea of necessity as a defense is one of the most doubtful devices, not only as to its existence, but also as to its scope. The recognition of necessity as a defense means that the life, bodily integrity, or property of an innocent person may be destroyed to save the life, integrity, or property of another. Yet, since the impulse for self-preservation is deeply rooted in human beings, it has been advocated that necessity should be recognized as a defense even at common law.⁸⁰ However, except in a few cases, the courts have declined to do so.⁸¹

The Criminal Codes of Argentina, Mexico, and Chile have given elaborate consideration to the conditions under which the plea of necessity is a good legal defense.⁸²

V. ATTEMPTED CRIME

The doctrine of attempt involves three major problems:

- (1) the determination of the borderline between preparation and attempt;

liability married women (except for felonies) acting under the threats, command or coercion of their husbands; Cal. Pen. Code (Deering, 1937) § 26. Texas Ann. Pen. Code (Vernon, 1936) art. 32 provides: "A married woman who commits an offense by the command or persuasion of her husband, shall in no case be punished with death, but may be imprisoned for life or for a term of years, according to the nature of the crime; and in cases not capital she shall receive only one-half the punishment to which she would be otherwise liable."

79. Criminal Code of Argentina, Art. 34(2); Criminal Code of Mexico, Art. 15(4). See note 57, *supra*. For Chile, see Corte Suprema, November 26, 1877 (Gac. 1877, p. 1727, § 3430); Corte Suprema, May 13, 1882 (Gac. 1882, p. 475, § 586).

80. See *The Diana*, 74 U.S. 354, 19 L.Ed. 165 (1868); *United States v. Holmes*, Fed. Cas. No. 15,383 (C.C.E.D. Pa., 1842). On the other hand, see *Reg v. Dudley*, 15 Cox C.C. 624, 14 Q.B.D. 273 (1884); *Brewer v. State*, 72 Ark. 145, 78 S.W. 773 (1904). See also Davies, *The Law and Abortion and Necessity* (1938) 2 Mod. L. Rev. 126; Durand, *Abortion: Medical Aspects of Rex v. Bourne* (1938) 2 Mod. L. Rev. 236; Gass, *The Effectiveness of Abortion Legislation in Six Countries* (1938) 2 Mod. L. Rev. 97; Tolnai, *Abortion and the Law* (1939) 148 *The Nation* 424; Comment (1921) 21 Col. L. Rev. 71; Note (1935) 35 Col. L. Rev. 87.

81. *United States v. Ashton*, Fed. Cas. No. 14,470 (C.C.D. Mass. 1834); *Commonwealth v. Knox*, 6 Mass. 76 (1809); *Commonwealth v. Brooks*, 99 Mass. 434 (1868). See Perkins, *supra* note 76, at 582, n. 8.

82. Criminal Code of Argentina, Art. 34(3); Criminal Code of Mexico, Art. 15(4); Criminal Code of Chile, Art. 10(7). See note 57, *supra*.

- (2) the treatment of an attempt to commit a crime
 - (a) either with ineffective means, or
 - (b) with effective means, but upon an object on which even otherwise effective means could have no effect, or
 - (c) with ineffective means as well as upon an object on which even effective means could have no effect;
- (3) the legal significance of a withdrawal from the attempt to commit a crime.

The dividing line between preparation and attempt is vague.⁸³ According to one theory, the accused must have actually carried out the first objective element of the crime in order to enter the stage of attempt.⁸⁴ Another theory suggests that it is sufficient for the commission of a criminal attempt if the act is closely related to the first objective element of the crime.⁸⁵ A third theory uses the test of whether or not the act done involves a danger for the person or goods at whom or at which the crime is aimed.⁸⁶ There are general statutory definitions of attempt to commit crime in the states of New York, Montana, Utah, and Washington; but there is no explicit statutory provision in the remaining forty-four states.⁸⁷ The Criminal Code of Argentina defines attempt "as the beginning of the commission of the crime."⁸⁸ The Criminal Code of Chile provides that there

83. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction* (1930) 40 *Yale L. J.* 53; Beale, *Criminal Attempts* (1903) 16 *Harv. L. Rev.* 491; Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability* (1941) 49 *Yale L. J.* 789; Sayre, *Criminal Attempts* (1928) 41 *Harv. L. Rev.* 821; Skilton, *The Requisite Act in a Criminal Attempt* (1937) 3 *U. of Pitt. L. Rev.* 308.

84. It is generally agreed that this theory is too narrow. See *Glover v. Commonwealth*, 86 Va. 382, 10 S.E. 420 (1889); *Reg v. Cheeseman*, Le. & Ca. 140, 169 Eng. Reprint 1337 (1862).

85. *United States v. Stephens*, 12 Fed. 52 (C.C.D. Ore. 1882); *People v. Murray*, 14 Cal. 159 (1859); *People v. Miller*, 2 Cal. (2d) 527, 42 P. (2d) 308, 98 A.L.R. 913 (1935); *State v. Lung*, 21 Nev. 209, 28 P. 235, 37 Am. St. Rep. 505 (1891). In all these cases the accused was acquitted, since there was no close relationship to the first objective element.

86. It seems that there is no substantial difference between the second and third theory. The third theory, however, seems to furnish the clearest test.

87. *New York Penal Code* (Gilbert's Ann. Crim. Code and Penal Law, 1941) § 2, provides: "Attempt to commit a crime. An act done with intent to commit a crime, and tending but failing to effect its commission, is 'an attempt to commit that crime.'" *Mont. Rev. Codes Ann.* (Anderson & McFarland, 1935) § 11590; *Utah Rev. Stat. Ann.* (1933) § 103-1-29; *Wash. Rev. Stat. Ann.* (Remington, 1932) § 2264. As to the remaining 44 states, see Michael and Wechsler, *Criminal Law and its Administration* (1940) 584, n. 3, 4.

88. *Criminal Code of Argentina*, Art. 42.

is an attempt to commit a crime, if (1) either the accused did everything necessary to consummate the crime, although the effect is still lacking, or (2) if he carried out his intent by direct acts, although one or more of the objective elements are not yet effected.⁸⁹

The problem which is presented by the "impossible attempt to commit a crime" has arisen in the common law⁹⁰ as well as the civil law.⁹¹ The distinction between absolute and relative impossibility has evidently influenced the common law courts.⁹² The Draft of the Criminal Code Commission seems to present a workable solution of the problem.⁹³ The Criminal Code of Argentina leaves the punishment of an "impossible attempt" to the discretion of the trial court.⁹⁴ The codes of Mexico and Chile are silent on that problem.

The effect of a withdrawal from the attempt to commit a crime is a matter of criminal policy. If voluntary withdrawal is an exemption from punishment, the perpetrator may be motivated to desist from the completion of the crime; if, however, voluntary withdrawal from the attempt has no legal effect, he

89. Criminal Code of Chile, Art. 7.

90. Strahorn, *Effect of Impossibility on Criminal Attempts* (1930) 78 U. of Pa. L. Rev. 962; Skilton, *supra* note 83; Skilton, *the Mental Element in a Criminal Attempt* (1937) 3 U. of Pitt. L. Rev. 181; and Note (1937) 17 B. U. L. Rev. 421.

91. Schwenk, *supra* note 54, at 559.

92. If there is nothing in the house, drawer or pocket that can be stolen, the impossibility is merely relative. Hence, the perpetrator is punishable. *State v. Wilson*, 30 Conn. 500 (1862); *Commonwealth v. McDonald*, 59 Mass. 365 (1850); *Commonwealth v. Cline*, 213 Mass. 225, 100 N.E. 358 (1913); *People v. Jones*, 46 Mich. 441, 9 N.W. 486 (1881). The same is true, if the dose of poison is too small to cause the death of one person [*State v. Glover*, 27 S.C. 602, 4 S.E. 564 (1888)], or if the drug is unsuccessfully administered to produce abortion [*Hunter v. State*, 38 Tex. Cr. Rep. 61, 41 S.W. 602 (1897)]. On the other hand, where the impossibility is absolute, there is not even a punishable attempt at a crime. *Nicholson v. State*, 97 Ga. 672, 25 S.E. 360 (1896); *People v. Jaffe*, 185 N.Y. 497, 73 N.E. 169, 9 L.R.A. (N.S.) 263 (1906); *Foster v. Commonwealth*, 96 Va. 306, 31 S.E. 503, 42 L.R.A. 589, 70 Am. St. Rep. 846 (1898).

93. Draft Code, § 74, reads: "Every one who, believing that a certain state of facts exists, does or omits an act, the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offense, attempts to commit that offense, although its commission in the manner proposed was, by reason of the non-existence of that state of facts at the time of the act or omission, impossible." Report of Criminal Code Bill Commission: The Draft Code (1879) 77. See also Cyprus Criminal Code (Order in Council, 1928, Gov. Print. Office: Nicosia) (1928) § 354.

94. Criminal Code of Argentina, Art. 44(2), provides that "if the crime is impossible the punishment shall be decreased to a half and may be reduced to the legal minimum or less according to the degree of dangerousness revealed by the delinquent." See also Diaz, *op. cit. supra* note 3, at 109, 227; Jofre, *supra* note 11, at 110, Art. 44; 1 Malagarriga, *op. cit. supra* note 3, at 310, Art. 44, no. 2; 2 Moreno, *op. cit. supra* note 3, at 413, no. 286.

may as well complete the crime. The purpose of prevention seems to be more desirable than that of punishment for the attempt. Yet the common law provides for punishment of the attempt, although the perpetrator voluntarily abandons his evil purpose.⁹⁵ In Argentina and Mexico, an attempt to commit a crime is not punishable if the perpetrator voluntarily desists from the completion of the crime.⁹⁶ However, the older code of Chile provides for the punishment of attempt even though the perpetrator voluntarily withdrew from it.⁹⁷

VI. PARTICIPATION IN A CRIME

A classification of those who participate in the commission of a crime should depend on the degree to which they further it. However, the classification in the common law between principals of the first and the second degree and between accessories before and after the fact is not based on that ground. Furthermore, it has been said that the common law observes no distinction of essence between principals of the first and second degree⁹⁸ and that the distinction between principals and accessories before the fact is wholly a matter of judicial construction and is purely technical.⁹⁹ Finally, it seems that the accessory after the fact is not a participant at all. The crime has already been completed when he goes into action. Statutory enactments by Congress as well as by several states have taken these considerations into account.¹⁰⁰ It is submitted that *de lege ferenda* three groups of participants should be distinguished according to

95. *State v. McCarty*, 115 Kan. 583, 224 Pac. 44 (1924); *People v. Marrs*, 125 Mich. 376, 84 N.W. 284 (1900); *Commonwealth v. Lessner*, 274 Pa. 108, 118 Atl. 24 (1922); *Glover v. Commonwealth*, 86 Va. 382, 10 S.E. 420 (1889).

96. Criminal Code of Argentina, Art. 43; Criminal Code of Mexico, Art. 12.

97. Criminal Code of Chile, Art. 7.

98. *State v. Woodworth*, 121 N. J. Law 78, 1 A.(2d) 254 (1938); *State v. Whitt*, 113 N.C. 715, 720, 18 S.E. 715, 719 (1893); *State v. Allison*, 200 N.C. 190, 156 S.E. 547 (1931). See also Perkins, *supra* note 76, at 594-601; Sears, *Principals and Accessories—Some Modern Problems* (1931) 25 Ill. L. Rev. 845.

99. *State v. Poynier*, 36 La. Ann. 572 (1884); *State v. Rodosta*, 173 La. 623, 138 So. 124 (1931). See also Perkins, *supra* note 98, at 594 et seq.

100. 35 Stat. 1152 (1909), 18 U.S.C.A. § 550 (1927) reads: "'Principals' defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 35 Stat. 1152 (1909) 18 U.S.C.A. § 551 (1927) reads: "Punishment of accessories. Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years." See also Ga. Code (Park et al., 1935), tit. 26, §§ 26-501, 26-502, 26-601, 26-606; New York Penal Law (Gilbert's Ann.

the degree to which they further the commission of the crime, namely, those persons who actually perpetrate the crime regardless of whether they are present or absent, those who successfully instigate the crime, and those who assist the perpetrator in the commission of the crime. Unsuccessful instigation—called solicitation at common law—constitutes a misdemeanor, even though the perpetrator tried to solicit another to commit murder or treason.¹⁰¹ This classification seems to be inadequate to the gravity of the criminal act.

The Criminal Code of Argentina provides the same penalty for the instigator as is imposed upon the perpetrator. It provides, however, a like punishment for the person without whose help the perpetrator would not have been able to commit the crime.¹⁰² On the other hand, the Mexican Criminal Code provides that all the participants shall be punished alike.¹⁰³ The Criminal Code of Chile distinguishes between perpetrator, accomplice, and concealer.¹⁰⁴ All three codes leave open the problems of "necessary participation in a crime,"¹⁰⁵ of *excessus mandati*, and of *agent provocateur*.¹⁰⁶

Crim. Code & Penal Law, 1941), §§ 2, 26, 27, 1934. See also Michael and Wechsler, *op. cit. supra* note 87; Orfield, *Effect of Statute Providing for Similar Prosecution and Punishment of Principal and Accessory* (1931) 10 *Neb. L. Bull.* 170; Sears, *Principal and Accessories*, *supra* note 98.

101. It is a misdemeanor to solicit another to commit murder. *Commonwealth v. Randolph*, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782 (1891). It is also a mere misdemeanor to solicit another to commit arson. *State v. Bowers*, 35 S.C. 262, 14 S.E. 488, 15 L.R.A. 199, 28 Am. St. Rep. 847 (1892). The same is true of the solicitation to commit adultery. *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105 (1828).

102. Criminal Code of Argentina, Art. 45, provides that all persons shall be subject to punishment for the crime who participate in the perpetration of the elements or give to the perpetrator such help and cooperation that without it he would not have been able to commit the crime. The same punishment will be imposed upon those who have directly instigated another to commit a crime. Art. 46 provides that those who contribute to the perpetration of the crime in another way or give subsequent help in compliance with a previous promise will be punished with the penalty provided for the perpetration of the crime, but diminished to a third.

103. Criminal Code of Mexico, Art. 48, provides that all those persons are participants in the crime who take part in the conception, preparation, or perpetration of the crime or render help or cooperation of any sort in consequence of a previous, or in connection with a subsequent agreement, or who directly induce a person to commit a crime.

104. Criminal Code of Chile, Art. 14, distinguishes between *autores*, *complices*, and *encubridores*.

105. Necessary participation exists, when a crime cannot be committed without the participation of another, e.g., bigamy, adultery, rape, incest. In these instances, the problem often arises whether the "necessary participant" can be punished.

106. *Excessus mandati* exists if the perpetrator exceeds the scope of the crime which the instigator wanted to have committed. *Agent provocateur* is a person who instigates another to commit a crime in order to catch him at the stage of attempt and turn him over to the authorities. In this country,

Conspiracy is a special crime in Argentina,¹⁰⁷ whereas the codes of Mexico and Chile include it in their general parts.¹⁰⁸

VII. MERGER AND CONTINUOUS CRIME

At common law, the doctrine of merger is extremely limited. It is only where the same criminal act constitutes both a felony and a misdemeanor that there is, in the absence of statutory change or abrogation of the rule, a merger of the two offenses, the misdemeanor being merged in the felony and the latter only being punishable.¹⁰⁹ This singular case of merger at common law resulted from the fact that the procedure in felony and misdemeanor cases was different.¹¹⁰ Thus, the common law treated the problem of merger purely from a procedural angle. However, the problem of merger is not only a matter of procedure, but also of substantive law. In the first place, there are a number of crimes which cannot be committed without the simultaneous commission of another crime.¹¹¹ In addition, no crime can be perpetrated without an attempt to commit it. Consequently, it seems in these instances that there exists a "necessary merger of crimes."¹¹² In such a case the delinquent should be indicted only

the practice of an *agent provocateur* is called "entrapment." It involves not only the question whether the entrapping person is punishable, but also whether the entrapped may be punished. See Beale, *The Borderland of Larceny* (1929) 6 Harv. L. Rev. 244; Comments (1920) 20 Col. L. Rev. 598, (1929) 2 So. Calif. L. Rev. 283. See also *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932).

107. Criminal Code of Argentina, Art. 232, provides: If a person participates as promoter or director in a conspiracy of two or more persons to commit the crime of rebellion or sedition, he shall be punished with a fourth of the penalty provided for the crime which was to be perpetrated; provided that the conspiracy was discovered before it was carried out.

108. Mexican Criminal Code, Art. 14, provides that if several persons participate in the realization of a crime and one of them commits a crime not previously agreed upon, he shall be punished for it, unless (1) it does not further the perpetration of the crime agreed upon; (2) it is not a necessary or natural consequence of the crime agreed upon nor of the means used to carry it out; (3) they did not know that another crime would be committed; (4) they were not present, when the other crime was committed, or they did everything to prevent it, although they were present.

Criminal Code of Chile, Art. 8(2), provides that if two or more persons join to commit a crime, it is a punishable conspiracy only in those instances in which the penal code declares it to be punishable.

109. *United States v. Gardner*, 42 Fed. 829 (N.D. N.Y. 1890); *Elsley v. State*, 47 Ark. 572, 2 S.W. 337 (1886); *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75 (1849).

110. Misdemeanants were allowed many privileges in making their defense, such as full privilege of counsel, a copy of the indictment and a special jury. See *Rex v. Westbeer*, 1 Leach C.C. 12, 2 Strange 1133 (1740); *Graff v. People*, 208 Ill. 312, 70 N.E. 299 (1904); *Clark & Marshall*, op. cit. supra note 53, at 12, 13, § 6, n. 47.

111. Rape by force cannot be committed without assault and battery; robbery cannot be committed without larceny.

112. It is recognized in common law that an attempt of crime merges in

for that crime in which the other crimes are necessarily merged. In other instances, where one and the same act incidentally involves several crimes, it might be justifiable to say that *poena major absorbet minorem*, in other words, that the penalty will be determined according to that crime which entails the heaviest punishment possible.¹¹³ The constitutional provision prohibiting double jeopardy leads to the same result, if the prosecutor chooses the most severe crime as the basis of his indictment. The difficulty in distinguishing between one single and several distinct criminal transactions (problem of identity) exists under the merger theory as well as under the double jeopardy theory.¹¹⁴

The problem of merger becomes even more difficult when the accused commits several distinct offenses. At common law, he may be indicted and convicted for each separately since the prohibition of double jeopardy does not apply.¹¹⁵ If the trial judge actually orders him to serve the sentences on the several counts consecutively, he evidently would disregard the fact that the serving of two or more terms in a penitentiary results in more suffering than each term of itself would create. In order to abolish the hardship, it is necessary to find a measure for determining one term for all the crimes committed.¹¹⁶ The device of a concurrent service of sentences also avoids the hardship. However, it is a mere procedural device fully within the discretion of the trial judge and is not reviewable.¹¹⁷

the completed offense. *Graham v. People*, 181 Ill. 477, 55 N.E. 179, 47 L.R.A. 731 (1899). See also Sayre, *supra* note 83, at 73.

113. Schwenk, *supra* note 54.

114. See Comment (1932) 45 Harv. L. Rev. 535. See also *Thompson v. State*, 90 Tex. Cr. Rep. 222, 234 S.W. 400 (1921), holding that robbery of two persons on one occasion constitutes two criminal transactions, noted in (1922) 35 Harv. L. Rev. 615; *State v. Mowser*, 92 N.J. Law 474, 106 Atl. 416 (1919), holding that a conviction of robbery bars a conviction of homicide which was committed as the result of violence in the perpetration of the robbery, noted in (1919) 33 Harv. L. Rev. 110. See also Horack, *The Multiple Consequences of a Single Criminal Act* (1937) 21 Minn. L. Rev. 805. Comments (1931) 40 Yale L. J. 462, (1937) 7 Brooklyn L. Rev. 79. Note (1933) 112 A.L.R. 983.

115. *United States v. Hampden*, 294 Fed. 345 (E.D. Mich. 1923); *Hostetter v. United States*, 16 F.(2d) 921 (C.C.A. 8th, 1926); *Gorsuch v. United States*, 34 F.(2d) 279 (C.C.A. 6th, 1929); *People v. Parker*, 74 Cal. App. 540, 241 Pac. 401 (1925); *State v. Augustine*, 15 N.J. Misc. 401, 191 Atl. 805 (1937). The state may also elect to prosecute for either offense. *United States v. One Nash Auto*, 23 F.(2d) 126 (D.C. Mont. 1927); *People v. Dillon*, 199 Cal. 1, 248 Pac. 230 (1926).

116. One suggestion could be to fix first the penalty for each crime and then to impose a penalty which is not less than the most severe of those penalties.

117. *United States v. Daugherty*, 269 U.S. 360, 46 S.Ct. 156, 70 L.Ed. 802 (1926); *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). See also Comment (1932) 45 Harv. L. Rev. 535.

Although the common law recognizes the existence of certain "continuing crimes,"¹¹⁸ it does not recognize in general the idea that a series of crimes of the same nature, committed in the same way and carried out upon one previously conceived intent, constitutes *one* criminal transaction, so that an indictment for more than one count would be subject to the plea of double jeopardy.¹¹⁹ The theory has been advanced that if, for example, a servant decides to steal daily one cigar out of the cigar box of his master and he effectuates his intent for ten days, there is only one case of larceny instead of ten.¹²⁰

The Criminal Code of Argentina applies the principle of merger whenever several crimes are committed by one act.¹²¹ In the event the perpetrator commits several distinct and separate crimes, a measure is provided to avoid the hardship which results from the accumulation of punishments.¹²² The Mexican code follows the same principles.¹²³ Moreover, it recognizes the "continuous crime."¹²⁴ In Chile, the doctrine of merger applies when sev-

118. A continuing crime is one which consists of the continuance over a period of time of a prohibited condition, for instance living in adultery or fornication. Ordinarily, however, crimes against public morals need not be of a continuous nature, and need not affect the public at large, but only such as come in contact with it. See *State v. Waymire*, 52 Ore. 281, 97 Pac. 46, 21 L.R.A. (N.S.) 56, 132 Am. St. Rep. 699 (1908).

119. *Johnson v. Commonwealth*, 301 Ky. 314, 256 S.W. 388 (1923), holding that each hand of play terminating in a distribution of winnings was a "game" within the Kentucky statute. See Note (1924) 37 Harv. L. Rev. 912.

120. Schwenk, *supra* note 54, at 564.

121. Criminal Code of Argentina, Art. 54, provides that if one act violates more than one penal provision, only that provision is applicable that provides for the more severe punishment. Art. 55 provides that if the accused commits several crimes by different acts, the penalty will be fixed in the following way: if the kind of punishment for all crimes is the same, then the minimum punishment is determined by the punishment of the most severe penalty and the maximum punishment shall be the total of all penalties but not exceeding the legal maximum amount of that kind of punishment as provided by the code. Art. 56 provides that, if the kind of punishment for the different crimes is different, the most severe punishment will be applied and the penalty will be fixed under consideration of the minor crimes.

122. See note 121, *supra*.

123. Criminal Code of Mexico, Art. 64, provides that an accused who has committed several crimes by different acts is punishable only for that one crime which imposes the most severe punishment upon him. The penalty thus found may be increased to the amount of the total of the penalties fixed for each crime. In no event, however, may this penalty exceed thirty years of prison.

Art. 19 provides that this method does not take place if the accused committed a continuous crime or perpetrated one act which violates several penal provisions.

Art. 19(2) defines a continuous crime as "an act or omission which has been continued without interruption for a greater or less period of time."

124. Criminal Code of Mexico, Art. 19. See note 123, *supra*.

eral crimes are committed by one act, but not when several crimes are perpetrated by separate acts.¹²⁵

VIII. PENALTIES

The kind and extent of punishments depend largely upon the purpose of punishment. According to more enlightened modern thought, decisions of the courts, and teachings of penologists, the humane policy is that the infliction of penalties for violation of criminal laws is to be considered not as a punishment, but rather as the reformation of the wayward and the protection of society.¹²⁶ In other words, the theory of *punitur quia peccatum est* has yielded to the theory of *punitur ne peccetur*. But even under the modern theory there is enough room for a variety of punishments, as the codes of Argentina,¹²⁷ Mexico,¹²⁸ and Chile¹²⁹ show. It is a particu-

125. Criminal Code of Chile, Art. 74, provides that the accused must be punished for each crime that he has committed. He must serve the penalties simultaneously, if that is possible. If that is impossible, he must serve the penalties in the order prescribed by the code. However, an exception exists in the event the crime was committed as a necessary means for the commission of another crime or in the event that one single act constitutes two or more crimes. Here, Art. 65 provides that the penalty shall be determined by that criminal provision which imposes the severest punishment.

126. Glueck, *Criminal and Justice* (1936) 212, 213, contains the statements: "Society should utilize every scientific instrumentality for self-protection against destructive elements in its midst with as little interference with the free life of its members as is consistent with such protection and with a recognition of its responsibility to aid the offending member in every way that gives reasonable promise of his reform and rehabilitation." On page 216: "Punishment in modern criminal law still contains too much of the vindictive element." On page 218, the author suggests: "the criminal law must be so framed as to reduce to a minimum the area of vindictive punishment." See also *Howard v. State*, 28 Ariz. 433, 237 Pac. 203, 40 A.L.R. 1275 (1925); *Ex Parte France*, 38 Idaho 627, 224 Pac. 433 (1924); *Aabel v. State*, 86 Neb. 711, 126 N.W. 316, 126 Am. St. Rep. 719 (1910).

It was also stated in *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), that the great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. See also Glueck, *Principles of a Rational Penal Code* (1928) 41 Harv. L. Rev. 453.

127. The Criminal Code of Argentina, Art. 5, enumerates the following as penalties: penitentiary, jail, fine, and disqualification. A sentence to penitentiary for more than three years carries with it general political disqualification for the period of punishment or for three more years, if the court thinks it fit (Art. 12). It also means loss of the patria potestas during the service of sentence, loss of the right to take of property or to dispose of it *inter vivos* (Art. 12). The convict is subject to a curatorship as provided by the Civil Code for incapable persons (Art. 12). The code distinguishes between consequences of general disqualifications (loss of public office and of suffrage, incapacity to obtain public offices or commissions and loss of pension), and of special disqualification (loss of employment, office, profession, and incapacity to obtain another) (Arts. 11, 19, 20). The code also provides for conditional conviction, reparation of damages and conditional release from prison. In case of sentence to penitentiary or jail for not more than two years, or to fine, the tribunal may order in its judgment that the service of the sentence, payment of the fine, shall be suspended. Whether or not it will do so depends upon the moral personality of the accused, the nature of the

lar feature of all three codes that the convicted has to pay damages to the injured.¹³⁰ Each code contains detailed provisions regarding the recovery of damages.¹³¹

The common law does not bind the judge to consider certain aggravating or mitigating circumstances in order to determine a definite penalty.¹³² It was Ferri in particular who suggested that a penal code should specify aggravating and extenuating circumstances which must be applied strictly by the judge in order to find the concrete penalty.¹³³ However, the value of such strict rules has been questioned.¹³⁴ The codes of Argentina and Mexico indicate the circumstances to be considered in rather broad language, whereas the code of Chile enumerates ten extenuating and nineteen aggravating circumstances.¹³⁵ In Argentina and Mexico, spe-

crime committed and other surrounding circumstances, which may throw light upon the personality of the accused. The suspension does not affect the reparation of damages or the payment of court fees (Arts. 26-29).

128. The Mexican Criminal Code enumerates seventeen sorts of "penalties and means of precautions": (1) prison, (2) relegation, (3) confinement of insane, deaf and dumb, degenerate persons, and drunkards, (4) confinement, (5) prohibition to attend certain places, (6) pecuniary penalty, (7) confiscation of the criminal instruments, (8) confiscation or destruction of dangerous and noxious things, (9) admonition, (10) warning, (11) bond to prevent a crime, (12) suspension or loss of rights, (13) dismissal or suspension from functions or public offices, (14) special publication of the sentence, (15) supervision by the police, (16) suspension or dissolution of associations, (17) tutelary measures for minors (Art. 24). The pecuniary penalty consists of a fine and the reparation of damages (Art. 29).

129. In the Criminal Code of Chile, the punishments for "crimes" are capital punishment, perpetual penitentiary, perpetual jail, major penitentiary, perpetual relegation, major arrest, major exile, major relegation, general and perpetual ineligibility for public offices, etc. (Art. 21). The punishments for "simple delicts" are minor penitentiary, minor jail, minor arrest, minor exile, minor relegation, banishment, suspension of public offices and professional licenses (Art. 21). The punishment for "misdemeanors" is prison (Art. 21). In all instances, a fine may be imposed and the loss and confiscation of the instruments and products of the crime may be ordered (Art. 21). In addition, the convict is bound to pay the costs, damages and detriments which he has caused by committing the crime (Art. 24).

130. See notes 127, 128, and 129, *supra*.

131. Criminal Code of Argentina, Art. 29; Criminal Code of Mexico, Arts. 30-35; Criminal Code of Chile, Art. 24.

132. It has been held that in hearing evidence in aggravation or mitigation of punishment, the court may hear such evidence as it deems necessary and proper. *People v. Popescue*, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199 (1931). See also Note (1931) 77 A.L.R. 1211. An elaborate analysis of the aggravating and mitigating circumstances recognized by courts has been given by Hall, *Reduction of Criminal Sentences on Appeal* (1937) 37 Col. L. Rev. 521, 761.

133. 1 Ferri, *Relazione sul Progetto Preliminare Di Codice Penale Italiano* (1921) 153.

134. Glueck, *supra* note 126, at 466-481; Glueck, *Indeterminate Sentence and Parole in the Federal System: Some Comments on a Proposal* (1941) 21 B.U.L. Rev. 20; Glueck, *500 Criminal Careers* (1930) c. II.

135. Criminal Code of Argentina, Art. 40, provides that the court will determine the penalty according to Art. 41. The court must take into consideration (1) the nature of the act, the means used as well as the extent of the damage and the danger produced by the commission of the crime; (2) age,

cial punishment is provided for the recidivist,¹³⁶ and in Mexico, for the habitual criminal.¹³⁷

IX. CIRCUMSTANCES WHICH EXTINGUISH CRIMINAL RESPONSIBILITY

Circumstances which exclude criminal responsibility (either the illegality of the act, or the culpability of the perpetrator) are clearly distinguishable from those which extinguish it. If a circumstance exists which excludes criminal responsibility, no crime comes into existence. A circumstance which extinguishes criminal responsibility presupposes that a punishable crime has been committed, but precludes punishments. The grounds for the extinction of criminal responsibility are substantially the same in all three codes.¹³⁸ There are, however, various methods to determine the period of prescription. In Argentina, the period depends on the character of the penalty which has to be imposed for the commission of the particular crime;¹³⁹ in Mexico, the period of prescription is determined by the abstract punishment provided for the particular crime,¹⁴⁰ and in Chile, a definite period of prescription is provided.¹⁴¹ In addition to the prescription of the crim-

education, habits, conduct, motives, impossibility or difficulty to make a living for himself or his family, previous crimes and other preceding circumstances, personal conditions, personal relations, time, place, mode and occasion of the crime. Criminal Code of Mexico, Arts. 51, 52 are similarly phrased. Criminal Code of Chile, Arts. 11, 12, 13, 62, 64.

136. Criminal Code of Argentina, Arts. 50-53; Criminal Code of Mexico, Arts. 20-23, 65.

137. Criminal Code of Mexico, Arts. 21, 66.

138. Criminal Code of Argentina, Art. 59, provides that the penal action is extinguished by death, amnesty, prescription and by waiver, whenever the crime is of private nature. Art. 65 provides that even the sentence may prescribe. Arts. 69 and 73 provide that the subsequent consent of the injured will extinguish the penal responsibility for crimes of private nature: namely, adultery, slander, violation of secrets and unfair competition.

Criminal Code of Mexico, Arts. 91-118, provide that the Criminal responsibility shall be extinguished by death (Art. 91), amnesty (Art. 92), pardon and consent of the injured (Art. 93), indulgence ("*indulto*," Arts. 94-98), and prescription (Arts. 100-118).

Criminal Code of Chile, Art. 93, provides that the penal responsibility shall be extinguished by death, service of the sentence, amnesty, indulgence, pardon of the injured as to those crimes which must be prosecuted by private action, prescription of the penal action, and prescription of the penalty (i. e., sentence).

139. Criminal Code of Argentina, Art. 62, provides for a prescription within 20, 5, 2, or 1 year, according to the punishment which the code provides for the commission of the particular crime. Art. 65 provides for the prescription of the sentence.

140. Criminal Code of Mexico, Art. 104, provides that a crime prescribes in one year, if it deserves only a fine. If it deserves corporal punishment, it prescribes within a period which is equal to the period of punishment, but not less than three years (Art. 105). The period of punishment shall be determined by the arithmetical middle of the period running from the minimum to the maximum punishment (Art. 118).

141. Criminal Code of Chile, Arts. 94-97, provide for a prescription of the penal action on the one hand and of the sentence on the other. "Crimes" for

inal action, Argentina and Chile provide that, if the service of the sentence is not commenced within a certain period of time, the liability of serving it is ended by prescription.¹⁴²

CONCLUSION

Since the enactment of the Chilean Criminal Code in 1874, the ideas of basic principles of criminal law have changed. The doctrine of *punitur quia peccatum est* has given way to that of *punitur ne peccetur*. Consequently, not the crime, but the criminal has been made the focus of the trial. No wonder that a new criminal code has been proposed for Chile by the Ministry of Justice.¹⁴³ It provides for the abolishment of those penalties which are inconsistent with the modern purpose of punishment.¹⁴⁴ It also abolishes the enumeration of aggravating and mitigating circumstances¹⁴⁵ and introduces the indeterminate sentence.¹⁴⁶ The concept of the frustrated delict has been given up in view of the fact that a frustrated delict is nothing but an attempted crime.¹⁴⁷ Finally, the accessory after the fact is no longer a participant in the crime of the perpetrator, but is guilty of a separate and lesser offense dealt with in the special part of the proposed code.¹⁴⁸

Though the Criminal Code of Argentina is of rather recent date, it obviously has not satisfied the expectations which were set in it. By Decree of September 19, 1936, Jorge E. Coll and Eusebio Gómez were charged with the draft of a new criminal code. On July 8, 1937, they submitted it to the Minister of Justice and Public Instruction.¹⁴⁹ The general part of the draft is composed of ten titles, which are these: (1) Application of the Code, (2) The Crime, (3) The Criminal, (4) Minors, (5) Sanctions, (6) Imposing Sanctions, (7) Conditional Pardon, (8) Reparation of Damages, (9) Prosecutions (public, private, and on demand), (10) Prescription of Crimes and Sentences. The draft is, like that of Chile, based upon the theory that the criminal, not the crime,

which the capital punishment or perpetual penitentiary, jail or relegation must be imposed prescribe within twenty years, other "crimes" prescribe within fifteen years. "Simple delicts" prescribe within ten years, and "misdemeanors" prescribe within six months. The penalty prescribes in twenty, fifteen, ten years, or six months, depending on whether it was imposed for a "crime," "simple delict," or "misdemeanor."

142. See notes 138 and 141, *supra*.

143. Ministerio de Justicia, Proyecto de Código Penal (1929).

144. *Id.* at VI.

145. *Id.* at XIII.

146. *Id.* at VII-X.

147. *Id.* at XV.

148. *Id.* at XIII-XIV.

149. Ministerio de Justicia e Instrucción Pública, Proyecto de Código Penal para la República Argentina (1937).

shall be punished. The draftsmen conclude the report of their motives with a statement, the realization of which seems to be as important as any new codification: the effectiveness of the new code will depend on two conditions, on the adequate equipment of the penal institutions and the qualification of those authorities who are in charge of the criminal.¹⁵⁰

150. *Id.* at IX, X.